

PRESUMED UNDUE INFLUENCE: THE FALSE PARTITION FROM FIDUCIARY ACCOUNTABILITY

ROBERT FLANNIGAN*

I INTRODUCTION

The sole function of the law of fiduciary accountability is to control the opportunism that may impair our limited access arrangements.¹ Unfortunately the clarity of that function has faded. Some judges have misconstrued the conceptual boundaries of the regulation.² The judicial treatment of what today commonly is described as the doctrine of presumed undue influence powerfully illustrates the deterioration in clarity.³ Over the course of the past two centuries English courts have slowly been separating the ‘doctrine’ of presumed undue influence from the law of fiduciary accountability. There was no explicit declaration of that separation. Instead, in a blinkered process, judges simply repeatedly cited certain cases to produce what appeared to be a line of authority that differed from conventional fiduciary regulation. That appearance of difference led other judges to devise novel criteria for the application of the supposed doctrine. That raised fresh concerns and accelerated the conceptual disorder.

Because a claim of presumed undue influence invariably raises consent issues, I begin my analysis with a review of consent doctrine, specifically the relevance of disclosure, advice and influence. I include a review of the judgments of Lord Eldon, who both clarified the law and contributed to its subsequent disruption. I proceed to address the relevance of a ‘fairness’ criterion for both the trunk jurisprudence and the ‘developing’ law of presumed undue influence.⁴ I then examine the deficient analyses in the relatively recent English cases that solidified the taxonomic separation of the doctrine of presumed undue influence from fiduciary accountability.

* University of Saskatchewan.

¹ Robert Flannigan, ‘The Core Nature of Fiduciary Accountability’ [2009] *New Zealand Law Review* 375. See also the discussion of limited access at Robert Flannigan, ‘Access or Expectation: The Test for Fiduciary Accountability’ (2010) 89 *Canadian Bar Review* 1, 3-14.

² I have examined the genesis of a number of the misconstructions. On the duty of fidelity and the duty of confidence, see Robert Flannigan, ‘The [Fiduciary] Duty of Fidelity’ (2008) 124 *Law Quarterly Review* 274. In the corporate context, see Robert Flannigan, ‘The Adulteration of Fiduciary Doctrine in Corporate Law’ (2006) 122 *Law Quarterly Review* 449; Robert Flannigan, ‘Shareholder Fiduciary Accountability’ [2014] *Journal of Business Law* 1.

³ The within analysis refines the analysis at Robert Flannigan, ‘The Fiduciary Obligation’ (1989) 9 *Oxford Journal of Legal Studies* 285, 292-297. See also Rick Bigwood, ‘From *Morgan to Etridge*: Tracing the (Dis)Integration of Undue Influence in the United Kingdom’ in Neyers, Bronaugh & Pitel (eds), *Exploring Contract Law* (Hart Publishing, 2009) ch 15, and Marshall Haughey, ‘The Fiduciary Explanation for Presumed Undue Influence’ (2012) 50 *Alberta Law Review* 129. While my analysis differs in certain respects from the Bigwood and Haughey contributions, we share the view that undue influence is a manifestation of conventional fiduciary accountability.

⁴ The use of the term fairness often contemplates relative value (e.g. adequacy of consideration) but may more broadly contemplate a subjective analysis of aspects of the quality of an interaction. Both senses of the term are problematic in the context of a claim of fiduciary breach. ‘Fairness’ in an important sense is a toxic term in the law because often it displaces principled analysis. As the term alone means nothing, and everything, it has no analytical utility.

The length of the following discussion is attributable to the necessary conceptual and temporal breadth of my analysis. There is much in the English jurisprudence that requires attention before it is possible to fully comprehend the past development and present content of the doctrine of presumed undue influence. That length precludes an examination of the progression of the law in other jurisdictions. It will be appreciated however that the English jurisprudence has dictated or strongly influenced developments across the Commonwealth. The English courts in fact are primarily responsible for much of the disorder universally associated with the law of presumed undue influence. The discussion therefore will be of immediate relevance everywhere.

II TRUE CONSENT: DISCLOSURE AND ADVICE

Individuals assume all sorts of limited access functions (trustee, agent, partner). We (the community) give definition to the performance of those functions by subjecting them to idiosyncratic nominate regulation (the law of trust, agency, partnership). Simultaneously we impose a parallel generic fiduciary regulation that requires that actors not compromise their nominate function by entertaining unauthorised conflicts or benefits.⁵ We impose both the nominate and the fiduciary regulation largely on a default basis. In particular, with respect to the latter, we permit conflicts and benefits where the appropriate party consents.⁶ It is at this point that disclosure, advice and influence become applicable to questions of fiduciary accountability.⁷ In order for consent to be valid, there must be full disclosure, proper advice and an absence of undue influence.⁸

Seeking consent to a conflict or benefit is an *optional* course of action for a fiduciary. There is no *duty* to secure consent.⁹ Obtaining consent is but a means to avoid the default liability that otherwise accrues for an unauthorised conflict or benefit. By acquiring consent a fiduciary simply ensures that a conflict or benefit is *authorised* and that, consequently, there is no foundation for a claim of fiduciary breach. A fiduciary is free to forgo seeking consent, but that will risk the validity of the transaction.

Consent being optional in that sense, so too is the disclosure that validates consent. If a fiduciary chooses to fully disclose a conflict or benefit, the consent obtained is recognised as valid in its disclosure dimension. If the fiduciary fails to disclose information, or to disclose so as to permit full comprehension, true consent has not been secured and the transaction is open to challenge on that basis. But there is no breach of duty merely in the failure to fully disclose. The breach is to assume a conflict or benefit that is not authorised.

⁵ Robert Flannigan, 'The Boundaries of Fiduciary Accountability' (2004) 83 *Canadian Bar Review* 35.

⁶ There is no fiduciary duty (and hence no possible breach) if there is consent *ex ante* to a conflict or benefit. *Ex post* consent (ratification, confirmation), on the other hand, erases a breach after the fact and thereby necessarily cancels the duty that founded the breach. That is, there initially is a duty and a breach, but both are erased by the *ex post* consent. Recognise that the validity of an alleged *ex post* consent will be determined by the same principles that determine the validity of *ex ante* consent.

⁷ It will be appreciated that opportunism may be projected even through ostensibly other-regarding disclosure and advice. The careful opportunist will groom context to shape evidence of informed beneficiary consent, whether that consent relates to a transaction with the beneficiary or a third party.

⁸ Those conditions define the validity of consent generally, and consequently do not have a unique application for fiduciary accountability.

⁹ *Blackmagic Design Pty Ltd v Overliese* [2011] FCAFC 24, [105]-[108]; *Buitendag v Ravensthorpe Nickel Operations Pty Ltd* [2012] WASC 425, [69].

The point requires emphasis. A breach of fiduciary duty occurs the moment a conflict or benefit is assumed without consent. Nothing is added by asserting that there is a breach of a separate *duty* to disclose the conflict or benefit. The matter of consent is an entitlement question that frames the issue of liability. The fiduciary is claiming an *entitlement* to the conflict or benefit on the ground that it was *authorised*. The matter is one of fiduciary *choice*. If the choice of the fiduciary is to disclose, there is still a need to obtain consent. If consent is obtained, there can be no liability. If the choice is to not fully disclose, thereby negating consent, there is a breach of duty once the conflict or benefit is assumed.

Accordingly, in the context of a claim for breach of fiduciary duty, there is no *duty* of disclosure. Contrast that with the actual affirmative duties of disclosure that arise for purposes other than fiduciary accountability. Trustees, for example, have a *duty* to provide beneficiaries with information material to the nature of their interests and to dealings with the trust property. Solicitors have a *duty* to disclose to clients in order to enable informed instruction. Those duties of disclosure are obligations that exist separately from the optional disclosure associated with fiduciary accountability.

That said, the conceptual foundations for the various disclosure *duties* are not always well understood, and the pressure for justification and taxonomic classification may partly account for attempts to characterise them as *fiduciary* duties. Sometimes the duties are asserted as stand-alone obligations.¹⁰ Or they may be tied to a status assertion that a transaction or relation is *uberimmae fidei*.¹¹ On basic principle, however, the duties may be understood as specific expressions of the conventional nominate duties of different classes of fiduciaries to act in the best interest of their beneficiaries.¹²

Affirmative or positive *duties* of disclosure may also arise as expressions of the duty of care that regulates the actions of everyone, including fiduciaries.¹³ Disclosure may be required in order to avoid a claim of negligent performance. It may be reasonable for example for a fiduciary to disclose to a beneficiary in order to clarify or extend information received by the fiduciary (from the beneficiary or from third parties) on which the fiduciary proposes to act. If such disclosure would avoid foreseeable injury, it becomes duty.

It is evident in the jurisprudence that these disclosure *duties* often have been conflated with the disclosure associated with fiduciary accountability. The effect of that is to wrongly assign ‘duty’ to the optional disclosure. That assignment will be constrained only by a proper comprehension of the difference between nominate regulation on the one hand and fiduciary regulation on the other. It must be understood that fiduciary accountability is concerned exclusively with controlling opportunism, and not with more broadly defining the nominate content or parameters of how fiduciaries are to perform their undertakings.

¹⁰ In *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [51], the duty to disclose trust documents was grounded in ‘the court’s inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts’.

¹¹ Query, in the case of partnerships, *Conlon v Simms* [2006] EWCA Civ 1749.

¹² I use the term beneficiary to generally identify the persons (trust beneficiaries, principals, wards, partners, etc) who take the *benefit* of the protection of fiduciary accountability.

¹³ While the duty of care applies to fiduciaries, it is not a *fiduciary* duty. That is not understood in some quarters. In the United States, for example, some courts and commentators describe the fiduciary duty of corporate directors as a duty of loyalty *and* care. That linkage of strict accountability for opportunism with the often negligible accountability for the distinct mischief of negligence has no substantive or taxonomic justification.

The same analysis applies to the advice condition. Ensuring that a beneficiary is properly advised as to the nature and effect of a transaction,¹⁴ whether directly by the fiduciary or by an independent advisor,¹⁵ is merely an optional means to validate consent. But for other purposes (that is, where there is no issue of fiduciary opportunism) many fiduciaries will as a matter of *duty* be bound to appropriately advise their beneficiaries. Thus, solicitors and financial advisors (investment banks, brokers, estate planners) must in accordance with their particular functions advise their beneficiaries of relevant legal and market considerations. The duty will arise as a contextual manifestation of either the best interest duty or the duty of care governing the fiduciary.¹⁶ Where however there is a personal conflict or benefit involved, fiduciaries must obtain the consent of the appropriate party. As with disclosure, giving advice for the purposes of informed consent is optional, but not giving it risks the validity of the transaction.¹⁷

III PRESUMED UNDUE INFLUENCE

Consent may also be defective because of undue influence. Everyone understands that relations of influence are vulnerable to the risk that the influence may be undue.¹⁸ The power to influence, like authority or proximity, is just another means to acquire access to the value of beneficiary assets.¹⁹ The particular means of gaining access is not of essential analytical relevance. It is the *fact* of access, however obtained, that matters. If that access is a limited access, its potential exploitation will be a fiduciary breach.

The actual undue application of influence often will be impossible to detect. We may only perceive the potential conflict or benefit. In many cases, perhaps most, we cannot perceive even that, as conflicts and benefits effectively will be concealed because they are kept secret by third parties or are engineered to be physically or temporally remote.²⁰ The courts long ago recognised the manifest difficulty with detecting the opportunistic exercise of influence and they fashioned the regulation that today is (mis)described as the doctrine of presumed undue influence.

¹⁴ Consider *Hammond v Osborn* [2002] EWCA Civ 885; *Randall v Randall* [2004] EWHC 2258 (Ch).

¹⁵ Independent advisors must themselves be properly informed and exercise care before their advice will be considered satisfactory. See *Gibbs v Daniel* (1862) 4 Giff 1, 66 ER 595; *Williams v Johnson* [1937] 4 All ER 34 (PC).

¹⁶ Consider *Goody v Baring* [1956] 2 All ER 11 (Ch).

¹⁷ For example, for true ex post consent a beneficiary must be informed of the voidability of the subject transaction. See *Stump v Gaby* (1852) 2 De G M & G 623, 42 ER 1015; *Kempson v Ashbee* (1874) LR 10 Ch App 15.

¹⁸ Undue influence (both actual and presumed) is commonly explained in general contract law textbooks as a standard principle available to vitiate contractual obligation. It must be understood however that the law of presumed undue influence is not simply a doctrine of contract law. Limited access arrangements (status or fact-based fiduciary relations) may arise by contract, but also in other ways, including trust settlements, family interactions and religious connections.

¹⁹ Query whether a bribe may be regarded as a form of presumed undue influence. Consider *Shipway v Broadwood* [1899] 1 QB 369 (CA).

²⁰ We may be misled initially by the appearance of substance (e.g. credentials, titles, offices) and accept the invitations of fiduciaries to trust them, and coincidentally suspend the vigilance we perhaps might otherwise exercise. Feigned solicitude and cloaks of accreditation consistently overpower vigilance.

The modern law of undue influence is problematic in fundamental respects. The main defect is the erroneous foundational supposition that the doctrine of presumed undue influence is substantively distinct from conventional fiduciary accountability. That supposition arose in the jurisprudence subsequent to a number of decisions of Lord Eldon that were wrongly taken to be originating authorities for an independent doctrine. The three decisions were *Gibson v Jeyes*,²¹ *Hatch v Hatch*²² and *Huguenin v Baseley*.²³ Prior to those decisions the courts did not identify presumed undue influence as an independent doctrine. There was but one ‘great rule’ that applied to all relations of ‘confidence’.²⁴ By 1807, the year *Huguenin* was decided, the fundamental character of fiduciary accountability was well established. The great rule was that a person in whom confidence was reposed could not compromise that confidence by entertaining unauthorised conflicts or benefits. Several judgments articulated that general default rule in terms of reposed confidence and proscribed advantage.²⁵ Others, in an equivalent description, referred to relations where one undertook to act for another.²⁶ There were numerous other decisions where there was no compact abstract statement of the rule, but the analysis in each case plainly illustrated the application of the rule.²⁷ Numerous judgments noted that the rule, and its strict character,²⁸ were justified by the difficulty of detecting opportunism.²⁹ A breach of the rule rendered a transaction voidable, including against third parties with knowledge.³⁰

²¹ (1801) 6 Ves Jun 266, 31 ER 1044.

²² (1804) 9 Ves Jun 292, 32 ER 615.

²³ (1807) 14 Ves Jun 273, 33 ER 526.

²⁴ ‘Great rule’ was the term used by Lord Eldon in *Gibson* (at 278). See also *Wood v Downes* (1811) 18 Ves Jun 120, 34 ER 263 (‘great principle’).

²⁵ *Osmond v Fitzroy* (1731) 3 P Wms 129, 24 ER 997; *Cray v Mansfield* (1750) 1 Ves Sen 379, 27 ER 1093 (see the supplementary note at Ves Sen Supp 167, 28 ER 490); *Fox v Mackreth* (1788) 2 Bro CC 400, 29 ER 224, affd (1791) 2 Cox 320, 30 ER 148; *Ex parte James* (1803) 8 Ves Jun 337, 32 ER 385. See also Joseph Story, *Equity Jurisprudence* (Maxwell, 2nd ed, 1839) §309.

²⁶ *Walmesley v Booth* (1739) 2 Atk 25; 26 ER 412; *York Buildings Company v Mackenzie* (1797) 3 Paton 378 (Lord Thurlow); *Whichcote v Lawrence* (1798) 3 Ves Jun 740, 30 ER 1248; *Ex parte Lacey* (1802) 6 Ves Jun 625, 31 ER 1228.

²⁷ *Robinson v Pett* (1734) 3 P Wms 249, 24 ER 1049; *Cocking v Pratt* (1750) 1 Ves Sen 400, 27 ER 1105; *Cole v Gibson* (1750) 1 Ves Sen 503, 27 ER 1169; *Hylton v Hylton* (1754) 2 Ves Sen 547, 28 ER 349; *Bridgeman v Green* (1757) Wilm 58, 97 ER 22; *Welles v Middleton* (1784) 1 Cox 112, 29 ER 1086; *Twining v Morrice* (1788) 2 Bro CC 326, 29 ER 182; *Crowe v Ballard* (1790) 3 Bro CC 117, 29 ER 443; *Newman v Payne* (1793) 2 Ves Jun 199, 30 ER 593; *Massey v Davies* (1794) 2 Ves Jun 317, 30 ER 651; *Lord Hardwicke v Vernon* (1799) 4 Ves Jun 411, 31 ER 209; *Campbell v Walker* (1800) 5 Ves Jun 678, 31 ER 801; *Ex parte Bennett* (1805) 10 Ves Jun 381, 32 ER 893; *Lady Ormond v Hutchinson* (1806) 13 Ves Jun 47, 33 ER 212; *Wright v Proud* (1806) 13 Ves Jun 136, 33 ER 246.

²⁸ See generally Robert Flannigan, ‘The Strict Character of Fiduciary Liability’ [2006] *New Zealand Law Review* 209. See also George Jeremy, *Equity Jurisdiction* (J. & W.T. Clarke, 1828) 394-396.

²⁹ See for example *Bridgeman v Green* (1757) Wilm 58, 97 ER 22; *Whichcote v Lawrence* (1798) 3 Ves Jun 740, 30 ER 1248 (see also the supplemental note on *Whichcote* at 1 Ves Jun Supp. 422, 34 ER 856); *Lister v Lister* (1802) 6 Ves Jun 631, 31 ER 1231; *Ex parte James* (1803) 8 Ves Jun 337, 32 ER 385; *Hatch v Hatch* (1804) 9 Ves Jun 292, 32 ER 615; *Ex parte Bennett* (1805) 10 Ves Jun 381, 32 ER 893; *Sanderson v Walker* (1807) 13 Ves Jun 601, 33 ER 419. See also *Earl of Crawford v Hepburn* (1767) Mor 16208. The detection concern continued to inform the jurisprudence thereafter. See *Greenlaw v King* (1840) 3 Beav 49, 49 ER 19; *Parker v McKenna* (1874) LR 10 Ch App 96.

³⁰ Consider the later case of *Archer v Hudson* (1846) 15 LJ Ch 211 (CA).

The jurisprudence to that point had three significant features. The first was that proof of consent required proof of full knowledge, proper advice and the absence of undue influence. The second feature was that no distinction was made between bargains³¹ and gifts.³² The rule had identical application to both.³³ The third feature was that the fairness of a bargain (the adequacy of the consideration) was not a criterion of liability or an available defence.³⁴ There had been isolated statements and thin implications of a fairness criterion in certain cases,³⁵ but those were explicitly contradicted by contemporaneous statements in other cases,³⁶ and then seemingly vanquished by several judgments of Lord Eldon³⁷ and other judges³⁸ at the beginning of the nineteenth century. Inadequacy of value, if not so grossly inadequate as to be unconscionable, was at most only *evidence* of opportunism.³⁹

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- ³¹ Bargains included property sales, annuity contracts and guarantees. Recognise that bargains may be structured to include elements of gift or simply to disguise or immunise a gift.
- ³² Gifts, like bargains, were voidable unless the fiduciary proved proper disclosure and advice, and the absence of undue influence. See *Osmond v Fitzroy* (1731) 3 P Wms 129, 24 ER 997; *Bridgeman v Green* (1757) Wilm 58, 97 ER 22.
- ³³ No substantive distinction between bargains and gifts appears to have been asserted before *Harris v Tremeneere* (1808) 15 Ves Jun 34, 33 ER 668. It was clear in Story's 1839 review of constructive fraud, above n 25, ch 7, that the distinction was not recognised at that time (or by him). See also the editor's note 2 at the end of the report of *Hatch v Hatch* (1804) in J.C. Perkins (ed), *Vesey Reports* (Little & Brown, 1844) vol 9, 299, where it is stated that: 'These principles [respecting bargains] apply, *a fortiori*, to gratuities obtained under circumstances affording similar grounds for suspecting that undue influence may have been exercised'. There is different set of editor notes in the English Reports at (1804) 9 Ves Jun 292, 32 ER 615.
- ³⁴ The judges spoke of substantive fairness when they discussed whether proof of adequate value (consideration), advantage or loss was required. Procedural fairness was defined by the parameters for true consent.
- ³⁵ See *Oldin v Samborn* (1737) 2 Atk 15, 26 ER 406 (bare statement that a purchase by a recent guardian was valid because 'full consideration' was paid); *Ward v Hartpole* (1776) 3 Bligh 470, 4 ER 671 (bargain invalid because a 'grossly inadequate' consideration was 'coupled with' other circumstances). Some might believe that Lord Thurlow suggested a fairness criterion in *Fox v Mackreth* (1788) 2 Bro CC 400, 29 ER 224, affd (1791) 2 Cox 320, 30 ER 148, but that would be inconsistent with his judgments in *Welles v Middleton* (1784) 1 Cox 112, 29 ER 1086 and *Crowe v Ballard* (1790) 3 Bro CC 117, 29 ER 443. The clearest assertion of a fairness (adequacy) criterion was that of Lord Loughborough in *York Buildings Company v Mackenzie*, (1795) 3 Paton 378, 398, where he stated that: 'The bargain must be perfectly fair and equal, at the best price, because they are placed in a situation in which they are bound, in the first instance, to act against their own advantage, and for the advantage of their employers'. That statement, however, is inconsistent with the views Lord Loughborough later expressed in *Whichcote v Lawrence* (1798) 3 Ves Jun 740, 30 ER 1248 and *Ex parte Reynolds* (1800) 5 Ves Jun 707, 31 ER 816.
- ³⁶ *Hylton v Hylton* (1754) 2 Ves Sen 547, 28 ER 349; *Welles v Middleton* (1784) 1 Cox 112, 29 ER 1086; *Crowe v Ballard* (1790) 3 Bro CC 117, 29 ER 443; *Whichcote v Lawrence* (1798) 3 Ves Jun 740, 30 ER 1248; *Campbell v Walker* (1800) 5 Ves Jun 678, 31 ER 801; *Ex parte Reynolds* (1800) 5 Ves Jun 707, 31 ER 816. See also *Owen v Foulkes*, summarized in a reporter's note at (1802) 6 Ves Jun 625, 630.
- ³⁷ *Ex parte Lacey* (1802) 6 Ves Jun 625, 31 ER 1228; *Ex parte James* (1803) 8 Ves Jun 337, 32 ER 385; *Coles v Trecothick* (1804) 9 Ves Jun 234, 32 ER 592; *Ex parte Bennett* (1805) 10 Ves Jun 381, 32 ER 893; *Sanderson v Walker* (1807) 13 Ves Jun 601, 33 ER 419.
- ³⁸ *Ex parte Reynolds* (1800) 5 Ves Jun 707, 31 ER 816; *Lister v Lister* (1802) 6 Ves Jun 631, 31 ER 1231; *Randall v Errington* (1805) 10 Ves Jun 423, 32 ER 909.
- ³⁹ *Bridgeman v Green* (1757) Wilm 58, 97 ER 22; *Gibson v Jeyes* (1801) 6 Ves Jun 266, 31 ER 1044; *Morse v Royal* (1806) 12 Ves Jun 355, 373, 33 ER 134; *Lowther v Lowther* (1806) 13 Ves Jun 95, 103, 33 ER 230.

The first of these three features would never be challenged. The second and third, we will see, would be tested – leading to the fracturing of the jurisprudence.

The development of presumed undue influence as a formally independent doctrine subsequent to the *Gibson*, *Hatch* and *Huguenin* decisions did not happen as a sharp break in the law. The judgments themselves did not suggest a break. Rather, judges in later cases simply cited one or more of the three decisions, sometimes describing them as leading or source authorities. The plume of decisions with common sources or roots thereby produced would naturally without more (without critical examination) come to be perceived as distinct doctrine. That perception was buttressed by the amplification of a ‘presumption’ of undue influence⁴⁰ to describe the default operation of the conventional proscription on unauthorised conflicts and benefits.⁴¹ It was further buttressed by judges specifying a unique list of relations that attracted the influence presumption by reason of status. Reflecting judicial views of the power to influence, the accepted status-based classes were attorneys, guardians, parents, and spiritual and medical advisors. That list differed from the collection of relations that contemporaneously had been identified as status relations in the trunk fiduciary jurisprudence.⁴² The perception of distinct doctrine was however illusory. Neither the resort to a presumption, nor a unique list of status relations, diminishes the propellant fact that influence is just a means of access (like authority and proximity) that enables the diversion of the value of beneficiary assets.

IV THE CONTRIBUTIONS OF LORD ELDON

As noted above, courts cite three decisions of Lord Eldon (*Gibson*, *Hatch*, *Huguenin*) as source authorities for an independent doctrine of presumed undue influence. Do those decisions actually support that reading? I will show that they are conventional decisions, and that the perception of them as source authorities is unjustified. I will then examine a number of other decisions of Lord Eldon that opened the door to arguments that led to departures from the conventional position. We will see that Lord Eldon first contributed to the clarification of conventional fiduciary accountability, and then to its disruption.

The 1801 decision in *Gibson v Jeyes*, involving a bargain between an attorney and his client, did not purport to erect a distinct doctrine of presumed undue influence.⁴³ Rather, it was concerned with the conventional question of consent. Lord Eldon accepted that fiduciaries may deal with their beneficiaries, ‘but the relation must be in some way dissolved: or, if not, the parties must be put so much at arm’s length, that they agree to take the characters of purchaser and vendor’.⁴⁴ He declared that if a client insists on

⁴⁰ I will have more to say about the nature of this ‘presumption’ in the discussion of *Royal Bank of Scotland v Etridge (No. 2)* [2001] UKSC 44, *infra*.

⁴¹ The ‘presumption’ appeared early. See *Welles v Middleton* (1784) 1 Cox 112, 29 ER 1086. It was amplified over time to become the formal means of describing the onus of proof. Consider *Hunter v Atkins* (1834) 3 My & K 113, 40 ER 43; *Archer v Hudson* (1844) 7 Beav 551, 49 ER 1180; *affd* (1846) 15 LJ Ch 211 (CA). There was no similar progression to a formal presumption that consent was *uninformed*. Appreciate however that requiring a fiduciary to prove that beneficiary consent was given with full knowledge and advice amounts to a ‘presumption’ of *uninformed* consent.

⁴² Compare the two lists in Flannigan, above n 3. Lists from different sources vary depending on their contextual function and temporal appearance, and most commonly because they are not intended to be exhaustive.

⁴³ (1801) 6 Ves Jun 266, 31 ER 1044.

⁴⁴ *Ibid* 277.

transacting, even though advised to seek independent advice, the attorney has the onus of establishing informed participation:

[The law] throws upon him the whole *onus* of the case; that, if he will mix with the character of attorney that of vendor, he shall, if the propriety of the contract comes in question, manifest, that he has given her all that reasonable advice against himself, that he would have given her against a third person. It is asked, where is that rule to be found. I answer, in that great rule of the Court, that he, who bargains in matter of advantage with a person placing confidence in him is bound to shew, that a reasonable use has been made of that confidence; a rule applying to trustees, attorneys, or any one else.⁴⁵

The confidential relation must first be dissolved by the fiduciary giving the beneficiary ‘all that reasonable advice against himself’ that would demonstrate that the volition suggested by the participation of the beneficiary in the transaction was a true consent. In the remainder of the judgment, Lord Eldon confirmed that his concern was the propriety of beneficiary consent to fiduciary involvement.⁴⁶ Full information and proper advice were the determinants of whether beneficiaries truly consent to the possibility of the conflicts and benefits that may be associated with transactions with fiduciaries.⁴⁷

Lord Eldon confirmed and clarified his *Gibson* consent analysis in a number of subsequent cases. He explained that fiduciaries could contract with their beneficiaries,⁴⁸ but only if they first acquired consent to the dissolution of the fiduciary connection (i.e. consent to the proposed conflict or benefit) through the means of what he described as a new or second contract of dissolution. In *Ex parte Lacey*, he described the opportunism concern that extended even to the acquisition of consent:

A trustee, who is entrusted to sell and manage for others, undertakes in the same moment, in which he becomes a trustee, not to manage for the benefit and advantage of himself. It does not preclude a new contract with those, who have entrusted him. It does not preclude him from bargaining, that he will no longer act as a trustee. The *Cestuy que trust* may by a new contract dismiss him from that character: but even then that transaction, by which they dismiss him, must according to the rules of this Court be watched with infinite and the most guarded jealousy; and for this reason; that the Law supposes him to have acquired all the knowledge a trustee may acquire; which may be very useful to him; but the communication of which to the *Cestuy que trust* the Court can never be sure he has made, when entering into the new contract, by which he is discharged.⁴⁹

⁴⁵ Ibid 278.

⁴⁶ The judgment ultimately proceeds to a conclusion of negligence. Lord Eldon determined that the failure of the attorney to properly advise constituted negligence or a lack of reasonable diligence. Consent, in that respect, becomes an issue of care. Consider also *Bulkley v Wilford* (1834) 2 Cl & Fin 102, 6 ER 1094.

⁴⁷ Lord Eldon applied the same requirements of proof of disclosure and advice to both bargains and gifts. On the latter, see *Hatch v Hatch* (1804) 9 Ves Jun 292, 32 ER 615.

⁴⁸ Unqualified assertions that trustees could not contract with their beneficiaries appear sporadically in the cases. It is clear however it was always possible to contract out of the rule. See *Campbell v Walker* (1800) 5 Ves Jun 678, 31 ER 801; *Ex parte James* (1803) 8 Ves Jun 337, 32 ER 385; *Downes v Grazebrook* (1817) 3 Mer 200, 36 ER 77. Consider the editor notes at the end of *Osmond v Fitzroy* (1731) 3 P Wms 129, 24 ER 997 (n 3) and *Fox v Mackreth* (1788) 2 Bro CC 400, 29 ER 224, affd (1791) 2 Cox 320, 30 ER 148 (n 1).

⁴⁹ (1802) 6 Ves Jun 625, 626-627, 31 ER 1228.

In *Ex parte James* he again explained that the issue was proper consent: ‘The rule is, that a trustee shall not become the purchaser, until he enters into a fair contract, that he may become the purchaser, with those interested’.⁵⁰ Appreciate here that the ‘fair contract’ is the informed manifestation of consent. As Lord Eldon understood it, ‘the question was, not, whether the price was fair between the trustee and *cestui que trust* at the time, but, whether a person, who had a confidential situation previously to the purchase, had at the time of the purchase shaken off that character by the consent of the *cestui que trust*, freely given, after full information; and bargained for the right to purchase’.⁵¹ He reiterated his understanding in *Coles v Trecothick*:

As to the objection to a purchase by the trustee, the answer is, that a trustee may buy from the *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, proving, that the *cestui que trust* intended, the trustee should buy; and there is no fraud, no concealment, no advantage taken, by the trustee of information, acquired by him in the character of trustee.⁵²

Again it is clear that the investigation of the circumstances is directed to the question of consent. Then, in *Ex parte Bennett*, he returned to the rationale for requiring a fiduciary to gain the consent that would shake off the strict accountability:

[U]ntil by contract he shall do, what all the cases admit he may, but what it may be difficult to determine he has done effectually, shake off the character of trustee, and put himself in circumstances, in which he shall be no longer the person intrusted to sell, he shall not buy for himself. Why? The reason is, that it would not be safe, with reference to the administration of justice in the general affairs of trust, that a trustee should be permitted to purchase; for human infirmity will in very few instances permit a man to exert against himself that providence, which a vendor ought to exert, in order to sell to the best advantage; and which a purchaser is at liberty to exert for himself, in order to purchase at the lowest price.⁵³

His analysis was unchanged years later in *Cane v Allen*: ‘If the attorney were employed to sell, if he dealt for the property, he must put an end to the confidential relation, or put himself at arm’s length; or if the contract was afterwards quarrelled, it would be incumbent upon him to show that he had made a reasonable use of that confidence, and had given as ample and correct advice and information to his client as he would have done if his client had been dealing with a third person’.⁵⁴ Lord Eldon’s last remarks on the point were reported in *Downes v Grazebrook*: ‘[A trustee] cannot, without the express authority of his *cestuy que trust*, have any thing to do with the trust property as a purchaser’.⁵⁵ It is worth observing that in none of these several statements does Lord Eldon describe the burden of establishing the validity of consent as a ‘duty’. He does use the term duty elsewhere in these cases, as do judges in other cases, but that does not erase the reality that there is no actionable duty to seek or secure consent. A

⁵⁰ (1803) 8 Ves Jun 337, 352, 32 ER 385.

⁵¹ Ibid 353.

⁵² (1804) 9 Ves Jun 234, 246-247, 32 ER 592. Also (at 247): fiduciary accountability must be displaced ‘by an unqualified authorized contract for liberty to buy’.

⁵³ (1805) 10 Ves Jun 381, 394, 32 ER 893.

⁵⁴ (1814) 2 Dow 289, 299, 3 ER 869.

⁵⁵ (1817) 3 Mer 200, 208, 36 ER 77.

fiduciary has an *option* to arrange consent and to ensure its validity through full disclosure and proper advice.

The only clarification required here arises with respect to the references to the need to dissolve the relation. It should be understood that it is not necessary to fully dissolve the relation in the sense of ending the nominate undertaking.⁵⁶ Securing true consent to a conflict or benefit legally dissolves the relation for the purposes of fiduciary accountability to the extent of the scope of the consent. The nominate undertaking remains alive, but the default fiduciary duty is set aside. So, for example, in the quotation above from *Cane v Allen*, it is stated that the relation must either be ended or ‘ample and correct advice and information’ be given. These are each just expressions of consent, one that operates by ending the nominate undertaking (which ostensibly ends the fiduciary regulation) and one that operates by wholly or partially ending the parallel default fiduciary regulation.⁵⁷

The other significance of *Gibson* is that it has been read as establishing that fairness is a substantive criterion in a fiduciary analysis. That perception likely is attributable to remarks that, when read in isolation, may suggest that a fiduciary must prove that any transaction with a beneficiary is fair. Lord Eldon stated that a fiduciary must show ‘that no industry he was bound to exert would have got a better bargain’.⁵⁸ He later stated that a fiduciary must provide the ‘whole proof, that the thing is righteous’.⁵⁹ A full examination of the judgment, however, indicates that fairness was not designated as a criterion of validity. Lord Eldon accepted that ‘you cannot affect the bargain upon mere inadequacy; unless it is so gross as to shock the conscience of any man, who heard the terms’.⁶⁰ That is, in modern terms, unless it is ‘unconscionable,’ inadequate value is not actionable per se.⁶¹ Lord Eldon concluded that the inadequacy alleged in the case was not gross in the requisite degree, and that in any event he was not basing his decision on the adequacy or inadequacy of value.⁶²

That said, Lord Eldon did state that the sufficiency of value might serve as material *evidence* ‘where it is to be connected’ in some unclear sense with an argument that there was a confidential relation between the parties.⁶³ That, however, was not to conclude, as suggested in some later cases, that proof of fairness was necessary to validate transactions between fiduciaries and beneficiaries. As noted earlier, Lord Eldon himself made it clear in his own decisions soon thereafter that liability did not

⁵⁶ With respect to a gift, see *Re Holmes’ Estate* (1861) 3 Giff 337, 66 ER 439.

⁵⁷ Recognise that wholly ending the nominate undertaking may be less effective because the associated fiduciary regulation might not actually end with the formal termination of the nominate undertaking. Fiduciary accountability may continue, for example, for confidential information, maturing business opportunities or influence that persists (e.g. where wards recently come of age). See *Carter v Palmer* (1842) 8 Cl & Finn 657, 8 ER 256.

⁵⁸ (1801) 6 Ves Jun 266, 271 31 ER 1044.

⁵⁹ *Ibid* 276.

⁶⁰ *Ibid* 273. Consider *White v Damon* (1802) 7 Ves Jun 30, 32 ER 13.

⁶¹ Lord Eldon revisited the point in *Coles v Trecothick* (1804) 9 Ves Jun 234, 246, 32 ER 592. Query the analysis in *Morse v Royal* (1806) 12 Ves Jun 355, 373, 33 ER 134; *Lowther v Lowther* (1806) 13 Ves Jun 95, 103, 33 ER 230; *Plowright v Lambert* (1885) 52 LT (ns) 646, 651-652 (Ch).

⁶² See also (at 227) Lord Eldon’s discussion of *Fox v Mackreth* (1788) 2 Bro CC 400, 29 ER 224, *affd* (1791) 2 Cox 320, 30 ER 148.

⁶³ (1801) 6 Ves Jun 266, 273, 31 ER 1044. See the germ of the idea in *Bridgeman v Green* (1757) Wilm 58 at 63-64, 97 ER 22. See also *Heathcote v Paignon* (1787) 2 Bro CC 167, 75, 29 ER 96.

depend on proof that the fiduciary had made an advantage or that the transaction was otherwise unfair.⁶⁴

Appreciate here that even the narrower idea that a disparity in value can serve as *evidence* is problematic.⁶⁵ Of what is it supposed to be evidence? The evaluation of relative fairness involves a subjective estimation of indeterminate factors right up to the conclusion that a transaction is unconscionable. A disparity in value per se is wholly devoid of analytical cut. There may be reasons for a disparity, but it is those reasons, and not the disparity itself, that has analytical traction. The reasons in a particular instance may or may not themselves be actionable. The law has rules to discipline conduct that is objectionable, such as misrepresentation, duress or failing to give satisfactory notice of onerous terms. If those rules are not breached, relief from a disparity in value lacks justification. On principle the relevance of a disparity in value is simply that it may be a sign, or caution, that there might be actionable reasons to invalidate a transaction. If the argument is that true consent was not secured, the analysis turns to that question, and that depends on an examination of disclosure, advice and influence, and not on the disparity in value. The adequacy of the consideration may be relevant in the analysis, but only in the sense that it is material information that a fiduciary must disclose in order to establish the true consent of the beneficiary. Many of the cases that refer to the fairness or adequacy of a consideration may be explained as instances of the relevance of the *disclosure* of value, rather than value per se.⁶⁶

Consider next *Hatch v Hatch*.⁶⁷ That decision was an unremarkable application of conventional fiduciary accountability, and requires only brief attention. Like *Gibson*, Lord Eldon did not purport to define a distinct doctrine of presumed undue influence. The only issue was consent. Lord Eldon asked whether the gift made by a recent ward was ‘an act of rational consideration, an act of pure volition, uninfluenced’.⁶⁸ As neither her guardian nor her attorney had given her full information, the gift was set aside. Notwithstanding that routine analysis, the case subsequently was cited as definitional or illustrative of the imagined distinct doctrine.⁶⁹

Huguenin v Baseley similarly was concerned primarily with consent.⁷⁰ The validity of a gift from a lady to a spiritual advisor who managed her property depended on whether it was a ‘pure, voluntary, well understood’ act of her mind.⁷¹ As Lord Eldon put it:

The question is, not, whether she knew what she was doing, had done, or proposed to do, but how that intention was produced: whether all that care and providence was

⁶⁴ See n 37 above. Subsequent to *Gibson* Lord Eldon appears to have become acquainted with the analysis of Lord King in *Keech v Sandford* (1726) Sel Cas T King 61, 25 ER 223. Most of his decisions thereafter articulate the detection concern and deny the relevance of fairness.

⁶⁵ The idea appears in subsequent cases. See *Morse v Royal* (1806) 12 Ves Jun 355, 33 ER 134; *Lowther v Lowther* (1806) 13 Ves Jun 95, 33 ER 230; *Baker v Carter* (1835) 1 Y & C Ex 250, 160 ER 102. See also the argument of counsel (Sir Samuel Romilly) in *Huguenin v Baseley* (1807) 14 Ves Jun 273, 284 et seq, 33 ER 526.

⁶⁶ See notes 79, 84, 142 infra. Consider *Dougan*, infra n 170.

⁶⁷ (1804) 9 Ves Jun 292, 32 ER 615.

⁶⁸ *Ibid* 297.

⁶⁹ E.g. *Liles v Terry* [1895] 2 QB 679 (CA); *Wright v Carter* [1903] 1 Ch 27 (CA).

⁷⁰ (1807) 14 Ves Jun 273, 33 ER 526.

⁷¹ *Ibid* 296.

placed round her, as against those, who advised her, which, from their situation and relation with respect to her, they were bound to exert on her behalf.⁷²

He went on to explain that a voluntary intention was defective if it was not grounded in full knowledge and advice:

Repeating, therefore, distinctly, that this court is not to undo voluntary deeds, I represent the question thus: whether she executed these instruments not only voluntarily, but with that knowledge of all their effect, nature and consequences, which the defendants *Baseley* and the attorney were bound by their duty to communicate to her, before she was suffered to execute them.⁷³

Apart from the reference to ‘duty’, that is an entirely conventional statement of what is required to establish true consent.

In the result, none of these three cases either explicitly or implicitly disconnect cases of presumed undue influence from the trunk fiduciary jurisprudence. Consequently, they provide no actual support for the formal existence of a distinct doctrine. That is to be expected of course because the opportunism mischief is not substantively different where the means of access happens to be influence.

That brings us to certain later decisions of Lord Eldon that appear to be inconsistent with the then existing law. Consider his 1808 decision in *Harris v Tremenheere*, involving transactions of both gift and bargain.⁷⁴ The judgment is significant because Lord Eldon employed a distinction between gifts and bargains, and also apparently accepted fairness (adequate consideration) as a criterion for the validity of bargains. He separated the leases involved into gifts and a bargain, and applied different rules to each. The pure gifts were valid because they were spontaneous acts of generosity given without inaccurate representations of value on the part of the defendant. Lord Eldon, it must be noted, did not indicate, as he should have, that the burden was on the defendant to show that the gifts were informed acts free of undue influence. As for the bargain, Lord Eldon stated that the defendant ‘imposed upon himself the duty of informing himself fully of the value [and of ensuring that] he was making the best bargain he possibly could’.⁷⁵ He later stated that the defendant was required to prove that ‘he paid the full amount that he could have obtained from any other person’.⁷⁶ Lord Eldon then directed that the consideration given should be assessed, and when it was determined to be ‘not a full consideration,’ the lease was invalidated.⁷⁷ All of that, it should be appreciated, constituted novel analysis. No court previously had articulated a distinction between bargains and gifts, and Lord Eldon did not offer any sort of explanation for such a distinction. The requirements for proof of full information and proper advice certainly were not different. And the requirement Lord Eldon here asserted for proof of the fairness of the bargain (as opposed to the gifts) was flatly contradicted by the weight of the prior jurisprudence, including Lord Eldon’s own judgments.⁷⁸ In particular, it was not suggested that the consideration was

⁷² Ibid 300.

⁷³ Ibid.

⁷⁴ (1808) 15 Ves Jun 34, 33 ER 668.

⁷⁵ Ibid 40-41.

⁷⁶ Ibid 42.

⁷⁷ Ibid.

⁷⁸ Consider parenthetically the indecisive suggestions of a fairness criterion in Lord Eldon’s earlier judgment in *Parke v White* (1805) 11 Ves Jun 209, 32 ER 1068.

grossly inadequate so as to be unconscionable, or that the quantum was evidence of a lack of true consent. The decision is baffling.

A few years later, in *Montesquieu v Sandys*, Lord Eldon again asserted a distinction between gifts and bargains.⁷⁹ Again he did not explain the basis for such a distinction. A gift, in his view, could not be accepted by an attorney until the relation was dissolved (informed autonomous consent established). A bargain on the other hand, was permissible while the relationship continued as long as it 'was not in any degree the object of his concern as attorney,' he not being 'the attorney *in hac Re*'.⁸⁰ This latter element, it should be appreciated, does not actually imply any substantive distinction between gifts and bargains for the purposes of fiduciary accountability. Moreover, it too broadly excuses transactions from fiduciary regulation.⁸¹

In *Cane vs. Allen* Lord Eldon returned to a conventional analysis.⁸² Neither he nor Lord Redesdale required proof of the fairness of the bargain. Lord Eldon in fact implicitly rejected a criterion of adequate value when he stated that the validation of the bargain required the attorney to 'communicate all the knowledge which he as agent had gained as to the real value of the estate'.⁸³ That is, disclosure of any *knowledge of value* was required, and if that disclosure was accurately made, the adequacy of the value implicitly could not be a separate criterion.⁸⁴ That confirms, along with Lord Eldon's earlier clear rejections of fairness as a substantive criterion, that his analysis in *Harris* was anomalous.⁸⁵

Thus, after sifting Lord Eldon's work, the social function of fiduciary accountability was definitively settled. It was understood that relations of confidence were vulnerable to opportunism, and that opportunism was difficult, often impossible, to detect. Fiduciary accountability therefore was imposed on such relations on a strict, albeit default, basis. Unauthorised conflicts or benefits were unacceptable. Securing consent to a conflict or benefit was the only defence to a claim of breach.⁸⁶ There was no *duty* to seek consent. Establishing true consent, or that the transaction was 'righteous',⁸⁷ was an option that could be exercised by leading evidence of full disclosure, proper advice, and the absence of undue influence. Finally, fairness, on the commanding weight of authority, was not a criterion for liability. That was the accepted content of the great rule at the beginning of the nineteenth century.

⁷⁹ (1811) 18 Ves Jun 302, 34 ER 331. Though rather opaque, the analysis in *Montesquieu* appears to proceed as an issue of *disclosure* of value, not value per se.

⁸⁰ Ibid 313. The initial use of the term *in hac re* in this context has been attributed to Baron Alderson in *Jones v Thomas* (1837) 2 Y & C Ex 498, 519-520, 160 ER 493. It references the ambit of the duty of an attorney acting in the character of attorney. On the breadth of *in hac re* duty, see *Tomson v Judge* (1855) 3 Drew 306, 313, 61 ER 920; *McPherson v Watt* (1877) 3 AC 254, 263 (HL); *Wright v Carter* [1903] 1 Ch 27, 53 (CA). Consider *Twining v Morrice* (1788) 2 Bro CC 326, 29 ER 182.

⁸¹ It should be evident that the influence generated by an undertaking may inform all transactions with the beneficiary. See *Holman v Loynes* (1854) 4 De G M & G 270, 280-281, 43 ER 510.

⁸² (1814) 2 Dow 289, 3 ER 869. See also *Wood v Downes* (1811) 18 Ves Jun 120, 34 ER 263.

⁸³ Ibid 294.

⁸⁴ The *Cane* analysis proceeded as an issue of *disclosure* of value, not value per se. That analysis was not superseded by Lord Eldon's isolated undeveloped observation (at 300) that the transaction in question 'contained nothing unfair'.

⁸⁵ See also *Downes v Grazebrook* (1817) 3 Mer 200, 36 ER 77.

⁸⁶ There were other defences that did not purport to deny the existence of the obligation (e.g. laches, the intervention of third party rights, the impossibility of restitution).

⁸⁷ Lord Eldon's use of the term righteous apparently was meant to convey, not a requirement of fairness, but the need for an informed and autonomous consent.

V THE REQUIREMENT OF FAIRNESS

The great rule has remained intact to the present day. The boundaries and content of the rule, however, have been clouded by subsequent judicial inattention and raw invention. A primary divisive utensil has been a continuing appeal to the ‘fairness’ criterion. The appeal to fairness commenced almost immediately after the Eldon decade of contribution,⁸⁸ growing from the seeds he planted with his decisions in *Harris* and *Montesquieu*. The jurisprudence essentially parted, initially seemingly unconsciously, into contradictory lines of authority. That departure was not challenged. Instead, as we will see, it was silently accommodated or absorbed (or suppressed) by taxonomic fractionation.

The trunk line of authority continued through the first half of the century with judges inquiring only into whether consent was informed and autonomous, either rejecting⁸⁹ or making no reference to a fairness criterion.⁹⁰ The opposed cases ostensibly supporting a fairness criterion were fewer, and notably short on compelling reasoning. In *Selsey v Rhoades*, Leach V-C adopted without attribution the anomalous analysis of Lord Eldon in *Harris* to uphold a bargain made on a speculative valuation.⁹¹ He asserted a distinction between bargains and gifts, and in the case of the former required that the fiduciary prove ‘that he gives the full consideration’.⁹² The decision is additionally problematic because on appeal the Lord Chancellor indicated that, but for the acts of confirmation, ‘probably the lease might not have stood’.⁹³ In *Champion v Rigby*, Leach, now Master of the Rolls, repeated the anomalous view: ‘I am of the opinion, that a solicitor dealing with his client is bound to shew that he has given his client the price which he would have advised his client to accept from another person’.⁹⁴ In *Cheslyn v Dalby* Baron Alderson made the unsupported statement that he was to assess whether the transaction ‘was a fair transaction’.⁹⁵ In *Charter v Trevelyan* the Lord Chancellor declared that an agent could bargain with a principal if consent could be proved *or* that ‘the price paid was the full value of the property so purchased’.⁹⁶ That assertion – that a transaction could be validated by proof of fairness even in the absence of proof of consent – went beyond any previous fairness

⁸⁸ Lord Eldon made his conventional and irregular contributions in the decade 1801-1811 (*Gibson to Montesquieu*). His later judgments accorded with the conventional views he expressed during that decade. See *Downes v Grazebrook* (1817) 3 Mer 200, 36 ER 77; *Bulkley v Wilford* (1834) 2 Cl & Fin 102, 6 ER 1094.

⁸⁹ *Jones v Thomas* (1837) 2 Y & C Ex 498, 160 ER 493; *Scott v Davis* (1838) 4 My & Cr 87, 41 ER 34; *Hamilton v Wright* (1842) 9 Cl & Fin 111, 8 ER 357; *Bentley v Craven* (1853) 18 Beav 75, 52 ER 29.

⁹⁰ *Griffiths v Robins* (1818) 3 Madd 191, 56 ER 480; *Goddard v Carlisle* (1821) 9 Price 169, 147 ER 57; *Pratt v Barker* (1826) 1 Sim 1, 57 ER 479; *Maddeford v Austwick* (1826) 1 Sim 89, 57 ER 512; *Dent v Bennett* (1839) 4 My & Cr 269, 41 ER 105; *Greenlaw v King* (1840) 3 Beav 49, 49 ER 19; *Gillett v Peppercorne* (1840) 3 Beav 78, 49 ER 31; *Carter v Palmer* (1842) 8 Cl & Fin 657, 8 ER 256; *Gibson v Russell* (1843) 2 Y & CCC 104, 63 ER 46; *Archer v Hudson* (1846) 15 LJ Ch 211 (CA); *Maitland v Irving* (1846) 15 Sim 437, 60 ER 688; *Billage v Southee* (1852) 9 Hare 534, 68 ER 623; *Hoghton v Hoghton* (1852) 15 Beav 278, 51 ER 545.

⁹¹ (1824) 2 Sim & St 41, 57 ER 260.

⁹² *Ibid* 49.

⁹³ (1827) 1 Bligh (ns) 1, 8, 4 ER 774.

⁹⁴ (1830) Tamlyn 421, 425, 48 ER 168.

⁹⁵ (1836) 2 Y & C Ex 170, 194, 160 ER 357.

⁹⁶ (1844) 11 Cl & Fin 714, 732, 8 ER 1273.

assertion.⁹⁷ In *Edwards v Meyrick* Wigram V-C at least purported to offer authority, but both his authority and his analysis were deficient.⁹⁸ He cited a number of cases and the Sugden text for his assertion that, while contracting was possible, ‘the *onus* lies on the solicitor to prove that the transaction was fair’.⁹⁹ However, neither the cases cited,¹⁰⁰ nor Sugden,¹⁰¹ actually support that assertion.¹⁰² Wigram V-C quoted specifically from *Gibson*, but as indicated above, Lord Eldon regarded substantive fairness (the adequacy of value) as irrelevant unless it was shocking enough to be unconscionable.¹⁰³ The only ‘fairness’ that mattered was the fairness of putting a beneficiary in a position to produce an informed consent to transact with a fiduciary on the proposed terms. Wigram V-C was of the view that the nature of the proof in cases involving transactions between fiduciaries and beneficiaries ‘must depend upon the circumstances of each case’.¹⁰⁴ On the facts before him, there was no indication of any suppression of information or of any actual conflict on the part of the attorney, who admittedly was acting *in hac re*. That left for his consideration what duty ‘might arise from the mere possibility of the relation of attorney and client, giving the attorney some influence or ascendancy over the client’.¹⁰⁵ Without explanation, he declared that the attorney was not bound ‘to do more than prove that he gave full value for the estate’.¹⁰⁶ Following that misinformed distortion,¹⁰⁷ he proceeded to conclude that ‘full and fair value’ had been given.¹⁰⁸ There literally is nothing in these competing cases that credibly justified a fairness requirement.¹⁰⁹ Neither principle nor authority supported the assertions of the various judges.

⁹⁷ Lord Campbell (at 740) made the less aggressive, but still misinformed, assertion that the onus was ‘clearly to prove that the transaction was fair’.

⁹⁸ (1842) 2 Hare 60, 67 ER 25.

⁹⁹ *Ibid* 68.

¹⁰⁰ The cases were *Gibson v Jeyes* (1801) 6 Ves Jun 266, 31 ER 1044, *Montesquieu v Sandys* (1811) 18 Ves Jun 302, 34 ER 331 and *Cane v Allen* (1814) 2 Dow 289, 3 ER 869.

¹⁰¹ Edward Sugden, *Vendors and Purchasers of Estates* (Sweet, 10th ed, 1839) vol 3, 238.

¹⁰² I pause to note that inevitably every legal principle will be contradicted by some degree of seemingly divergent expression. That will be due to imprecise terminology or deficient comprehension, and, occasionally, explicit disagreement. In *Edwards* there was no disagreement. Wigram VC either was not aware of the cases strongly denying the relevance of fairness per se, or he selectively omitted them from his analysis.

¹⁰³ See the text at notes 60-61 above.

¹⁰⁴ (1842) 2 Hare 60, 70, 67 ER 25.

¹⁰⁵ *Ibid* 71.

¹⁰⁶ *Ibid*. Earlier (at 70), he stated that: ‘If he proves the full value to have been given the ground for any unfavourable inference is removed’.

¹⁰⁷ It was clear from prior cases that a beneficiary could avoid a transaction even if fair. See the cases at notes 36, 37, 38 above.

¹⁰⁸ (1842) 2 Hare 60, 73, 67 ER 25. That conclusion was not affected by information that the value of the property might be increased by the possible construction of a railroad because that information was only speculation at the time and it was not proved that the attorney knew that information.

¹⁰⁹ Consider that judges sometimes appear to use fair in a casual manner, not intending sharp legal content. In *Lewis v Hillman*, (1852) 3 HLC 607, 10 ER 239, Lord St. Leonards stated (at 629) that even ‘a fair trustee...cannot sell to himself’. He later stated (at 630) that a transaction ‘must be open and fair, and free from all objection’. Both uses appear to be casual. See also *Cane v Allen* (1814) 2 Dow 289, 3 ER 869; *Dover v Buck* (1865) 5 Giff 57, 66 ER 921; *Wheeler v Sargeant* (1893) 69 LT 181. Consider also whether *Hunter v Atkins*, (1834) 3 My & K 113, 40 ER 43, is supportive of a fairness criterion. Lord Brougham appeared to use the term fair to

At the midpoint of the century the contradiction in the cases was strikingly illustrated by two 1854 decisions expressing the opposed views. In *Holman v Loynes* the judges took *Gibson v Jeyes* and *Edwards v Meyrick* to have established that fiduciaries must prove the substantive fairness of a transaction.¹¹⁰ Lord Cranworth focused on the words of Lord Eldon requiring a fiduciary (an attorney) to demonstrate ‘that no industry he was bound to exert would have got a better bargain’.¹¹¹ He determined that the annuity transactions in question were not at a fair price. At the same time however, Lord Cranworth indicated that the unfair prices were due to the failure of the fiduciary to make inquiries as to the price obtainable for an annuity for a person in poor health, thereby making it a case that should have been decided on the basis of a lack of *informed* consent (due to the negligence of the fiduciary), rather than a lack of ‘fairness’. Lord Justice Turner, for his part, first affirmed the general application of fiduciary accountability: ‘[T]he control exercised by the Court over such dealings is part of its general system for preventing any undue advantage being taken by persons in whom confidence has been reposed’.¹¹² The bulk of his judgment was then devoted to explaining that the confidential relation extended to the *in hac re* transaction. He described the ‘rules of the Court’ that were associated with that relation: ‘Those rules require no more than that the client should be fully informed and duly and honestly advised, and that the price should be just’.¹¹³ Here Turner LJ properly regarded full disclosure and advice as relevant evidence of consent. However, apparently being insufficiently familiar with the case law, he improperly insisted on a requirement of fairness or ‘just’ price.

The judgment of Turner LJ is important in a second negative respect. In the course of his analysis Turner LJ added a cryptic commentary:

Gifts from clients to their attorneys can be maintained only, when not only the relation has ceased but the influence may rationally be supposed to have ceased also. That was laid down by Lord Eldon in *Wood v Downes* (18 Ves. 120); and I see no reason why the rule, which applies to gifts, should not equally in this respect apply to purchases. It is true that the rules of the Court against gifts are absolute, and that against purchasers they are modified: but this is a question, not upon the extent of the rules, but upon the circumstances under which they are to be brought into operation, and in that respect I see no difference between the cases of gifts and purchases.¹¹⁴

Those remarks appear to be both internally contradictory (gifts, he himself accepted, were valid with informed consent and therefore not absolutely proscribed) and inconsistent with the existing authority (there was no established distinction between bargains and gifts). The resort to such a distinction was a novelty employed, but left unexplained, by Lord Eldon in *Harris* and *Montesquieu* (and Sir John Leach in *Selsey*). Turner LJ did not himself cite authority or further explain the supposed difference, and his own sense, stated above, was that for the purpose at hand there was no difference. That all matters, it will become apparent shortly, because in subsequent cases his remarks were taken to indicate the existence of distinct tests for the validity of bargains and gifts.

describe circumstances where the assessment of defined criteria (disclosure, influence) determined validity (that is, fairness was not itself a criterion).

¹¹⁰ (1854) 4 De G M & G 270, 43 ER 510.

¹¹¹ *Ibid* 272, 274.

¹¹² *Ibid* 280.

¹¹³ *Ibid* 284.

¹¹⁴ *Ibid* 283.

The *Holman* decision was rendered in January 1854. Six months later the decision of the House of Lords in *Aberdeen Rail Co v Blaikie Brothers* appeared.¹¹⁵ Lord Cranworth delivered the judgment that has since been generally recognised as a proper statement of the law. Apparently having in the interim been introduced to the established conventional authorities, Lord Cranworth specifically rejected a ‘fairness’ inquiry:

Such an agent 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. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the cestui qua trust which it was impossible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee have been as good as could have been obtained from any other person; they may even at the time have been better. But still so inflexible is the rule that no inquiry on that subject is permitted.

The English authorities on this subject are numerous and uniform. The principle was acted on by Lord King in *Keech v Sandford* and by Lord Hardwicke, in *Whelpdale v Cookson* and the whole subject was considered by Lord Eldon on a great variety of occasions. It is sufficient to refer to what fell from that very able and learned judge in *Ex parte James*. It is true that the questions have generally arisen on agreements for purchases or leases of land, and not, as here, on a contract of a mercantile character. But this can make no difference in principle. The inability to contract depends not on the subject-matter of the agreement, but on the fiduciary character of the contracting party, and I cannot entertain a doubt of its being applicable to the case of a party who is acting as manager of a mercantile or trading business for the benefit of others no less than to that of an agent or trustee employed in selling land.¹¹⁶

The *Aberdeen* case involved corporate directors, but as Lord Cranworth noted, that made no difference. The accountability depends ‘not on the subject-matter of the agreement, but on the fiduciary character of the contracting party’. And when liability is assessed, as the earlier trunk cases had established, substantive fairness per se is not relevant.

Notwithstanding the clarity and strength of *Aberdeen*, two decisions shortly reinstated disorder. The following year, in *Tomson v Judge*, a case involving a gift structured to have the appearance of a bargain, Vice-Chancellor Kindersley first stated that for a bargain ‘the onus lies on the solicitor to shew that the transaction was perfectly fair, that the client knew what he was doing, and in particular that a fair price was given, and of course that no kind of advantage was taken by the solicitor’.¹¹⁷ That assertion of a fairness criterion obviously was not informed by *Aberdeen*, which was not cited.

Then, citing *Holman* as authority, and *Montesquieu* as one of several cases he thought supported his view,¹¹⁸ Kindersley V-C asked if ‘the rule with regard to gifts [was] more stringent’.¹¹⁹ He concluded that the cases established that ‘the rule with

¹¹⁵ (1854) 23 LT (os) 315.

¹¹⁶ Ibid 316.

¹¹⁷ (1855) 3 Drew 306, 313, 61 ER 920.

¹¹⁸ Ironically, he added that Lord Eldon in *Harris v Tremeneere*, (1808) 15 Ves Jun 34, 33 ER 668, may have been ‘under a misapprehension of the rule’ when dismissing the bill as to pure gifts.

¹¹⁹ (1855) 3 Drew 306, 314, 61 ER 920.

regard to gifts is absolute, that is, it is not open to the attorney to shew that the transaction was fair'.¹²⁰ That, it will be appreciated, was only to rehearse the unexplained distinction of Lord Eldon. The case law as a whole had established that both gifts and bargains could be validated by proof of informed autonomous consent (disclosure, advice, absence of undue influence), and that substantive fairness was *not* a criterion.¹²¹ The idea that proof of fairness was required for a bargain but not a gift plainly was a misconception produced by aberrant analysis.

Perhaps sensing the need for justification, Kindersley V-C volunteered his view of the nature of the bargain/gift distinction:

There is this obvious distinction between a gift and a purchase. In the case of a purchase the parties are at arms' length, and each party requires from the other the full value of that which he gives in return. In the case of a gift the matter is totally different, and it appears to me that there is a far stricter rule established in this Court with regard to gifts than with regard to purchases, and that the rule of this Court makes such transactions, that is of a gift from the client to the solicitor, absolutely invalid.¹²²

It should be evident that there is no relevant distinction here.¹²³ Absent consent, fiduciaries are not 'arms' length' in a functional sense to their beneficiaries,¹²⁴ whether the transaction is a bargain or a gift, and in neither instance can it be assumed that the value involved was transferred pursuant to a consent that was informed and autonomous. It must be understood at this point that there is no valid distinction between bargains and gifts for the purposes of fiduciary accountability. But that was not recognised by Kindersley V-C. As it was, the effect of this part of the *Tomson* analysis was to brace a fracture in the law of fiduciary accountability. The burden of proof for a fiduciary would vary according to whether the transaction was a bargain or a gift. A demonstration of informed autonomous consent was required in each case, but proof of fairness was an additional requirement for the validation of a bargain.

The next year, with an isolated statement in *Savery v King*, Lord Cranworth seemed to give support to a requirement of proof of fairness.¹²⁵ The circumstances involved a bargain between a solicitor and his clients (a father and son) which was claimed to be invalid because of an alleged undue influence of the father and solicitor over the son. Lord Cranworth, who delivered the unanimous judgment of the House of Lords, appeared to accept the consent interpretation of Lord Eldon's *Gibson* analysis. His initial description of the burden on a solicitor was as follows:

[W]here a solicitor purchases or obtains a benefit from a client, a court of equity expects him to be able to show that he has taken no advantage of his professional position; that the client was so dealing with him as to be free from the influence which a solicitor must necessarily possess, and that the solicitor has done as much to protect

¹²⁰ Ibid 315.

¹²¹ The cases had established that (1) a beneficiary did not have to prove that the transaction was unfair and (2) the fiduciary could not validate a transaction merely by showing it to be fair.

¹²² (1855) 3 Drew 306, 315, 61 ER 920.

¹²³ His "obvious distinction" fails to distinguish because opportunism exploits access, and its operation does not depend on the means of access or the nature of particular interactions. There is no unique protection in the *supposition* that one is receiving "the full value of that which he gives in return".

¹²⁴ The arms' length notion is not helpful in this context. See Robert Flannigan, 'Commercial Fiduciary Obligation' (1998) 36 *Alberta Law Review* 905.

¹²⁵ (1856) 5 HLC 627, 10 ER 1046.

his client's interest as he would have done in the case of the client dealing with a stranger.¹²⁶

Lord Cranworth repeated essentially the same summation of the burden three more times at different points in his analysis without once mentioning any requirement for fairness or fair value.¹²⁷ But at the very end of his judgment, he inexplicably appended a requirement of proof of 'utmost value':

In order to sustain his purchase, Savery must show not only that he gave the utmost value for the estate, but farther, that no one of the circumstances likely to influence [the son] in his determination to concur or not to concur in the sale was kept from him, that he was aware of the invalidity of the mortgage, so far as he was concerned, and so knew the real nature and extent of his interest.¹²⁸

No authority was cited for that 'utmost value' addition, and it is at odds with his four prior summations, all of which are consistent with each other and which ostensibly purport to be complete statements of the burden.¹²⁹ It was also opposed by Lord Cranworth's own words in *Aberdeen* where, in the most emphatic terms, the House of Lords rejected a fairness criterion.¹³⁰

A requirement of proof of fairness plainly is inconsistent with a requirement to prove informed autonomous consent. If a fiduciary proves, in Lord Cranworth's words in *Savery*, that the beneficiary is 'free from the influence [of the fiduciary]'¹³¹ or has 'fully understood what he was doing [and has] had competent means of forming an independent judgment'¹³² or has been 'properly put on his guard as to the nature and consequences of what he was doing,'¹³³ how can it still be open to a judge to conclude that the transaction was not fair? The risk of opportunism has been dissolved (or reduced)¹³⁴ for the purposes of the transaction, and the beneficiary has acted autonomously on the information at hand. Further, value is subjective and determined by the unique circumstances of each party. Value is a temporary contextual conclusion about an asset, not an intrinsic attribute that can be specified definitively. Unfairness or inadequate value cannot be *proved* independently of proving deficient or overreaching conduct, even at the extreme end of the continuum of value. Fairness or value is a

¹²⁶ Ibid 655-656.

¹²⁷ Ibid 657, 660-661, 665.

¹²⁸ Ibid 666.

¹²⁹ The reference to utmost value was obiter. In the preceding paragraph of his analysis Lord Cranworth had noted that the price paid by the attorney was more than had been offered by any other person. He then stated (at 665) that: 'If the question here turned on the point, whether he had in the sale done the best for his client, and had complied with the rule as laid down by Lord Eldon, I am much disposed to think that he had'. He concluded, however that 'in truth the question here does not depend on any such doctrine [the duty to do his best]'. Rather, the transaction failed for a lack of either advice or disclosure: 'This sale cannot stand against [the son], because it was made by him without his having been made aware that the original mortgage was invalid'. Lord Cranworth was saying that it was not enough to prove fair value if the consent was not a fully informed consent. But in framing his analysis as he did, he allowed it to be misinterpreted.

¹³⁰ It was also opposed by Lord Cranworth's words in *Smith v Kay* (1859) 7 HLC 750.

¹³¹ (1856) 5 HLC 627, 656, 10 ER 104.

¹³² Ibid 657.

¹³³ Ibid 661.

¹³⁴ Many opportunistic actions will remain concealed. Fiduciaries keep the fruit of undetected conflicts and benefits.

conclusion derived from the analysis of other considerations; it is not itself a criterion of the validity of a transaction.¹³⁵

It nevertheless may be asked how anyone could reasonably object to requiring a fiduciary to prove the fairness of a transaction. Given the corrosive opportunism mischief, why is it not perfectly acceptable, even prudent, to insist on proof of fairness? Ostensibly that only creates an appropriately higher standard that is consistent with the judicial ethic of jealously protecting beneficiaries of fiduciary undertakings. The short answer is that the introduction of a duty to demonstrate fairness opens the door to the very mischief that fiduciary accountability attempts to control. While a standard of fairness might seem to be unambiguously advantageous to the beneficiary, in fact it is not. The critical concern is that the appearance of fairness may be manipulated crudely or in very sophisticated ways to conceal real incentives and gains. Relational and situational factors may be groomed. The quality of transactions may be distorted to achieve cosmetic ends. Artifice and duplicity will contrive to adjust appearances to the point that nothing suggests unfairness.¹³⁶ In that manner, a legal standard that invites proof of fairness simultaneously invites *ex ante* and *ex post* manipulation of the facts by opportunistic fiduciaries. Fairness is then a *gateway*, not a barrier, to opportunism.

Again however it may be thought that there is at least some utility in judges hearing submissions respecting fairness, if perhaps only to raise the possibility of deficient consent. To that end, however, fairness cannot remain at the same level of relevance as evidence of disclosure, advice and autonomy. It will be appreciated that the assertions of fact on either side of a dispute will normally suffice to expose any apparent fairness discontinuities and to suggest the direction of investigation. Judges will thus ‘see’ the ostensible unfairness, but will not rest their conclusion on it, because no one can know in many cases whether evidence of fairness has been manufactured or shaped. Short of a fairness discrepancy that meets the general test of unconscionability, beneficiary consent should be considered valid once the fiduciary conclusively proves full disclosure and advice, and the absence of undue influence.

It may be added that introducing an independent fairness element may ultimately lead to its domination of the analysis. Some judges are receptive to the elevation of ‘fairness’ tests. They will no longer need to distill the details of the jurisprudence. All power will reside in their *ad hoc* subjective assessments of the ‘fairness’ of particular circumstances. Subjectivity will be paraded as ‘wisdom’. Principle will dissolve.

In the decades following *Savery*, the disorder continued.¹³⁷ The conventional line of cases proceeded with judges inquiring only into whether consent was informed and autonomous, again either rejecting¹³⁸ or making no reference to a fairness criterion.¹³⁹

¹³⁵ That said, divergences from expected value (e.g. market value, distress sale value) potentially could raise a caution as to the validity of consent, and may have limited analytical value in that confined sense. See the text accompanying n 65-66 above.

¹³⁶ Proof of fairness would be determinative only where there was proof of full disclosure, advice and autonomy, but substantive fairness somehow was in issue. If the fairness question were resolved in favour of the fiduciary, the machinations of the fiduciary may have contributed to that result.

¹³⁷ The disorder also appears in contemporary texts. See for example William Kerr, *Fraud and Mistake* (Maxwell and Son, 1868) where (at 107-108, 122-123) initial assertions of a fairness criterion were immediately followed by denials of the relevance of fairness.

¹³⁸ *Tate v Williamson* (1866) LR 2 Ch App 55 (CA); *Richards v French* (1870) 22 LT (ns) 327; *Dunne v English* (1874) LR 18 Eq 524 (CA); *Parker v McKenna* (1874) LR 10 Ch App 96; *Re Caerphilly Colliery Company* (1877) 5 Ch D 336; *De Bussche v Alt* (1878) 8 Ch D 286 (CA).

Other decisions concurrently asserted a fairness criterion. Notably, most of the competing decisions on bargains¹⁴⁰ produced in the decade following *Savery* were authored by a single judge, Sir John Romilly, who despite an earlier decision rejecting a fairness analysis,¹⁴¹ repeatedly stated without qualification (i.e. without mentioning any juridical opposition on the point) that fiduciaries were required to establish the fairness of a transaction.¹⁴² His confidence was such that he rarely pointed to authority for his anomalous view.¹⁴³ Yet it cannot be assumed that he simply was not aware of the multitude of notorious decisions indicating that substantive fairness was not a criterion of liability.¹⁴⁴ As it was, he never did justify the fairness criterion, or explain how it fit with the detection concern that had been emphasised in the prior cases.

Of the other later nineteenth-century decisions asserting a fairness criterion, only two need be mentioned.¹⁴⁵ The decision of the House of Lords in *McPherson v Watt*

¹³⁹ *Wright v Vanderplank* (1856) 3 De G M & G 133, 44 ER 341; *Barnard v Hunter* (1856) 5 WR 92; *Smith v Kay* (1859) 7 HLC 750; *Cowdry v Day* (1859) 5 Jur (ns) 1199; *Nottidge v Prince* (1860) 29 LJ Ch 857; *Gibbs v Daniel* (1862) 4 Giff 1, 66 ER 595; *Prideaux Lonsdale* (1863) 1 De G J & S 433, 46 ER 172; *Toker v Toker* (1863) 3 De G J & S 487, 46 ER 724; *Davies v Davies* (1863) 9 Jur (ns) 1002; *Turnbull v Garden* (1869) 38 LJ Ch 331; *Turner v Collins* (1871) LR 7 Ch App 329 (CA); *Kempson v Ashbee* (1874) LR 10 Ch App 15; *Morgan v Minett* (1877) 6 Ch D 638; *Huntington Copper and Sulphur Company (Limited) v Henderson* (1877) 15 SLR 217 (HL); *Bainbrigg v Browne* (1881) 18 Ch D 188; *Cockburn v Edwards* (1881) 18 Ch D 449 (CA); *Eden v Ridsdales Railway Lamp and Lighting Company, Limited* (1889) 23 QBD 368 (CA); *Tyars v Alsop* (1889) 61 LT 8 (CA); *Berry v Glazebrook* (1891) 7 TLR 574 (CA); *Re North Australian Territory Company* [1892] 1 Ch 322 (CA); *Morley v Loughnan* [1893] 1 Ch 736; *De Witte v Addison* (1899) 80 LT 207 (CA); *Lagunas Nitrate Company v Lagunas Syndicate* [1899] 2 Ch 392; *Powell v Powell* [1900] 1 Ch 243; *Barron v Willis* [1900] 2 Ch 121 (CA). Query *Mitchell v Homfray* (1881) 8 QBD. 587 (CA).

¹⁴⁰ As to gifts, consider *Walker v Smith* (1861) 29 Beav 394, 54 ER 680; *Broun v Kennedy* (1863) 33 Beav 133, 55 ER 317, affd (1864) 46 ER 901.

¹⁴¹ *Bentley v Craven* (1853) 18 Beav 75, 52 ER 29. See also *York and North-Midland Railway Company v Hudson* (1845) 16 Beav 485, 51 ER 866; *Hoghton v Hoghton* (1852) 15 Beav 278, 51 ER 545; *Smedley v Varley* (1857) 23 Beav 358, 53 ER 141; *Fowler v Wyatt* (1857) 24 Beav 232, 53 ER 347; *Berdoe v Dawson* (1865) 34 Beav 603, 55 ER 768. Query *Blaikie v Clark* (1852) 22 LJ Ch 377.

¹⁴² *Denton v Donner* (1856) 23 Beav 285, 53 ER 112; *Spencer v Topham* (1856) 22 Beav 573, 52 ER 1229; *Gresley v Mousley* (1859) 4 De G & J 78, 45 ER 31; *Grosvenor v Sherratt* (1860) 28 Beav 659, 54 ER 520; *Marquis of Clanricarde v Hemming* (1861) 30 Beav 175, 54 ER 855; *Dally v Wonham* (1863) 33 Beav 154, 55 ER 326; *Luff v Lord* (1864) 34 Beav 220, 55 ER 619. Some of these decisions appear to rest on disclosure of value, rather than value per se (consider *Gresley*, *Luff*, *Dally*). Consider separately *Heymann v European Central Railway Company* (1868) LR 7 Eq 154.

¹⁴³ Query in that regard the content of his appeal to authority in *Hobday v Peters (No. 1)* (1860) 28 Beav 349, 54 ER 400. See also *Cooke v Lamotte* (1851) 15 Beav 234, 51 ER 527, which sometimes is wrongly taken to be a relevant case. It is an ordinary gift case, where there was no fiduciary relation. Consider *Hoghton v Hoghton* (1852) 15 Beav 278, 51 ER 545; *Cobbet v Brock* (1855) 20 Beav 524, 52 ER 706. Then see *Barclays Bank plc v O'Brien* [1994] 1 FCR 357.

¹⁴⁴ Part of the explanation may be that the submissions made by counsel generally referenced decisions that asserted a fairness criterion, particularly *Edwards v Meyrick* and *Holman v Loynes*, and made no reference to the trunk line of cases rejecting a fairness analysis. That said, it is difficult to accept that Romilly MR would not have been aware of the latter authority.

¹⁴⁵ See *Coutts v Acworth* (1869) LR 8 Eq 558; *Pisani v A.G. for Gibraltar* (1874) LR 5 PC 516; *Plowright v Lambert* (1885) 52 LT (ns) 646 (Ch); *Luddy's Trustee v Peard* (1886) 33 Ch D 500; *Re Halsam & Hier-Evans* [1902] 1 Ch 765 (CA) (per Stirling LJ).

reflected the disorder.¹⁴⁶ The House confirmed that proof of fairness would not save a transaction if there had not been full disclosure of material information. The judges were less clear as to whether proof of fairness was independently necessary for a fiduciary to enforce a transaction. Lord O'Hagan appears to have so concluded.¹⁴⁷ But Lord Blackburn stated that 'in such cases we do not inquire whether it was a good bargain or a bad bargain, before we set it aside'.¹⁴⁸ Significantly, none of the judges investigated the rationale for a fairness requirement, and whether it was coherent as a condition of enforceability where it was otherwise established that the participation of a beneficiary in a transaction proceeded autonomously on full information and proper advice.

The second case, the 1887 decision of the Court of Appeal in *Allcard v Skinner*, is important for two main reasons.¹⁴⁹ First, it essentially formalised the partitioning of the law. All three judges appeared to regard claims of undue influence as governed by a regime of accountability distinct from fiduciary accountability. Cotton LJ located the jurisdiction quite specifically, yet vaguely, in 'the principles laid down by the decisions of the Court of Chancery in setting aside voluntary gifts executed by parties who at the time were under such influence as, in the opinion of the Court, enabled the donor afterwards to set the gift aside'.¹⁵⁰ He added, equally vaguely, that the court interferes 'on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused'.¹⁵¹ He left the policy and the abuse undefined, but the case itself was concerned entirely with the control of opportunistic influence. Lindley LJ coincidentally suggested an independent doctrine when he pointed to 'the doctrine of undue influence expounded and enforced in *Huguenin v Baseley* ... and other cases of that class'.¹⁵² But as noted earlier, *Huguenin* actually was a conventional decision on consent, and it did not purport to introduce or recognise a distinct doctrine of presumed undue influence. Both Cotton LJ and Lindley LJ described the cases as divided into two classes: actual undue influence and presumed undue influence.¹⁵³ Their linkage of those two classes presumably is why they refrained from applying a fiduciary characterisation to cases of presumed undue influence.¹⁵⁴

Of more immediate interest is the significance of the case on the question of the relevance of fairness. Two of the judges, Cotton LJ and Bowen LJ, made no mention of fairness. Rather, both indicated that the onus on a fiduciary was to establish that the gift was the product of the exercise of a free or independent will (proper disclosure and advice, and the absence of undue influence). Lindley LJ agreed but added remarks that appear to add a cloaked fairness determination. He asked himself what the operative

¹⁴⁶ (1877) 3 AC 254 (HL). Consider also *Thomson v Eastwood* (1877) 2 AC 215 (HL).

¹⁴⁷ *Ibid* 266.

¹⁴⁸ *Ibid* 272. The O'Hagan and Blackburn judgments were noted with approval in *Luddy's Trustee v Peard* (1886) 33 Ch D 500, but their fundamental opposition on fairness was ignored.

¹⁴⁹ (1887) 36 Ch D 145 (CA).

¹⁵⁰ *Ibid* 171.

¹⁵¹ *Ibid*.

¹⁵² *Ibid* 181.

¹⁵³ The two bases of liability require, respectively, that a complainant prove actual influence or an actual relation of influence. Occasionally both are proved. See *Morley v Loughnan* [1893] 1 Ch 736; *Walker v Walker* [2007] EWHC 597 (Ch).

¹⁵⁴ In some texts actual undue influence had not been characterised as fiduciary in character (instead being regarded as equitable supplementation of the narrow common law notion of duress), and consequently its linkage with presumed undue influence may have appeared to preclude fiduciary characterisation of the latter.

principle was: ‘Is it that it is right and expedient to save persons from the consequences of their own folly? or [sic] [Or] is it that it is right and expedient to save them from being victimised by other people? In my opinion the doctrine of undue influence is founded upon the second of these two principles’.¹⁵⁵ That statement of principle was consistent with the conventional understanding of the basis of fiduciary accountability. That was made clear when Lindley LJ added that gifts would be set aside without proof of actual undue influence because of the conventional detection concern: ‘Courts have done this on the avowed ground of the necessity of going this length in order to protect persons from the exercise of such influence under circumstances which render proof of it impossible’.¹⁵⁶

Lindley LJ ought to have ended his summation of general principle at that point. Instead, he went on later in his judgment to assert a distinction between small and large gifts:

Where a gift is made..., the Court will not set aside the gift if of a small amount simply on the ground that the donor had no independent advice. In such a case, some proof of the exercise of the influence of the donee must be given. The mere existence of such influence is not enough in such a case; see the observations of Lord Justice Turner in *Rhodes v. Bate*. But if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act, the burden is upon the donee to support the gift.¹⁵⁷

This large/small distinction appears not to be simply a matter of relative quantum.¹⁵⁸ When Lindley LJ argued that a presumption of undue influence only arose if a gift could not be ‘reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act,’ he essentially introduced a fairness test as a threshold hurdle to accountability. Consider the analytical framework he proposed. Proof of a relation of influence would no longer be sufficient to raise the presumption of potential undue influence. It would now be necessary for the beneficiary (the donor of the gift) to show that the gift could not be accounted for on ordinary motives. Only then would the fiduciary (the donee) assume the burden to rebut the presumption.

The difficulties with the Lindley framework are several. First, the requirement for an investigation into motives involves a subjective assessment of the particular circumstances of the parties to determine whether the gift is reasonably justified as an expression of ordinary motive. That, it must be understood, is the very investigation that conventional fiduciary regulation explicitly rejects. Judges made fiduciary liability strict because they recognised that we (they) are not able to detect how circumstances may have been engineered or manipulated to give transactions the appearance of propriety or reasonable action. Ordinary motives may be shaped, and often will be asserted to mask opportunism. The concern with detecting opportunism is discounted if the threshold for accountability were to change to a reasonable person standard of the

¹⁵⁵ (1887) 36 Ch D 145, 182 (CA).

¹⁵⁶ *Ibid* 183.

¹⁵⁷ *Ibid* 185.

¹⁵⁸ For an earlier case suggesting that trifling amounts were not actionable, see *Cocking v Pratt* (1750) 1 Ves Sen 400, 27 ER 1105. The distinction would appear in later cases. See *Liles v Terry* [1895] 2 QB 679 (CA); *Wright v Carter* [1903] 1 Ch 27 (CA). Contrast the observations of Lindley MR in *Barron v Willis* [1900] 2 Ch 121, 132 (CA).

‘ordinary motives on which ordinary men act’.¹⁵⁹ A reasonableness threshold manifestly is antithetical to the imposition of fiduciary accountability.

A second difficulty with the Lindley framework is that he relied on flawed authority. The observations of Turner LJ in *Rhodes v Bate* that he referenced were themselves novel and wrong in principle.¹⁶⁰ According to Turner LJ:

This general principle, however, must, as it seems to me, admit of some limitation. It cannot, I think, reasonably be said, that a mere trifling gift to a person standing in a confidential relation, or a mere trifling liability incurred in favour of such a person ought to stand in the same position as a gift of a man’s whole property, or a liability involving it, would stand in. To carry the principle to this extent would, I think, interfere too much with the rights of property and disposition, and would be repugnant to the feelings and practice of mankind. In these cases, therefore, of merely trifling benefits, I think this Court would not interfere to set them aside upon the mere fact of the proof of a confidential relation and the absence of proof of competent and independent advice. In such cases, the Court, before it would undo the benefit conferred, would, I think, require some further proof – proof not merely of influence derived from the relation, but of *mala fides*, or of undue or unfair exercise of the influence.¹⁶¹

Those observations, for which Turner LJ cited no authority, are insensible. Consider that a trifling breach of contract is still a breach. A trifling trespass is still a tort. Congruently, a trifling gift is not different in kind from a larger gift. The nature of the gifting action is not altered by the quantum of the benefit. And of course the associated opportunism mischief remains the same for both large and small gifts. A trifling fiduciary breach may as a practical matter not be worth litigating, but it is still formally actionable. It also is inappropriate to frame or calibrate the difference as one between a trifling gift and a gift of one’s ‘whole property’. Apart from being a weak technique employed to urge difference by the paradoxical contrast of the polar ends of a quantum continuum, that only emphasises the difficulty, or imprudence, of drawing a line between what is or is not a trifling benefit. Further, it is insensible to argue that applying the same regulation that applies to other gifts to trifling gifts would ‘interfere too much with the rights of property and disposition, and would be repugnant to the feelings and practice of mankind’. Rights of property and disposition do not track quantum,¹⁶² and the ‘feelings and practice of mankind’ in fact are that exploitations of limited access are objectionable at every level of quantum. Finally, the idea that a beneficiary should have to prove *mala fides* or the undue or unfair exercise of influence was radically opposed by both principle and authority. Imposing such a requirement would cut back without justification part of the conventional range of presumed undue influence. In the end, there was no compelling analysis in *Rhodes*. Turner LJ indulged in free thinking that was not properly informed by either principle or sound authority. Lindley LJ uncritically adopted that thinking.

A third difficulty with the Lindley framework is that there is no conceptual congruity between small and large gifts, on the one hand, and the question of motive on the other. *Any* quality or quantum of gift may be explained by ordinary motives

¹⁵⁹ Consider the remarks of Bridge LJ in *Re Brocklehurst* [1978] Ch 14 (CA), in a judgment that is otherwise flawed in important respects.

¹⁶⁰ (1865) 1 Ch App 252

¹⁶¹ *Ibid* 258.

¹⁶² Further, how does a ‘trifling’ quantum interfere ‘too much’ with property rights?

(e.g. a large gift to a charity or educational institution).¹⁶³ And obviously, small gifts do not necessarily signal uncompromised function.

Fourthly, the Lindley framework introduces a fairness (ordinary motives) test for gifts,¹⁶⁴ the validity of which previously had depended only on the demonstration of informed free will. As discussed earlier, when asserting (wrongfully) a fairness criterion for bargains, the courts had explicitly rejected a fairness analysis for gifts.

That all constituted an explosive analysis. Yet Lindley LJ did not present it as such. He sought to ground it serenely in uncontroversial policy (the control of opportunism). But he misconceived how fiduciary accountability implements the policy of deterring victimisation. It is irrelevant whether a gift may be accounted for on some ordinary motive that ostensibly demonstrates that all was fair. Nevertheless, and despite its obiter and minority expression (lacking the concurrence of Cotton LJ or Bowen LJ), the Lindley formulation seeded the transformation of the jurisprudence, and I will return to it shortly.

The disorder respecting fairness was strikingly illustrated at the beginning of the twentieth century. In *Costa Rica Railway Company, Ltd v Forwood* the Court of Appeal confirmed the conventional rule.¹⁶⁵ Vaughan-Williams LJ directly endorsed the *Aberdeen* rejection of a fairness analysis. Rigby LJ and Stirling LJ separately stated that a fiduciary could not make a profit without the informed consent of the beneficiary. Neither suggested the existence of a fairness criterion.

The very next year three decisions expressed the opposed view. The Privy Council decision in *Dougan v Macpherson* involved a trustee who purchased the trust interest of his brother without disclosing a valuation he had obtained for another purpose.¹⁶⁶ Halsbury LC declared, without citing authority, that a court ‘will call upon the trustee to shew that he has given full information – that he has kept back nothing, and that he has given an adequate price’.¹⁶⁷ He apparently did not appreciate the patent inconsistency of that dual obligation (to prove full disclosure and an adequate price) where the information concerned was a valuation of the asset. Lord Macnaghten also expressed a fairness criterion, taking direction from an isolated statement of Lord Cairns in *Thomson v Eastwood*.¹⁶⁸ Quoting directly from Lord Cairns, he asserted that the trustee had ‘the onus of proving that he gave full value, and that all information was laid before the cestui que trust when it was sold’.¹⁶⁹ Each of the other four judges on the *Dougan* panel concurred in the judgment of Halsbury LC, although three of them based their decision solely on the failure to *disclose* the valuation.¹⁷⁰ Thus, despite the absence of any notation or discussion of the contradictory authorities, the effect of the decision was to give support to a fairness criterion for bargains.

¹⁶³ Consider *Evans v Lloyd* [2013] EWHC 1725 (Ch).

¹⁶⁴ The unconstrained evaluation of unconstrained arguments respecting the nature of asserted motives patently amounts to a ‘fairness’ test.

¹⁶⁵ [1901] 1 Ch 746 (CA).

¹⁶⁶ [1902] AC 197 (PC).

¹⁶⁷ *Ibid* 202.

¹⁶⁸ (1877) 2 AC 215 (HL)

¹⁶⁹ *Ibid* 201 (in the course of argument), 204. The statement in *Thomson v Eastwood* was obiter and Lord Cairns did not cite authority.

¹⁷⁰ Lord Ashbourne (at 204) stated that: ‘I am of opinion that that is not dealing fairly – that keeping back and non-disclosure, non-bringing forward of [the] valuation’. His view, in other words, was that the failure to ‘deal fairly’ was the *failure to disclose* the information respecting value. Lord Shand (at 205) agreed that the transaction was invalid because of the failure to disclose the valuation. He added that questions of integrity and honesty were irrelevant. Lord Lindley (at 206) stated shortly that the transaction was invalid as a result of the failure to disclose.

A little more than a month later, the Court of Appeal delivered its decision in *Re Haslam & Hier-Evans*.¹⁷¹ Two judges (Vaughan-Williams LJ, Cozens-Hardy LJ) decided that a bargain between solicitors and their client was valid because the fully informed consent of the client had been obtained. Stirling LJ concurred, but went on to specify a requirement of proof of fairness. He relied on the anomalous cases of *Edwards v Meyrick* and *Holman v Loynes* for the proposition that in addition to informed consent, the fiduciary must show that ‘the price was just’.¹⁷² He made no reference to any of the opposed authorities, including *Aberdeen*, which had been prominent in the *Costa Rica* decision the previous year (and to which he had contributed).

Later that year the same judges decided *Wright v Carter*.¹⁷³ The case involved both a gift to a solicitor and a subsequent bargain, presenting an opportunity for the court to squarely address the uncertainty over the test(s) of validity for both bargains and gifts. With respect to the bargain, the court adopted the aberrant analyses in *Holman* and *Tomson v Judge*. Stirling LJ echoed the analysis of Turner LJ in *Holman* when he stated that the fiduciary had the onus to prove that ‘first, the client must be fully informed; secondly, he must have competent independent advice; and, thirdly, the price which is given must be a fair one’.¹⁷⁴ Cozens-Hardy LJ explicitly accepted the words of Vice-Chancellor Kindersley in *Tomson* that in the case of a sale a solicitor must prove that ‘the transaction was perfectly fair, that the client knew what he was doing, and that a fair price was given’.¹⁷⁵

With respect to the gift to the solicitor, all of the members of the court apparently accepted without investigation the *Holman* and *Tomson* assertions that the onus differed.¹⁷⁶ Vaughan-Williams LJ stated that ‘it is perfectly plain that in the case of a gift the rule applied by the Court of Equity is much more stringent, is more absolute, than the rule that is applied in the case of a bargain or a contract’.¹⁷⁷ He coincidentally added, presumably in an effort to give analytical justification to earlier detritus, the novel assertions that manifest imprudence and trifling amount¹⁷⁸ could be relevant considerations in the determination of whether a relation of influence extended beyond its *in hac re* origination.¹⁷⁹ Stirling LJ stated that the court ‘starts with the presumption that undue influence exists on the part of the donee, and throws upon him the burden of satisfying the Court that the gift was uninfluenced by the position of the solicitor’.¹⁸⁰

¹⁷¹ [1902] 1 Ch 765 (CA).

¹⁷² *Ibid* 770.

¹⁷³ [1903] 1 Ch 27 (CA).

¹⁷⁴ *Ibid* 60.

¹⁷⁵ *Ibid* 61. Tellingly, however, he added the qualification that ‘so far as I am aware, that statement of the law is consistent with all the authorities [emphasis added]’.

¹⁷⁶ In the interim other judgments had equated bargains and gifts. See *Parfitt v Lawless* (1872) LR 2 P & D 462; *London and Westminster Loan and Discount Company (Limited) v Bilton* (1911) 27 LTR 184.

¹⁷⁷ [1903] 1 Ch 27, 50 (CA).

¹⁷⁸ The decision as a whole implicitly rejects the trifling amount distinction as framed by Turner LJ in *Rhodes and Lindley LJ in Allcard*.

¹⁷⁹ Consider *Bischoff's Trustee v Frank* (1903) 89 LT 188, where contemporaneously Wright J implicitly denied (at 189) any distinction between gifts and bargains (‘[Where] there is a voluntary gift or other transaction, the burden is on the donee to prove that the gift or other transaction was not the effect of the influence [emphasis added]’). In other respects the *Bischoff's Trustee* decision is problematic. Note that *Bischoff's* was appealed, but the appeal judgment was not reported. Parts of the Court of Appeal decision are described in *Howes v Bishop* [1909] 2 KB 390, 397-398 (CA) and *Talbot v Van Boris* [1911] 1 KB 854, 863-864.

¹⁸⁰ [1903] 1 Ch 27, 57 (CA).

That onus, in his view, was of a ‘different kind’ than the disclosure/advice/fairness onus he applied to the bargain transaction.

Accordingly, *Wright* gave traction to a fairness test for the validity of bargains with fiduciaries, and buttressed an onus distinction between bargains and gifts. That happened because deficient analysis (*Edwards, Holman, Tomson*) was regarded as authoritative.

The forgoing trace of the jurisprudence reveals repeated misinformed appeals to a fairness criterion over the course of the nineteenth century. That generated a conceptual fog that did not disperse. On the one hand, the ‘great rule’ continued with a conventional line of authority predicated on the accepted policy of controlling opportunism. Persons in whom confidence was reposed (by status or on the facts) could not entertain unauthorised conflicts or benefits. The prohibition was unapologetically strict. And the fairness of a transaction, whether a bargain or a gift, was irrelevant. On the other hand, a weaker parallel line of cases proceeded on assumptions that substantive fairness was a criterion. Some judgments that should have been understood as manifestations of conventional principle subsequently were read or interpreted uniquely (*Gibson, Hatch, Huguenin*). Over time they came to be regarded as originating or inaugural statements of general principle. Other judgments simply asserted contradictory principles (*Harris, Edwards, Holman, Allcard*). These divergent analyses and their progeny, it must be understood, did not explicitly challenge the conventional authorities, which rarely were cited. It seems that the divergence either was not recognised as divergence, or not worth exploring given the seemingly uncontroversial presentation by judges (in a continuous blinkered cascade of adoption) of what actually was rogue principle. Instead, distinctions were assumed or asserted, and the divergence ostensibly was accommodated. Contradiction was not confronted; it was elevated by or into empty taxonomic reconciliation.

VI CONVENTIONAL VIGOUR

It is of cardinal importance to understand that the conventional strict proscription on unauthorised conflicts or benefits in limited access arrangements has endured to the present day without any credible challenge to its core content. Over the last century judges have continued to apply the conventional analysis in innumerable cases. As before, the judges inquired only into whether consent was informed and autonomous, again either rejecting¹⁸¹ or making no reference to a fairness criterion.¹⁸² I will here review only one example, the decision of the Court of Appeal in *Tufton v Sporni*.¹⁸³

The *Tufton* case is instructive on a number of points, and generally is an example of a largely proper analysis of fact-based fiduciary accountability. First, the court reiterated the conventional position that the unfairness of a bargain (an inadequate price) was not enough to cancel it. Secondly, the court indicated that the claim turned on whether the influence involved created a fiduciary relation, thus properly equating

¹⁸¹ *Re Bulmer* [1937] Ch 499 (CA); *Brudenell-Bruce v Moore* [2012] EWHC 1024 (Ch).

¹⁸² *Radcliffe v Price* (1902) 18 TLR 466 (Ch); *Law v Law* [1905] 1 Ch 140 (CA); *Bank of Montreal v Stuart* [1911] AC 120 (PC); *Inche v Omar* [1929] AC 127 (PC); *Lancashire Loans, Limited v Black* [1934] 1 KB 380 (CA); *Williams v Johnson* [1937] 4 All ER 34 (PC); *Bullock v Lloyds Bank Ltd* [1955] Ch 317; *Zamet v Hyman* [1961] 1 WLR 1442 (CA); *Lloyds Bank Ltd v Bundy* [1975] QB 326 (CA) (Sir Eric Sachs); *O’Sullivan v Management Agency and Music Ltd* [1985] QB 428 (CA).

¹⁸³ [1952] 2 TLR 516 (CA).

the presumption of undue influence with conventional fiduciary accountability. Thirdly, the court linked domination by influence with actual undue influence. It was not necessary to prove domination for claims of presumed undue influence. It was only necessary to prove influence ‘based on or arising out of a particular association and an advisory capacity’.¹⁸⁴ Fourthly, Jenkins LJ denied that there was a relevant distinction between bargains and gifts, though he did not cite the prior conflicting views on the point.¹⁸⁵ Fifthly, the circumstances involved a transaction (the sale of a house) between two men who were unrelated but who were associated together on a committee to promote a cultural centre. The question was whether their relation gave rise to fact-based fiduciary accountability. The court found that it did, and that the sale fell within the scope of that accountability. Sir Raymond Evershed MR observed that ‘a relationship of confidence created for a specific and limited purpose, may well extend by a necessary or natural process to other matters which arise out of or in consequence of the subject matter of the original connexion’.¹⁸⁶ That was an important observation. It indicated that there often is an enlargement of accountability beyond a specific demarcation of the scope of an undertaking. There must be a connection between the undertaking and the challenged transaction, but that connection rightly may be found in incidental or derivative arrangements.

VII THE MODERN DOCTRINE OF PRESUMED UNDUE INFLUENCE

Unfortunately the vigour of the conventional authorities did not prevent the further accretion of misconceived analysis.¹⁸⁷ The partitioning of presumed undue influence had its own vigour.¹⁸⁸ Recall that despite the incorporation of presumed undue influence analysis in conventional cases (such as *Tufton v Spери*),¹⁸⁹ a distinct line of cases had proceeded through insular citation to generate the appearance of a separate doctrine. Beginning with *Gibson* and passing through cases such as *Huguenin*, *Tomson*, *Allcard* and *Wright*, the impression of qualitative difference was created. That line of authority would solidify its independence with high judicial authority.

At this point it is convenient to explain in greater depth why the doctrine of presumed undue influence is not separable from conventional fiduciary accountability. Where actors undertake to act in the interest of others, they normally acquire access to the value of the assets belonging to those others. Access may be acquired through direct or indirect grants of authority or proximity. It may also be acquired through an ability to influence decisions or actions. A general ability to influence gives general access to potentially the full range of the connected activities of the influenced person. The particular manner of the acquisition of the access does not matter. It only matters that the access was acquired for a other-regarding purpose. The mischief is that the undertaking will be compromised by the prospect of personal advantage that is latent in

¹⁸⁴ Ibid 525.

¹⁸⁵ Ibid 526.

¹⁸⁶ Ibid 522.

¹⁸⁷ Assertions of a fairness criterion continued to appear in standard form and in proxy notions. Standard assertions are found in *Allison v Clayhills* (1907) 97 LT 709 (Ch); *Demerara Bauxite Company v Hubbard* [1923] AC 673 (PC); *Tito v Waddell* [1977] Ch 106. See also *Moody v Cox* [1917] 2 Ch 71, 88 (Ch) per Scrutton LJ (the party with influence must satisfy the court that the ‘contract is an advantageous one to the other party’).

¹⁸⁸ Contrast *Roche v Sherrington* [1982] 2 All ER 426, 432 (Ch), where Slade J recognised the need to prove ‘the relevant fiduciary relationship’.

¹⁸⁹ See the cases at notes 138, 181 above.

the access. Our recognition of that mischief leads us to proscribe unauthorised conflicts and benefits.

Once that is understood it should be apparent that the ‘doctrine’ of presumed undue influence is but standard fiduciary accountability. The conventional basis for fiduciary *accountability* is the assumption of a limited access, and the conventional test for fiduciary *liability* is an unauthorised conflict or benefit.¹⁹⁰ For the ostensible doctrine of presumed undue influence, the presumption of undue influence is triggered by proof of a relation of influence. That determination is equivalent to finding fiduciary accountability. It should be understood however that it is not the ability to influence per se that establishes the fiduciary accountability. An ability to influence presupposes the existence of a decision or action to be taken in the interest of (or for some purpose of) the beneficiary.¹⁹¹ That is, the access (by way of influence) must be a *limited* access. Then, with respect to the crystallisation of accountability into liability, the supposed doctrine of presumed undue influence applies to conflicts or benefits of the influencer (or associated persons).¹⁹² That is equivalent to finding fiduciary liability. Lastly, in both cases, liability is avoided only where true consent can be established. In both cases true authorisation is established by proof of disclosure, proper advice and the absence of undue influence.

Further, like conventional fiduciary accountability, the doctrine of presumed undue influence is concerned with the *risk* of opportunism, not *actual* opportunism. Conventional fiduciary accountability is imposed once limited access is demonstrated, and liability follows upon proof of an unauthorised conflict or benefit. At no point must a beneficiary of fiduciary accountability prove *actual* opportunism. The rationale, it will now be clear, is the recognised difficulty in detecting opportunism (and the availability of the consent channel to validity). The detection of influence that is undue is as difficult as detecting the opportunism enabled by other means of gaining limited access. Accordingly, when judges require only proof of a relation of influence to raise a presumption of undue influence, they are regulating the *risk* that the influence is undue. The doctrine of presumed undue influence thus cannot be distinguished from fiduciary accountability on the basis of a supposed unique presumption. All determinations of accountability, whether status or fact-based, and irrespective of the means of gaining the limited access, raise precisely the same ‘presumption’ or recognition of a *risk* of opportunism.¹⁹³ That presumption is a significant one. It is substantively different from the onus described in *Re Craig* as one ‘passing back and forth between one side and the other as the evidence may appear from time to time to tip the scales one way or the other’.¹⁹⁴

It should also be apparent that there is no justification for the erection of two distinct sets of status fiduciary relations, one associated with the trunk jurisprudence

¹⁹⁰ Flannigan, above n 5, 37-38.

¹⁹¹ A decision to gift produces benefits for both the donor and donee, but the decision initially is made, so far as the influencer is concerned, in the interest of the beneficiary.

¹⁹² Associated persons would be, for example, spouses or children. See *Goddard v Carlisle* (1821) 9 Price 169, 147 ER 57; *Liles v Terry* [1895] 2 QB 679 (CA); *Barron v Willis* [1900] 2 Ch 121.

¹⁹³ One consequence is that in the absence of actual proof, fiduciaries held liable for fiduciary breach are free to declare that it was not determined that they actually acted opportunistically.

¹⁹⁴ [1971] Ch 95, 106. See *Re Brocklehurst* [1978] Ch 14, 33 (CA) (per Lawton LJ) (‘If no explanation is given, or if given, is unsatisfactory, a court should infer that the gifts were obtained by the exercise of undue influence. Some common lawyers refer to this as the shifting of the evidential burden of proof. In the courts of equity it has been the practice to say that such situations raise a presumption of undue influence which a defendant recipient has to rebut’.).

(e.g. trustees, agents, employees, partners) and another with the doctrine of presumed undue influence (e.g. guardians, parents, physicians, spiritual advisors). Finding that a relation generally is vulnerable to opportunism because of the access that influence provides is not different from finding general exposure to opportunism because of the access that authority or proximity provide. Thus, for example, the parent-child relation is on principle a fiduciary relation in the fullest sense (to the extent that access is limited, rather than open),¹⁹⁵ and not merely selectively for the purposes of a claim of undue influence. Parents generally have access to the financial accounts and other assets of their children and may exploit them directly. It is the same with physicians. Influence need not be involved when physicians exploit (sell) confidential patient information or send patients to rehabilitation firms in which they have a financial stake. Guardians and spiritual advisors also undertake to generally act in the interest of their wards and adherents within the scope of their nominate function, and they are capable of exploiting the access they acquire through means other than influence. Accordingly, in the absence of any substantive reason to maintain separate sets of status fiduciary classes, the doctrine of presumed undue influence can only be understood as a form of fiduciary accountability.

In *Coomber v Coomber* the Court of Appeal observed that the presumption of undue influence did not apply to every fiduciary relation.¹⁹⁶ As Fletcher Moulton LJ put it: 'The nature of the fiduciary relation must be such that it justifies the interference'.¹⁹⁷ That sort of statement may easily be misconstrued.¹⁹⁸ The particular nominate nature of a relation (e.g. its trust, agency or guardianship character) is irrelevant to fiduciary accountability. Rather, it is the limited access of a relation that attracts fiduciary regulation. Trustees, agents and guardians are accountable as fiduciaries on a status basis because in each case they assume only a limited access to the assets of their beneficiaries, principals and wards. The reason the 'presumption' of undue influence does not apply to every fiduciary relation on a status basis is that it cannot be assumed that beneficiaries of every class of fiduciary are generally vulnerable to undue influence. Conversely, some relations are regarded as status fiduciary relations primarily because of the risk of undue influence. The point is that the nominate 'nature' of a relation must not be equated or confused with its limited access nature. It must always be demonstrated (by status or on the facts) that the access is a limited access. When understood in that way, there is no variation in interference (per Fletcher Moulton LJ). There is only one 'interference'. Where an access is limited, there is a singular proscription on unauthorised conflicts or benefits.

Of course once some judges began to suppose that the doctrine of presumed undue influence was distinct from fiduciary accountability, it became necessary for them to identify a different source for the doctrine. It was noted earlier that in *Allcard Cotton* LJ located the source of the doctrine specifically in a line of (unspecified) Chancery cases and more broadly in (unspecified) public policy.¹⁹⁹ Lindley LJ attributed the doctrine to *Huguenin*, saying only that the doctrine was there 'expounded and enforced'.²⁰⁰ In *Lancashire Loans, Ltd v Black*, Scrutton LJ unhelpfully described

¹⁹⁵ Access to the labour of children is not entirely a limited access. See Robert Flannigan, 'Child Labour: The Partial Fiduciary Accountability of Parents' (2007) 86 *Canadian Bar Review* 293.

¹⁹⁶ [1911] 1 Ch 723 (CA).

¹⁹⁷ *Ibid* 729.

¹⁹⁸ As it was in *Re Brocklehurst* [1978] Ch 14 (CA).

¹⁹⁹ (1887) 36 Ch D 145, 171 (CA).

²⁰⁰ *Ibid* 181.

the doctrine as one head of equitable fraud.²⁰¹ In the same case Lawrence LJ stated without qualification that the doctrine was *established* by *Huguenin*.²⁰² These various attempts at differentiation were uninformed and uninformative. In particular, *Huguenin* neither ‘established’ the doctrine, nor purported to recognise it as a distinct doctrine.

The law twisted in 1985 with the House of Lords decision in *National Westminster Bank plc v Morgan*.²⁰³ The unanimous judgment, delivered by Lord Scarman, was radically flawed. The main question addressed by the court was whether, for a claim of undue influence, it was necessary to prove disadvantage (‘manifest disadvantage’) in addition to proving a relation of influence. The Court of Appeal had said that there was no such requirement and that a presumption of undue influence could arise even where a transaction involved ‘reasonably equal benefits for both parties’.²⁰⁴ Lord Scarman disagreed. He stated that he could ‘find no support for [that] view of the law’ other than in the judgment of Cotton LJ in *Allcard*.²⁰⁵ He believed (wrongly) that Cotton LJ and the Court of Appeal below had erred in law.²⁰⁶

Two preliminary observations are in order. The first concerns statements made by Lord Scarman regarding terminology. He stated that the Court of Appeal judges ‘were led into a misinterpretation of the facts by their use, as is all too frequent in this branch of the law, of words and phrases such as ‘confidence,’ ‘confidentiality,’ ‘fiduciary duty’.’²⁰⁷ He added that there ‘are plenty of confidential relationships which do not give rise to the presumption of undue influence’ and that there ‘are plenty of nonconfidential relationships in which one person relies upon the advice of another’.²⁰⁸ Those remarks rather expose what appears to be a deficient knowledge of the fiduciary jurisdiction. The early ‘confidence’ terminology was well understood by most judges. It had not generally been misread or misused. Reposing confidence in another was understood to be the kind of relation that required ‘fiduciary’ regulation. Moreover, whether a relation does or does not raise a presumption of undue influence is a legal question, and relations that are not found to raise a presumption, whether rightly or wrongly, simply are not ‘confidential’ relations for the purposes of fiduciary accountability.

The second preliminary observation is that Lord Scarman properly denied that there was a relevant distinction between bargains and gifts.²⁰⁹ However, presumably in order to fit his analysis, he went on to say that gifts inherently involve disadvantage or sacrifice. But gifts are not accurately described as instances of disadvantage. Donors of gifts receive value in the form of, for example, reciprocation, recognition or psychic gain. Gifts are distinct from bargains primarily in that there is no apparent *exchange* (of value), but that difference does not imply that there ought to be a distinction for the purposes of fiduciary accountability.

Lord Scarman began his main analysis with the statement that he knew of ‘no reported authority where the transaction set aside was not to the manifest disadvantage of the person influenced’.²¹⁰ He followed that empty remark²¹¹ with empty assertion:

²⁰¹ [1934] 1 KB 380, 403-404 (CA).

²⁰² *Ibid* 409.

²⁰³ [1985] AC 686 (HL).

²⁰⁴ *Ibid* 703.

²⁰⁵ *Ibid*.

²⁰⁶ *Ibid* 703-704.

²⁰⁷ *Ibid* 703.

²⁰⁸ *Ibid*.

²⁰⁹ *Ibid* 704.

²¹⁰ *Ibid*.

Whatever the legal character of the transaction, the authorities show that it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the relationship between the parties it was procured by the exercise of undue influence. In my judgment, therefore, the Court of Appeal erred in law in holding that the presumption of undue influence can arise from the evidence of the relationship of the parties without also evidence that the transaction itself was wrongful in that it constituted an advantage taken of the person subjected to the influence which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it.²¹²

The weakness of that analysis should be evident.²¹³ First, the authorities did *not* show that it was necessary to prove manifest disadvantage or that there was ‘an advantage taken’. On the contrary, the great weight of authority indicated that it was not necessary to prove disadvantage, or as it was alternatively described in the cases, adequate consideration, injury or fairness.²¹⁴ Secondly, to say that a disadvantage must be ‘sufficiently serious’ to raise the presumption is to beg the question substantively. When is a disadvantage ‘sufficiently’ serious? Thirdly, if a claimant must first prove that the transaction ‘constituted an advantage taken of the person subjected to the influence,’ how is it analytically possible for a fiduciary to thereafter provide ‘proof to the contrary’? That form of analysis seems essentially only to eliminate the presumption of a risk of opportunism and leave the outcome to be determined by the relative weight of the submissions of the parties as to whether there is a manifest disadvantage (whether the transaction was fair). More fundamentally, the requirement to lead evidence of disadvantage is wholly at odds with the conventional position that fiduciary accountability is strict because opportunism frequently is undetectable. It may not be apparent, for example, that a transaction is disadvantageous because there is a better price available that is known to the fiduciary but not to the beneficiary. Lastly, the final words of the quoted remarks appear to suggest that the complaining party must establish that there could be no explanation for the transaction other than ‘that undue influence had been exercised to procure it’. The analysis instead should have been that the transaction was voidable because proof of a relation of influence raised a *risk* of opportunism – the will of the beneficiary *may* have been unduly influenced.

Lord Scarman moved on to adopt the analysis of Lindley LJ in *Allcard*. He initially accepted that Lindley LJ had correctly identified the principle (policy) of deterring victimization as the source of the doctrine of presumed undue influence.²¹⁵ He then wrongly declared that the principle ‘can now be seen to have been

²¹¹ Even a cursory review of the jurisprudence will reveal the emptiness of the remark. A comparable ‘no case found’ argument was dismissed by Dyson LJ in *Johnson v EBS Pensioner Trustees Ltd* [2002] EWCA Civ 164, [67].

²¹² [1985] AC 686, 704 (HL).

²¹³ In *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [155], Lord Scott described that reasoning as ‘circular’ (‘The transaction will not be “wrongful” unless it was procured by undue influence. Its “wrongful” character is a conclusion, not a tool by which to detect the presence of undue influence’.).

²¹⁴ Consider also the Irish decision *Prendergast v Joyce* [2009] IEHC 199, [48].

²¹⁵ Lord Scarman stated that the basis for setting aside a transaction ‘is not a vague “public policy” but specifically the victimisation of one party by the other’. On the face of it, however, the ‘victimisation of one party’ is itself plainly ‘vague public policy’. A further specification of the particular mischief is required. The jurisdiction seeks to control opportunism, not ‘victimisations’ of other kinds.

[established] by Lindley LJ²¹⁶ He next quoted with approval the novel ‘ordinary motives [of] ordinary men’ analysis of Lindley LJ, and wrongly asserted that it indicated ‘the critical importance of the nature of the transaction’.²¹⁷ His belief was that: ‘Subsequent authority supports the view of the law as expressed by Lindley LJ in *Allcard*’.²¹⁸ He pointed to two Privy Council decisions. The first, *Bank of Montreal v Stuart*, was formally a conventional decision decided on the basis of an absence of independent advice, and it did not in fact provide any definitive support for a criterion of manifest disadvantage.²¹⁹ Lord Scarman merely quoted an obiter passage from the judgment without offering any analysis of it. The second case, *Poosathurai v Kanappa Chettiar*, was itself a rogue decision.²²⁰ In *Poosathurai* Lord Shaw stated that proof of influence alone did not demonstrate that the influence was undue. His view, asserted without supporting authority, was that: ‘It must be established that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person’.²²¹ Lord Shaw, it should be apparent, got it wrong when he insisted that the operation of the presumption depended on the actual use of influence to cause actual injury. Lord Scarman nevertheless took *Poosathurai* to mean that the ‘wrongfulness of the transaction must, therefore, be shown’.²²² That was to install proof of fairness as a necessary criterion for the triggering of the presumption. Apparently neither he nor Lord Shaw were sufficiently familiar with the jurisprudence on presumed undue influence. They seem to have reasoned relative to a reference point of unconscionability.²²³ In any event, it appears that they simply did not comprehend the rationale for adopting a ‘presumption’ of a risk of undue influence for relations of influence. Beyond that, no part of the analysis in *Poosathurai* references or supports the ‘ordinary motives’ analysis that Lindley LJ proposed in *Allcard*.

The third case Lord Scarman addressed was *Lloyds Bank Ltd. v Bundy*.²²⁴ Sir Eric Sachs gave the majority judgment in *Lloyds Bank*, finding a fact-based fiduciary relation of influence. It was clear that Sir Eric did not contemplate a requirement of manifest disadvantage. Lord Scarman believed that would be error of law on the part of Sir Eric, if he (Sir Eric) was to be understood as rejecting the necessity of proof of wrongfulness in the sense asserted by Lindley LJ in *Allcard*, Lord Macnaghten in *Stuart* and Lord Shaw in *Poosathurai*. Lord Scarman sought to bypass or finesse the point by then immediately concluding that Sir Eric ‘got it absolutely right,’ quoting certain remarks that actually said nothing about a requirement of manifest disadvantage.²²⁵ It will be appreciated at this point that it was Lord Scarman who was in error. Sir Eric actually ‘got it right’ because he was not waylaid by the analyses of Lindley LJ in *Allcard* and Lord Shaw in *Poosathurai*.

²¹⁶ Ibid 705.

²¹⁷ Ibid 705-706. In the trunk jurisprudence only the nature of the *relation* was relevant to the imposition of the accountability. All unauthorised connected transactions, including those seemingly explicable as ordinary motive, were voidable.

²¹⁸ Ibid 706.

²¹⁹ [1911] AC 120 (PC).

²²⁰ (1919) LR 47 IA 1 (PC).

²²¹ Ibid 2.

²²² [1985] AC 686, 707 (HL). Contrast for example *Niersmans v Pesticcio* [2004] EWCA Civ 372, [20].

²²³ Consider independently the linked analysis of presumed undue influence and unconscionability in *Qutb v Hussain* [2005] EWHC 157 (Ch). See also *CFC Construction Co (WA) Ltd v Attisogbe* [2006] 3 LRC 1 (Ghana SC)

²²⁴ [1975] QB 326 (CA).

²²⁵ [1985] AC 686, 708.

There is another concern with the *Morgan* judgment. The language that Lord Scarman employed was problematic. By referring to a need to establish a ‘dominating influence’ (apparently adopting the expression from *Poosathurai*), he seemed to pass beyond the conventional position that it was only necessary to prove a relation of influence, not ‘domination’. On the face of it, Lord Scarman appeared to have radically increased the burden on those seeking to raise the presumption of a risk of opportunism. Overall it would now be necessary to establish three facts: (1) a relation of influence, (2) that the influence was ‘dominating’ and (3) that the transaction was manifestly disadvantageous.²²⁶

Questions and concerns with the analysis in *Morgan* were raised immediately, and a series of cases thereafter sought to clarify the judgment.²²⁷ Very quickly, in *Goldsworthy v Brickell*, the Court of Appeal rejected the novel requirement of domination, a notable instance of the Court of Appeal correcting (overruling) the House of Lords.²²⁸ Then, in *Bank of Credit and Commerce International SA v Aboody*, the Court of Appeal concluded that *Morgan* required proof of manifest disadvantage to support claims for both actual and presumed undue influence.²²⁹ It did so apparently without investigating the jurisprudence prior to *Morgan*, choosing to review only certain subsequent decisions that understandably had affirmed the imperative direction of *Morgan*. The court also assumed that the doctrine of undue influence (both classes) arose independently ‘to cover what would otherwise be a gap in the law,’ where (curiously), a court considered a transaction unconscionable but not otherwise impeachable.²³⁰ That, it should now be obvious, was to ignore a mass of conventional authority. The court also refused to distinguish gifts from bargains, and properly so, but again the crude assumption was that gifts by definition involved disadvantage. A few years later the decision in *Aboody* was reversed by a unanimous House of Lords in *CIBC Mortgages Plc v Pitt*.²³¹ Lord Browne-Wilkinson concluded that the *Morgan* decision did not extend to cases of actual undue influence, and that in any event there was no logic in imposing a requirement of proof of manifest disadvantage ‘where actual undue influence has been exercised and proved’.²³² Significantly, he pointedly added that ‘the exact limits of the decision in *Morgan* may have to be considered in the future’.²³³ That call for reconsideration was echoed a number of years later by a unanimous Court of Appeal in *Barclays Bank Plc v Coleman*, where Nourse LJ stated that ‘since the authorities have now got into a very unsatisfactory state and the concept of manifest disadvantage is elusive and often difficult to apply to the facts of individual cases, a re-examination of what it really means is necessary’.²³⁴

²²⁶ The first two elements collapse into one (to become proof of a relation of dominating influence). I separated them to clarify how the law was altered. As will appear shortly, subsequently the second element would be discarded and the third element revised.

²²⁷ Consider David Tiplady, ‘The Limits of Undue Influence’ (1985) 48 *Modern Law Review* 579.

²²⁸ [1987] Ch 378 (CA).

²²⁹ [1989] 1 QB 923 (CA).

²³⁰ *Ibid* 961.

²³¹ [1994] 1 AC 200 (HL).

²³² *Ibid* 209.

²³³ *Ibid*.

²³⁴ [2001] QB 20, [57] (CA). Nourse LJ himself contributed to the ‘unsatisfactory state’ when (*ibid*) he agreed that, while the disadvantage may be small, it must be ‘clear and obvious’. That insistence on a lucient disadvantage appears to further elevate the burden on the claimant, and is again inconsistent with the concern with the difficulty of detection.

VIII THE *ETRIDGE* REFORMULATION

The House of Lords sought to rehabilitate the law in *Royal Bank of Scotland v Etridge (No 2)*.²³⁵ The court was urged to jettison the requirement that a claimant prove manifest disadvantage. Delivering the one judgment that commanded ‘the unqualified support of all members of the House,’ Lord Nicholls declined to do so.²³⁶

Lord Nicholls began his analysis with a statement of his understanding of the source of the doctrine. Undue influence was ‘one of the grounds of relief developed by the courts of equity as a court of conscience,’ its function being to ‘ensure that the influence of one person over another is not abused’.²³⁷ As Lord Eldon had indicated in *Huguenin*, the issue was ‘how the intention was produced’.²³⁸ Where the means used to produce the intention was improper influence, ‘the consent thus procured ought not fairly to be treated as the expression of a person’s free will’.²³⁹ That all was congruent with the conventional rationale for fiduciary accountability. Influence may be exercised opportunistically, and it would be difficult to detect – being masked by the appearance of consent. Lord Nicholls thought that tighter definition was not possible because of the variability in the creation and exercise of influence.²⁴⁰

The analysis that followed was problematic in important respects. The burden placed on a person claiming undue influence, according to Lord Nicholls, was (1) to prove a relation of trust and confidence and (2) demonstrate that the transaction was one that ‘calls for explanation’.²⁴¹ That formulation was distinctive in its presentation. It required proof of a relation of ‘trust and confidence,’ rather than a relation of influence, making explicit the supposition that a relation of influence was a limited access arrangement. Also, instead of requiring proof of manifest disadvantage, the second requirement was said to be to convince the court that an explanation of the transaction ought to be required. That, on the face of it, appears to involve a factious replacement of the *Morgan* requirement of manifest disadvantage. Lord Nicholls confirmed that the replacement was intended. His reasoning, however, was neither clear nor compelling.

In his specific discussion of manifest disadvantage, Lord Nicholls first reframed his own statement of the second requirement. ‘Calls for explanation’ became ‘that the transaction is not readily explicable by the *relationship of the parties*’.²⁴² He stated that the requirement had been ‘summarised [by Lindley LJ] in the leading authority of *Allcard*,’ thereby wrongly implying that the Lindley analysis was the core judgment in that case.²⁴³ He noted that the requirement had been questioned after *Morgan*, but he declined the invitation of counsel to depart from *Morgan*. His view was that the second

²³⁵ [2001] UKHL 44. See Rick Bigwood, ‘Undue Influence in the House of Lords: Principles and Proof’ (2002) 65 *Modern Law Review* 435. See also Bigwood, above n 3, for a robust critique of *Morgan* and *Etridge*.

²³⁶ *Ibid* [3].

²³⁷ *Ibid* [6].

²³⁸ *Ibid* [7].

²³⁹ *Ibid*.

²⁴⁰ Tight definition clearly was not the priority when Lord Nicholls asserted (at [11]) that: ‘Even this test [whether ‘sufficient’ trust and confidence is reposed] is not comprehensive. The principle is not confined to cases of abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited’. It literally is impossible to fashion a trigger more vague than ‘where a vulnerable person has been exploited’.

²⁴¹ [2001] UKHL 44, [14].

²⁴² *Ibid* [21] [emphasis added].

²⁴³ *Ibid* [23].

requirement ‘as expressed by Lindley LJ [in *Allcard*] is good sense’.²⁴⁴ He thought it would be absurd ‘to presume that every [gift or bargain between children and parents, solicitors and clients, and physicians and patients] was brought about by undue influence’.²⁴⁵ The law would be ‘out of touch with every day life’ if it were to apply a presumption of undue influence to ‘unexceptional’ transactions such as Christmas or birthday gifts to parents, or reasonable fee agreements made with legal or medical advisors. That however was a deficient logic. It must be understood that the law does not presume undue influence. Judges simply recognise that there is a *risk* of undue influence and consequently they insist as a condition of validity that fiduciaries prove true consent. Moreover, it is transactions that appear ‘unexceptional’ that best serve as vehicles to project or conceal undue influence. A Christmas or birthday gift from a child not yet emancipated may well mask undue parental influence. And fee arrangements for legal or medical services have long been regarded as voidable because of the risk of opportunism.²⁴⁶ The point is that it is a mistake to excuse any particular kind (or quantum) of transaction on a class basis on the assumption that their ‘unexceptional’ character eliminates the risk of opportunism.²⁴⁷ Billions of Christmas and birthday gifts will hardly be at risk.²⁴⁸

Lord Nicholls then equated the ‘calls for explanation’ requirement with the *Allcard* (Lindley LJ) question asking whether a transaction was reasonably accounted for by ‘ordinary motives on which ordinary men act’. He stated that subsequently in *Morgan* Lord Scarman attached the manifest disadvantage label to that second requirement.²⁴⁹ Lord Nicholls believed that the label was ‘being misunderstood and applied in a way which does not accord with the meaning intended by Lord Scarman, its originator’.²⁵⁰ He referred to the ‘problem...in the context of wives guaranteeing payment of their husband’s business debts’.²⁵¹ His thinking was that on a ‘narrow’

²⁴⁴ Ibid [24].

²⁴⁵ Ibid.

²⁴⁶ On medical services, see *Pratt v Barker* (1826) 1 Sim 1, 57 ER 479; *Popham v Brooke* (1828) 5 Russ 8, 38 ER 930; *Dent v Bennett* (1839) 4 My & Cr 269, 41 ER 105; *Gibson v Russell* (1843) 2 Y & CCC 104, 63 ER 46; *Billage v Southee* (1852) 9 Hare 534, 68 ER 623; *Mitchell v Homfray* (1881) 8 QBD 587 (CA); *Radcliffe v Price* (1902) 18 TLR 466 (Ch) (where a Christmas gift to a physician was reversed, along with other gifts); *Re CMG* [1970] Ch 574 (Court of Protection). Query *Blaikie v Clark* (1852) 22 LJ Ch 377.

²⁴⁷ See *Randall v Randall* [2004] EWHC 2258, [42] (Ch). Discussing another decision, the court saw a paradox (‘One interesting feature of this case is that the first instance judge fairly recognised that the relationship between the donor and the donee could provide the motive for the gift but that such relationship, also, conversely gave the opportunity to take unfair advantage. So this is something of a two-edged sword. On one side, it helps to explain the gift. On the other, it provides the opportunity to take unfair advantage’).

²⁴⁸ It of course is open to judges to dismiss complaints on the abstract *de minimis* principle. Doing so does not involve any substantive alteration of the content of fiduciary accountability. See *Shipway v Broadwood* [1899] 1 QB 369 (CA).

²⁴⁹ [2001] UKHL 44, [26].

²⁵⁰ Ibid.

²⁵¹ Ibid [27]. The English courts have concluded that the husband-wife relation is not a status fiduciary relation. On principle that is a controversial conclusion. The spouse-spouse relation is comparable to a partnership relation. Partners carry on business in common with a view to profit. Spouses carry on a family enterprise in common with a view to profit (emotional, financial, procreative gain). The opportunism mischief in both limited access arrangements is the same. A spouse may exploit enterprise assets for selective individual gain inconsistent with the joint advantage of the union (e.g. exploit confidential information). Like a partnership, the spouse-spouse relation should be considered a status fiduciary relation that does not contemplate a

view, the guarantee was manifestly ('plainly')²⁵² disadvantageous to the wife, while on a wider view wives often have strong reasons for their actions (affection, self-interest).²⁵³ His solution to the supposed ambiguity was to discard the label:

Which, then, is the correct approach to adopt in deciding whether a transaction is disadvantageous to the wife: the narrow approach, or the wider approach? The answer is neither. The answer lies in discarding a label which gives rise to this sort of ambiguity. The better approach is to adhere more directly to the test outlined by Lindley LJ in [*Allcard*], and adopted by Lord Scarman in [*Morgan*].²⁵⁴

That was not a helpful solution. It may be suggested that enhanced clarity is not likely to be gained by returning to a test (that of Lindley LJ in *Allcard*) that was misconstrued and which Lindley LJ did not develop beyond its bare assertion.

There are significant concerns, beyond those noted earlier in the analysis of the *Allcard* decision, with such an approach. First, a need to demonstrate that a transaction is one that 'calls for explanation' is not a definitive threshold criterion in the sense that manifest disadvantage purports to be. It is not a criterion at all. Rather, it is an invitation to the claimant to advance arguments to the court as to whether an explanation should be required. Any argument may be considered relevant. Judges will have free rein to select factors they believe indicate whether an explanation (or a better explanation) should be required. Functionally that is a test of *fairness*. Secondly, the ambiguity that Lord Nicholls found objectionable with a manifest disadvantage test would be dwarfed by a 'calls for explanation' requirement. It offers no guidance whatsoever. It *asks* for guidance from the parties. Thirdly, in addition to imposing a novel burden on beneficiaries, the 'calls for explanation' approach essentially transfers the consent burden to them. In a conventional analysis, if a beneficiary is shown to have truly intended the transaction (the decision being fully informed and not animated by undue influence), that *is* the explanation for the transaction. The beneficiary truly *intended* it. Neither the nature of the transaction, nor the motive for it (ordinary or otherwise), is a relevant consideration. If however it is necessary for a beneficiary to demonstrate that the transaction 'calls for explanation,' the absence of overt opportunism often will compel the beneficiary to argue that an explanation is required because the beneficiary did not truly consent. That effectively transfers the burden of proving beneficiary consent from the fiduciary to the beneficiary (who must show defective consent). If the beneficiary fails to satisfy the 'calls for explanation' burden, no presumption arises, and the conventional burden on a fiduciary to establish beneficiary consent never materialises. Thus the new burden on beneficiaries has the

unidirectional influence that would on a status basis raise a presumption of undue influence. The assumption for spouses, as for partners, should be that (in the absence of evidence of actual undue influence) there is mutual *due* influence.

²⁵² Ibid [28]. This definitional insertion was added by Nicholls LJ. Earlier, in *Barclays Bank Plc v Coleman* [2001] QB 20, 30 (CA), Nourse LJ adopted the Nicholls understanding of the meaning of 'manifest' ('To some judges "manifest" seems to have connoted substance, not appearance. But I agree with Sir Donald Nicholls V-C in *Cheese v Thomas* [1994] 1 WLR 129, 134A, that it means "clear and obvious". So there must be a disadvantage and it must be clear and obvious. But that does not mean that it must be large or even medium-sized. Provided it is clear and obvious and more than de minimis, the disadvantage may be small').

²⁵³ Equal legal status means equal power to bind one's self (to have one's autonomy recognised) and consequently equal treatment in terms of liability for transactions. There can be no gender-based special equity. Guarantees of spousal debt are not a special class of transaction.

²⁵⁴ Ibid [29].

collateral effect of diminishing or eliminating the core burden on fiduciaries to prove consent. Fourthly, a ‘calls for explanation’ approach is but an invitation to opportunistic fiduciaries to shape or fabricate circumstances (or arguments) that will serve as plausible ‘explanations’ for the transactions that their opportunistic influences produce. Sophisticated fiduciaries in particular often will be able to fashion seemingly credible explanations. It is worth emphasising again that the *Allcard/Morgan/Etridge* approach, in whatever way it is formulated, is fundamentally at odds with the conventional position that opportunism in limited access arrangements is frequently undetectable and ought to be regulated strictly.

There is another difficulty with the judgment. Lord Nicholls included certain remarks about the nature of the presumption involved:

Generations of equity lawyers have conventionally described this situation as one in which a presumption of undue influence arises. This use of the term ‘presumption’ is descriptive of a shift in the evidential onus on a question of fact. When a plaintiff succeeds by this route he does so because he has succeeded in establishing a case of undue influence. The court has drawn appropriate inferences of fact upon a balanced consideration of the whole of the evidence at the end of a trial in which the burden of proof rested upon the plaintiff. The use, in the course of the trial, of the forensic tool of a shift in the evidential burden of proof should not be permitted to obscure the overall position.²⁵⁵

The problem with those remarks is the assertion that ultimately there must be a conclusion of actual undue influence, whether established by direct fact or judicial inference. It is important to reiterate that fiduciary accountability regulates the *risk* of undue influence. Proof of a status or fact-based relation of influence between actors shows there to be a risk of opportunism, and accordingly the inference is that the influence *might* have been undue. When judges then require the fiduciary to establish the true consent of the beneficiary, specifically that there was no undue exercise of influence, they establish a substantive condition for validity. If the fiduciary fails to prove true consent, the transaction is voidable. That is, the transaction is voidable even though undue influence was never proved, and was never required to be proved.²⁵⁶ It was enough for the beneficiary to have established the presence of a risk of undue influence because of the existence of a relation of influence.²⁵⁷

Further, it is not correct to describe the legal process as a shift in the evidential burden of proof. The onus on each party is different. The claimant must prove a relation of influence – a fiduciary relation – either by status or on the facts. The fiduciary must then separately prove true consent. Each onus is unique, and does not ‘shift’. The ‘presumption’ involved is actually just the reasoning that informed the assignment of a separate onus to the actor with influence. Judges recognised the risk of opportunism in relations of influence and chose to set separate conditions for the respective parties in order to resolve disputes over the validity of transactions between them. Once claimants prove a relation of influence, all in-scope transactions between the parties are voidable because of the latent risk of undue influence.²⁵⁸ No legal duty

²⁵⁵ Ibid [16]. See also the remarks of Lord Scott (at [219]).

²⁵⁶ *Hammond v Osborn* [2002] EWCA Civ 885, [45]; *Niersmans v Pesticcio* [2004] EWCA Civ 372, [20]; *Randall v Randall* [2004] EWHC 2258, [40]-[41] (Ch); *Wright v Hodgkinson* [2004] EWHC 3091, [117]-[119] (Ch).

²⁵⁷ See *Griffiths v Robins* (1818) 3 Madd 191, 56 ER 480; *Radcliffe v Price* (1902) 18 TLR 466 (Ch); *Tufton v Sporni* (1952) 2 TLR 516, 525 (CA).

²⁵⁸ See *Re Morris* [2000] All ER (D) 598 (Ch).

is imposed on fiduciaries at that point. Fiduciaries are not required to rebut the presumption that there is a risk of undue influence. That presumption *cannot* be rebutted. It will always be true that there is a risk of undue influence. Again, that is just the human reality that animated the placement of the onus of establishing true consent. Fiduciaries simply have an opportunity to prove the separate fact that there was no undue influence on their part. The judges have required that all consents be tested for autonomy, and they have placed that burden with fiduciaries. There is no rebuttal of a presumption, no shift, just separate burdens to establish the separate elements of their opposed arguments.²⁵⁹

The point usefully may be emphasised. Persons claiming that a transaction is voidable for undue influence are asserting that their agreement to the transaction was defective or impaired (by compromised influence). Where a relation is not one of influence, claimants must prove that their consent actually was impaired by undue influence. For relations of influence, the courts have reversed that onus. Fiduciaries have the option to satisfy the onus that beneficiary consent was not impaired, or driven by, undue influence. The courts have reversed the onus because of the risk of opportunism. They ‘presumed’ generally and on an abstract basis that relations of influence may be exploited by undue influence. The ‘presumption’ is simply a statement of the policy that drove the decision to impose the consent onus for limited access arrangements that are vulnerable to undue influence. Appreciate moreover that, while the onus is reversed at a general and abstract level, it does not shift in individual cases. The placement of the onus depends entirely on the nature of the claim. If the claim is actual undue influence, the claimant is fixed with an onus to prove impaired consent. If instead the claim is presumed undue influence, the fiduciary is fixed with an onus to prove that consent was not impaired by undue influence. That onus assignment remains unchanged throughout the trial of the claim. There is no ‘shift in the evidential burden of proof’. Where the claim is presumed undue influence, the claimant always has the initial onus of proving a relation of influence, and the fiduciary always has the distinct separate onus of proving the absence of undue influence. Lastly, recognise that the definition of the consent onus is identical to that which applies in the trunk jurisprudence. The policy is the same (the risk of opportunism), the abstract assignment of the onus is the same (assigned to the fiduciary), and the onus does not shift.

Appreciate, in summary, the nature of the legal transformation that *Etridge* produced. The ‘calls for explanation’ requirement introduced a threshold for accountability that was not found in the conventional jurisprudence. It is a substantive barrier to the assignment to fiduciaries of the onus of proving true consent. That onus originally was created to counter the difficulties with detecting opportunism. Now, unless the ‘calls for explanation’ requirement is satisfied, no consent onus will be assigned to fiduciaries, and beneficiaries will have to prove actual undue influence.

²⁵⁹ In *Thompson v Foy* [2009] EWHC 1076, [100] (Ch), Lewison J stated that ‘although the cases (and the textbooks) speak of “presumed undue influence” and “actual undue influence” these are no more than different ways of proving the same thing’. That is inaccurate. Each analysis leads to a different conclusion. Unlike a finding of actual undue influence, a finding of presumed undue influence constitutes only a conclusion that there was a risk of undue influence that has not, for whatever reason, been countered by proof of consent. The two distinct conclusions, when rightly understood, have different moral and social implications. Fiduciaries found liable for presumed undue influence remain free to deny that it was ever proved that they actually exercised an undue influence. Courts frequently state that their conclusions on liability are not to be taken as imputing impropriety or bad faith to the fiduciaries.

That in itself amounts to a confutation or repudiation of the detection concern for transactions that can be ‘explained’. Further, the ‘calls for explanation’ requirement invites fiduciaries to proffer any kind of consideration or argument to ‘explain’ transactions. That produces a contest of fairness arguments at that stage. Anticipating that contest, opportunistic fiduciaries will seek to manipulate circumstances ex ante to arrange transactions that will have plausible explanations. That again represents a repudiation of the detection concern. Lastly, consider the anterior placement of the ‘calls for explanation’ requirement. As a hypothetical question, why was that requirement not inserted into the analysis after fiduciaries are fixed with the onus of showing true consent (after proof of a relation of influence)?²⁶⁰ The answer is that doing so would expose the flaws with the ‘calls for explanation’ requirement. Set directly against each other, a contest of fairness arguments will always be superseded by a true consent analysis.²⁶¹ An ordinary motive, or any fairness argument short of legal unconscionability, cannot overcome a failure to demonstrate that the consent was informed and autonomous.

The *Etridge* decision ultimately had two important consequences. One was to install a problematic ‘calls for explanation’ threshold for the assignment to fiduciaries of the onus to prove beneficiary consent. The second consequence was to confirm the silent judicial partitioning of presumed undue influence and fiduciary accountability. Lord Nicholls made no reference to fiduciary accountability in his judgment and seemed to regard the doctrine of presumed undue influence as a distinctive jurisdiction.²⁶² It will be appreciated that it was by his own hand (tracing Lindley LJ) that the distinction was erected and elevated to authoritative taxonomy. A different test implies a different taxonomic characterisation. Yet even as altered, the doctrine of presumed undue influence is exclusively concerned with controlling opportunism in limited access arrangements. Though distorted, it remains a form of fiduciary accountability.

With the crystallising effect of *Etridge* the partition of the doctrine of presumed undue influence from fiduciary accountability was essentially complete, and subsequent decisions reflected that.²⁶³ For example, in *Hammond v Osborn*, despite ‘the revelation of continuing misconceptions,’ Nourse LJ declared that the ‘doctrine of undue influence is now very well settled and ought to be well understood’.²⁶⁴ For him, the ‘leading decisions’ were *Huguenin* and *Allcard*, and he pointed to *Goldsworthy*, *Aboody* and *Etridge* for general expositions of the law. It will be appreciated however that the law was not ‘very well settled’. With the exception of *Huguenin*, the cases he listed were all the progeny of the rogue Lindley analysis in *Allcard*, and were individually seriously problematic. His remarks nevertheless did illustrate that the doctrine of presumed undue influence had at that point been taxonomically dissociated from fiduciary accountability. The doctrine had assumed a taxonomic independence

²⁶⁰ Some judges have moved the question to the second stage. See *Smith v Cooper* [2010] EWCA Civ 722. Query also *Hitchins v Hill* (2011) 15 ITELR 1 (Guernsey Royal Court).

²⁶¹ See *Tate v Williamson*, (1866) LR 2 Ch App 55, 66 (CA). Consider *Gillespie & Sons v Gardner* (1909) 2 SLT 29, 34-35 (‘Concealment will vitiate even if there is no unfairness’).

²⁶² Unhelpful references to fiduciary accountability do appear in two of the other judgments. Lord Hobhouse stated (at [104]) that the relations that give rise to a duty to ‘deal fairly’ typically ‘are fiduciary or closely analogous relationships’. See also the reference of Lord Scott (at [158]).

²⁶³ The new view was not universally adopted. See *de Wind v Wedge* [2008] EWHC 514, [9]-[10] (Ch).

²⁶⁴ [2002] EWCA Civ 885, [24]. See also *Niersmans v Pesticcio* [2004] EWCA Civ 372, [2] (‘fundamental misconceptions persist’).

indolently through a serial rote dependence on rogue analysis, rather than by explicit credible functional differentiation.²⁶⁵

A final observation about *Etridge* is that its adoption of a fairness analysis has led some judges to equate undue influence with the doctrine of unconscionability.²⁶⁶ A number of 2003 Privy Council decisions are illustrative. In *R v Attorney General for England and Wales* Lord Hoffmann (with Lords Steyn, Millett and Bingham) read *Etridge* as being concerned with ‘the unfair exploitation by one party of a relationship which gives him ascendancy or influence over the other’.²⁶⁷ He stated that the nature of the transaction was not such ‘as to give rise to an inference that it was obtained by an unfair exploitation’.²⁶⁸ He then addressed the alternative claim of unconscionability and concluded that, given the holding on undue influence, ‘it must follow that the transaction cannot be independently attacked as unconscionable’.²⁶⁹ In *National Commercial Bank (Jamaica) Ltd v Hew* the judgment of the Privy Council was delivered by Lord Millett.²⁷⁰ Referencing *Etridge*, he stated that undue influence ‘arises whenever one party has acted unconscionably by exploiting the influence to direct the conduct of another which he has obtained from the relationship between them’.²⁷¹ Then, seemingly ignoring the ‘calls for explanation’ prerequisite, he declared that a transaction will not be set aside ‘if it is a fair transaction as between the parties to it’.²⁷² In *Dailey v Dailey* the Privy Council resurrected the bargain/gift distinction for its ‘calls for explanation’ analysis and made the insensible assertion that a transaction ‘entered into for full value [adequate consideration] needs no such explanation’.²⁷³ Value per se is not an ordinary motive, an explanation of any sort or a historically justified criterion. That same year, in the Chancery decision of *Williams v Williams*, the court stated that ‘[counsel] are agreed that following the decision of the House of Lords in *Royal Bank of Scotland plc v Etridge (No.2)* [2002] 2 A.C. 773, there is no relevant distinction to be made between a plea of unconscionable bargain and undue influence’.²⁷⁴ The same view was expressed a few years later in *Qutb v Hussain*.²⁷⁵ Then, in its 2010 decision in *Hewett v First Plus Financial Group Plc*, the Court of Appeal took the judgment of Lord Nicholls in *Etridge* to have established that reposing

²⁶⁵ Attempts at explicit differentiation were few and thin. Consider *Guram v McAteer*, 2008 NIQB 162, [84]-[85], where Smith QC stated that ‘although the description of a fiduciary relationship as “a relationship of trust and confidence” (per Millett LJ in [*Mothewe*]) might suggest that the dominant person in all relationships of undue influence is a fiduciary the authorities on undue influence do not support this proposition’. The judgment contains no further discussion and no citation to any ‘authorities’. Consider also *Derksen v Pillar* [2003] EWHC 3050 (Ch), where Hart J (at [38]) made the following misinformed statement without further analysis: ‘The proposition that the pleading of a relationship which is sufficient to give rise to presumed 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, so far as I am aware, a novel one in this jurisdiction’.

²⁶⁶ The possibility had been raised prior to *Etridge*. See *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221, 233. Consider also *Langton v Langton* [1995] 3 FCR 521 (Ch); *Dunbar Bank Plc v Nadeem* [1998] 3 All ER 876 (CA).

²⁶⁷ [2003] UKPC 22, [21].

²⁶⁸ *Ibid* [24].

²⁶⁹ *Ibid* [29].

²⁷⁰ [2003] UKPC 51. The *Hew* analysis was applied in *EID v Al-Kazemi* [2004] EWHC 2129 (Ch).

²⁷¹ *Ibid* [29].

²⁷² *Ibid* [34].

²⁷³ *Dailey v Dailey* [2003] 3 FCR 369, [24] (PC).

²⁷⁴ [2003] EWHC 742, [50] (Ch).

²⁷⁵ [2005] EWHC 157 (Ch).

trust and confidence created a duty of ‘candour and fairness,’ seemingly independently from a ‘calls for explanation’ or consent analysis.²⁷⁶ The analyses in the above cases have not been challenged, and at a minimum indicate that the law requires further attention. The other cases decided since *Etridge* have added little in terms of development,²⁷⁷ but it is worth observing that it would be difficult to differentiate the subjective analysis in many of them from a standard unconscionability analysis.²⁷⁸ None of the cases suggest any connection with the law of fiduciary accountability.²⁷⁹

IX ABUSE OF CONFIDENCE

This examination of the partitioning of presumed undue influence cannot end without noting one associated perverse substantive development. In *Bank of Credit and Commerce International SA v Aboody*, after affirming the requirement (subsequently over-ruled) of manifest disadvantage, the Court of Appeal stated that the defendant wife nevertheless ‘would probably have a remedy under another line of authority in which, having regard to the nature of the relationship between the parties, the court in the exercise of its equitable jurisdiction, has indisputably been prepared to set aside commercial transactions *even though no manifest disadvantage has been shown*’.²⁸⁰ The label Slade LJ gave to that line of authority was ‘abuse of confidence,’ a label he borrowed from a short incoherent entry in *Snell’s Principles of Equity*.²⁸¹

The perversion, is this. Once one is sufficiently familiar with the prior development of fiduciary accountability generally, and presumed undue influence in particular, it is quite clear that the ‘abuse of confidence’ principle is just a descriptor

²⁷⁶ [2010] EWCA Civ 312, [27].

²⁷⁷ Some judges appear to have broadened or generalised the ‘calls for explanation’ requirement beyond the ordinary motives notion. See *Macklin v Dowsett* [2004] EWCA Civ 904, [13] (‘explicability of the transaction’); *Turkey v Awadh* [2005] EWCA Civ 382, [19] (‘whether there was a sufficient explanation’) and [20] (‘[whether the transaction] can be explained in terms other than those of undue influence’); *Markham v Karsten* [2007] EWHC 1509, [37] (Ch) (‘[whether the transaction] is merely unexceptionable’ (sic)).

²⁷⁸ See for example *Jennings v Cairns* [2003] EWCA Civ 1935; *Niersmans v Pesticcio* [2004] EWCA Civ 372; *Macklin v Dowsett* [2004] EWCA Civ 904; *Michael v Cansick* [2004] EWHC 1684 (Ch); *Randall v Randall* [2004] EWHC 2258 (Ch); *Wright v Hodgkinson* [2004] EWHC 3091 (Ch); *Turkey v Awadh* [2005] EWCA Civ 382; *Goodchild v Bradbury* [2006] EWCA Civ 1868; *A v A* [2006] EWHC 2900 (Fam); *Walker v Walker* [2007] EWHC 597 (Ch); *Forde v Birmingham City Council* [2009] EWHC 12 (QB); *Thompson v Foy* [2009] EWHC 1076 (Ch); *Smith v Cooper* [2010] EWCA Civ 722; *Murphy v Rayner* [2011] EWHC 1 (Ch); *Wollenberg v Casinos Austria International Holding GmbH* [2011] EWHC 103 (Ch); *Hackett v Crown Prosecution Service* [2011] EWHC 1170 (Admin); *Trustees of Beardsley Theobalds Retirement Benefit Scheme v Yardley* [2011] EWHC 1380 (QB); *Curtis v Curtis* [2011] EWCA Civ 1602; *Hart v Burbidge* [2013] EWHC 1628 (Ch); *Evans v Lloyd* [2013] EWHC 1725 (Ch); *Pearce v Beverley* [2013] EWHC 2627 (Ch); *Re Estate of Joyce Smith* [2014] EWHC 3926 (Ch); *Hopkins v Hopkins* [2015] EWHC 812 (Fam).

²⁷⁹ Other cases functionally equate fiduciary accountability and presumed undue influence. See *de Wind v Wedge* [2008] EWHC 514 (Ch). Consider *Mitchell v James* [2001] All ER (D) 116, 278 (Ch).

²⁸⁰ [1989] 1 QB 923, 962 (CA).

²⁸¹ *Ibid.* See P.V. Baker & P. St. J. Langan, *Snell’s Principles of Equity* (Sweet & Maxwell, 28th ed, 1982) 544, where *Tate v Williamson* wishfully was cited for the proposition that ‘the principles of undue influence and abuse of confidence overlap but do not coincide’. A review of the *Snell* entry will confirm the other dimensions of its incoherence.

for the line of cases that departed from conventional authority by adding a requirement for proof of fairness. In *Aboody* Slade LJ declared that the ‘governing principle of abuse of confidence cases’ was expressed in *Demerara Bauxite Company v Hubbard*.²⁸² In *Demerara* the Privy Council had stated that a transaction between persons in a confidential relation is voidable unless the fiduciary is able to prove full disclosure and ‘can further show that the transaction was, in itself, a fair one, having regard to all the circumstances’.²⁸³ Slade LJ purported to give content to the ‘abuse of confidence’ principle with four points:

First, it is the danger of an abuse of confidence on the part of the person in the confidential position which causes the court to apply the stringent rules which it does, before permitting him to retain a benefit from the transaction with the other party. Secondly, while undue influence may also be proved as a fact, the liability and relief in abuse of confidence cases is quite independent of the existence of undue influence as such ... Thirdly, in such cases, a person in the confidential position is bound to disclose to the other party everything that is or may be material to that other's judgment before the transaction is completed... His failure to disclose such matters is treated as being itself an abuse of confidence entitling the other party to relief. Fourthly, so far from the complaining party having to prove that the transaction was disadvantageous to him, the onus falls on the other party to establish its fairness.²⁸⁴

The first point recognises that, like presumed undue influence, the ‘abuse of confidence’ doctrine is concerned with controlling opportunism. The second point recognises that influence need not actually be established by fact or inference of fact. The third point is equally unremarkable. Informed autonomous consent to conflicts and benefits is required for all limited access arrangements. The fourth point (the supposed existence of a fairness onus on the fiduciary rather than a manifest disadvantage onus on the beneficiary) describes the only distinguishing element of the abuse of confidence ‘doctrine’. We know however that the creation of that fairness onus was an unjustified development that was inconsistent with conventional policy and authority.²⁸⁵ The *Demerara* decision only seemed unambiguously authoritative because the Privy Council cited no previous authority other than the equally flawed analysis in the Scottish case of *Gillespie & Sons v Gardner*,²⁸⁶ which itself was based on the problematic analysis in *McPherson v Watt*.²⁸⁷ The Privy Council in *Aboody* simply did not comprehend the legal disorder that the supposed abuse of confidence doctrine represented.

Subsequent decisions did not rectify the abuse of confidence taxonomic invention. In *CIBC Mortgages Plc v Pitt* the House of Lords failed to recognise the misconception of doctrine, even though it explicitly characterised the abuse of

²⁸² Ibid.

²⁸³ [1923] AC 673, 681-682 (PC).

²⁸⁴ [1989] 1 QB 923, 963 (CA).

²⁸⁵ Some of the authorities referenced by Slade LJ did not support his suppositions. Slade LJ added (at 963) a quote from *Halsbury's* stating that if full disclosure was not made, ‘the fairness of the transaction is immaterial’. Also, in *Tate v Williamson*, (1866) LR 2 Ch App 55 (CA) (cited in *Snell*), Lord Chelmsford stated (at 66) that: ‘Even if the Defendant could have shewn that the price which he gave was a fair one, this would not alter the case against him’. The references to ‘fair dealing’ in *Tate* were only references to the need to fully disclose.

²⁸⁶ (1909) 2 SLT 29.

²⁸⁷ (1877) 3 AC 254 (HL).

confidence principle as a ‘long standing’ one applied to fiduciaries.²⁸⁸ The court only noted that there was a need to resolve the ‘sharp contrast’ between the abuse of confidence doctrine and the views expressed in *Morgan* respecting public policy and manifest disadvantage.²⁸⁹ Lord Browne-Wilkinson stated: ‘The attention of this House in *Morgan* was not drawn to the abuse of confidence cases and therefore the interaction between the two principles (if indeed they are two separate principles) remains obscure’.²⁹⁰ That obscurity remained unaddressed in *Bristol and West Building Society v Mothew*, where Millett LJ noted but did not discuss or cite authority for the proposition that a fiduciary dealing with a beneficiary ‘must prove affirmatively that the transaction is fair’.²⁹¹ It was the same in *Naidoo v Naidu* where Blackburne J stated that: ‘Sometimes referred to as the “fair-dealing” rule and on other occasions as “the abuse of confidence principle”, the rule is of course extremely well established’.²⁹² He immediately added that the ‘precise relationship between this principle and the overlapping principle of undue influence is a matter of some uncertainty’.²⁹³ There was no mention of the conflict with the conventional position. The vacuity continued in *Clarke v Marlborough Fine Art (London) Ltd*, where Patten J quoted a passage from *Tate v Williamson* ‘because it illustrates the close proximity of what are now usually described as the doctrines of presumed undue influence and abuse of confidence’.²⁹⁴ He concluded that *Tate* indicated that the two doctrines ‘have a common origin and purpose in scrutinising the conduct of fiduciaries in their dealings with the confiding party’.²⁹⁵ He did not further address that redundancy, nor did he raise the conflict with conventional authority. Nothing helpful was added by the analysis of Mummery LJ in *Johnson v EBS Pensioner Trustees Ltd*, who also characterised the principle (which he also described as the ‘fair dealing’ doctrine)²⁹⁶ as a form of fiduciary accountability.²⁹⁷

²⁸⁸ [1994] 1 AC 200, 209 (HL).

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*

²⁹¹ [1998] Ch 1, 18 (CA).

²⁹² (Ch) (All England Official Transcripts, 18 August 2000).

²⁹³ *Ibid.*

²⁹⁴ [2001] All ER (D) 189, [24] (Ch).

²⁹⁵ *Ibid.*

²⁹⁶ The ‘fair-dealing’ rule did not have an independent taxonomic existence prior to *Tito v Waddell* [1977] Ch 106. It arose in that case as an analytical ‘convenience’ adopted by Megarry V-C (at 225):

During the argument, two agreed labels emerged for the two rules, or two elements of the one rule; and for convenience of reference I shall use those labels. Without attempting in any way to set out all the details of the rules or elements, and merely for the purposes of identification, I propose to refer to them as follows:

- (1) *The self-dealing rule*: if a trustee purchases trust property from himself, any beneficiary may have the sale set aside ex debito justitiae, however fair the transaction
- (2) *The fair-dealing rule*: if a trustee purchases his beneficiary’s beneficial interest, the beneficiary may have the sale set aside unless the trustee can establish the propriety of the transaction, showing that he had taken no advantage of his position and that the beneficiary was fully informed and received full value.

Megarry V-C (at 241) later responded to the argument between counsel as to whether there were two rules or just one rule. Though he stated that the rules had a ‘common origin,’ his view was that ‘there are two rules: the consequences are different, and the property and the transactions which invoke the rules are different’. The error in that view is apparent. The content of the rule, we have seen, was a misconceived departure from conventional policy. Nothing justifies the separation of ‘fair-dealing’ from self-dealing for the purposes of fiduciary accountability. The mischief is identical. Query the analysis in the then current 1973 edition of *Snell*, which Megarry co-authored. See Robert Megarry & P. V. Baker, *Snell’s Principles of Equity* (Sweet & Maxwell, 27th ed, 1973) 240-241.

In *Etridge*, surprisingly, the House of Lords did not examine the abuse of confidence doctrine.²⁹⁸ That was inexplicable given the expressions of uncertainty as to its relation to presumed undue influence. Perhaps the court recognised the conflict with conventional doctrine (with respect to fairness) and left the whole matter for another day. Another possibility, though a conceptual leap, is that implicitly the ‘abuse of confidence’ principle merged into the *Etridge* analysis. That possibility was mentioned in *Curtis v Pulbrook* where an alternative claim for abuse of confidence was successful.²⁹⁹ There was no discussion of the doctrine, but Sheldon QC stated that ‘following *Etridge*, the law on abuse of confidence is largely subsumed in the doctrine of undue influence as regards the type of transaction and relationship between the parties’.³⁰⁰

It now must be obvious that the taxonomic formulation of the ‘abuse of confidence’ doctrine (the supposition of doctrinal independence) was mistakenly produced solely because of the confusion introduced by the thin line of cases asserting a fairness criterion for fiduciary accountability. That thin thread was not grounded in conventional principle, but it was tangible enough to serve as support for the collateral justification proffered in *Aboody* (the availability of an alternative remedy). It has since had an uneven treatment attended by judicial reservation and uncertainty. None of that needed to happen. But that is what confusion does; it breeds more confusion.

X CONCLUSION

The partition of presumed undue influence from fiduciary accountability now may be perceived as formally complete. The conventional rule was that once a beneficiary proved a relation of trust and confidence the fiduciary was required to show that the consent of the beneficiary was informed and autonomous. Now, because of the rogue analyses in *Allcard* (Lindley LJ), *Morgan* and *Etridge*, beneficiaries must satisfy the additional requirement of establishing that the transaction ‘calls for explanation’. That requirement depreciates the primal concern with detecting opportunism. Opportunistic fiduciaries now have new means to project their septic impulses by shaping transactions to support explanations that some judges will find plausible. Sophisticated opportunists will be most advantaged by the new regime, and we will not have the least inkling of their exploitations.

Fiduciary regulation has a singular conventional content. Accountability depends on the presence of a limited access, and liability on the presence of an unauthorised conflict or benefit. No other elements are required to establish accountability or liability. There is no fairness criterion. There is no distinction between bargains and gifts. There is no immunity for small transactions. There is no immunity for transactions that seemingly do not ‘call for explanation’. None of those elements identify circumstances that necessarily cancel the potential for opportunism. Yet judges introduced those ideas for the influence dimension seemingly believing they were crafting a distinct form of regulation. Their efforts were misinformed and misconceived. Importantly, no judge has directly confronted the detection concern and explained why it is less consequential in the influence context. No good reason exists to relax the strict regulation of influence. Proof of a limited access relation of influence

²⁹⁷ [2002] EWCA Civ 164.

²⁹⁸ The doctrine was noted in passing in the Court of Appeal. See [2001] QB 20, [62]-[63].

²⁹⁹ [2009] EWHC 782 (Ch).

³⁰⁰ *Ibid* [158].

and proof of a conflict or benefit should, in the absence of informed autonomous consent, be enough. The difficulty with detecting opportunism, and the communal costs of opportunism, justify that strict regulation.