

EQUITY'S ROVING COMMISSION IN

ADMINISTRATIVE LAW:

**An analysis of the present and potential role of equity in the
relationship between local authorities and their service users**

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CONTENTS

ABSTRACT

This thesis explores the use of equity and its principles in the field of public law. It asks whether the relationship between local authorities and their service users can properly be understood as being a fiduciary relationship. In considering this question the thesis examines the extent to which the relationship is analogous to trusteeship or whether it is some other sui generis category. This requires exploration of core elements of trust and loyalty and analysis, within a local government context of the debate as to whether fiduciary duties are confined to having a proscriptive role or whether, as some advocate they have a wider prescriptive function.

The relationship between local authorities and their service users is not considered to be a fiduciary relationship within the traditional class of relationships so classified. Notwithstanding, there are instances within that relationship where the characteristics resemble in part application of a sui generis label. For example, in the realm of local authorities and their interaction with the elderly, child care and youth counselling services it is possible to apply a quasi - trusteeship role. This categorisation cannot however be extended to the majority of interactions between local authorities and their service users which usually fall within a contract or tortious setting.

The main reason in not being able to identify the relationship between local authorities and their service users as fully fiduciary is the inability to point to a central core of loyalty between the parties which is so necessary for a finding of the

existence of a fiduciary relationship. The loyalty inhibitor is the polycentric essence of much of local authority decision making, which is made in a very diverse community group often with different complex needs and aspirations all clamoring for attention. Further, as local authorities are public bodies they must accommodate the 'public interest' in any decision making process and outcome. These factors combine to make a very different decision making environment than the way fiduciary obligations can be exercised in private law and makes the hurdles higher for an exercise of translation to the public law sphere.

The purpose of this analysis is to explore whether the roving commission of equity has any application to the public law field. Has equity died and shrivelled, or does equity still have the ability to flourish and accommodate new situations and changes in social morals and norms, 'yet maintain its core values and norms, without which no society can survive, let alone flourish.'¹

Notwithstanding, these hurdles this author considers that equity still has a role to play in public law, none more so than in the day to day decision making of local authorities as well as in judicial review proceedings. Equity can bring a contextual approach so necessary when substantive review is applied. Equity has proved to be a robust flexible adaptable tool, even in a complex modern environment. For example, the remedies it has fashioned of injunctions, declaratory relief and freezing orders to mention a few, as well as aiding the common law in its application of trust principles to a deserted wife's equity, where the title was in one party's sole name.

¹ Professor Tamar Frankel, 'Fiduciary Law in the Twenty-First Century'(2011) 91 BULR 1289, 1290

This author espouses a principle of stewardship which can be applied as an additional substantive review tool in the judicial tool box, along with Wednesbury and proportionality. Structuring substantive review is a major current debate in public law both judicially and academically: there is no valid reason why ethical principles such as stewardship-of person, place, property and purpose should not be a valid contributory player.

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CHAPTER ONE

INTRODUCTION

1.1 The Topic of this Thesis – the research question, and its importance

The prime question being asked in this thesis is: can equitable principles have a greater role to play in administrative law, with particular reference to the relationship between local authorities and their service users in England and Wales?

A major concern with any form of legal authority is the reach of its application. It is therefore crucial to identify who has legal authority, its extent and who is subject to those duties under the law. The main aim of this thesis is to explore whether equity has a role to play in public law with specific reference to the relationship between local authorities and their service users and to ask what identifying designation or label does the law attach to that relationship? Throughout this thesis the term ‘service users’ will be used, so as to encompass use of the old term ‘ratepayer’,² found in earlier case law, and to cater for local authorities’ wide

² A person who is liable to pay any rate or tax in respect of property entered in any valuation list. Rates are levied on both domestic and non-domestic property. There are domestic and business rates. Domestic rates are based on the property valuation and placed in a valuation band. Business rates are presently fixed by central government on all non-domestic properties, which includes village halls. Rates were abolished in England and Wales in 1990 and replaced by a community charge (‘poll tax’) a fixed tax per head that was the same for everyone. This was replaced by the Council tax, a system based on the rateable value of domestic property and on rental values for business properties

Receipts for national non-domestic rates for local authorities in England by financial quarter-

1.4.2015 –31.3.2016,	£22,867,606
1.4.2016 to date	£23,177,394

modern service delivery remit, which includes a wider range of individuals, whether they are council tax payers, residents, or those that come into a local authority area for the purposes of health, work leisure or other reasons, (including those seeking protection).³

1.2 The relevance of the research

A cogent articulation of how and to what extent fiduciary obligations apply in a local government setting is required for three main reasons.

First, a local authority has tremendous powers within its defined locality. It has over 1200 statutory functions ranging from diverse services for the elderly, children and those with learning disabilities, to the more mundane responsibilities for road maintenance and refuse collection.⁴ Local authorities have a revenue income from various sources,⁵ (see Table A in appendices) including central government grants and subsidies and council tax collected from residents and local businesses. From these statistics alone it can be seen local authorities are powerful players in the service market. In addition, the funding arrangement of local authorities is significantly changing, for example, in relation to business rate retention.⁶ Further,

(Table 3 online statistics, Department for Communities and Local Government - updated 29th June 2016)

³ For example, asylum seekers or unaccompanied children; Local authorities have duties to support all children 'in need' in their area. The basic scheme is found in Part III of the Children's Act 1989. Subsequent legislation, case law and guidance has further clarified local authorities' obligations. See especially, the Children (Leaving Care) (England) Act 2000 and the Children's Act 2004

⁴ The powers of local authorities are conferred by statute and include:

Mandatory powers - such as providing social work services

Permissive powers - such as economic development, recreational services; and

Regulatory powers - such as trading standards and environmental health; issuing licences for taxis and public houses

⁵ Department for Communities and Local Government, *Local Government Financial Statistics England* (No 26, 2016) < <https://www.gov.uk/government/statistics/local-government-financial-statistics-england-2016> > accessed 27 September 2016

⁶ Chancellor of the Exchequer, Budget, March 2016, HC Deb, 16 March 2016, cols 951-968. A consultation document has been issued entitled 'Self-sufficient local government; 100%

these changes can clearly be seen by comparing sources of funding in 2010/11 and projected sources of funding in 2019/20. The Local Government Association ('LGA')⁷ indicates that, by the end of this decade, the proportion of income from centralised grants will fall. Local authorities will be able to use capital receipts from the sale of assets for revenue (subject to circumstances to be announced). New figures show that England's 444 local authorities hold £22 billion in non-ring fenced reserves.⁸ The LGA has stated: 'Government has recognised our argument that local government should have autonomy in deciding how to spend its reserves. We have long argued that councils need to be able to make financial decisions based on local

Business Rates Retention consultation Document', published 5 July 2016 whereby the Department for Communities and Local Government seek comments by 26th September 2016. See, Department for Communities and Local Government, 'Self-sufficient local government; 100% Business Rates Retention consultation Document' (5 July 2016) < <https://www.gov.uk/government/consultations/self-sufficient-local-government-100-business-rates-retention>> accessed 27 September 2016

See also, Local Government Association, 'Rewiring Public Service' (December 2013), p1: On 1st April 2013 a new system of business rates retention began in England. Before that date all business rates collected by councils formed a single, national pot, which was then distributed by government in the form of formula grant. Through the Local Government Finance Act 2012, and regulations that followed, the Government gave local authorities the power to keep up to half the business rate growth in their area by splitting business rate revenue into the 'local share' and the 'central share'. The central share is redistributed to councils in the form of revenue support grant in the same way as formula grant.'

Note - The Local Government Association was created by local government to be its national voice in England and Wales. The purpose of the LGA is to support, promote and improve local government: a major focus being to represent local government through their public affairs team and appear in front of Parliamentary select committees and work with parliamentarians to amend legislation, ask parliamentary questions and to speak in debates.

See further, The Local Government Group, 'The LGA quick guide to local government' (April 2011) < http://www.local.gov.uk/health/-/journal_content/56/10180/3510763/ARTICLE> accessed 27 September 2016.

⁷ The Local Government Association, 'Future Funding outlook for councils 2019/20: Interim 2015' (June 2015) < http://www.local.gov.uk/futurefunding/-/journal_content/56/10180/7379688> accessed 27 September 2016

⁸ The Rt. Hon Greg Clark MP, Department for Communities and Local Government, 'Councils have over £22 billion in reserves' (19 November 2015) < <https://www.gov.uk/government/news/councils-have-over-22-billion-in-reserves>> accessed 27 September 2016

circumstances.’⁹ These changes, and pressure for greater autonomy, highlight the need to determine the relationship between local authorities and their service users.

Secondly, it seeks to understand how the relationship of local authorities and their service users is regarded in law and explores the way in which notions of ‘stewardship’, including management of local needs and expression of community aspirations and expectations could be engaged. It is important to understand how notions of fairness, impartiality, trust and loyalty can be conceptually harnessed in a public sphere where administrative decisions are taken that affect the daily lives of citizens.

Thirdly, the need for clear labelling of the relationship between a local authority and its service users is overdue. Under company law, for example fiduciary obligation has been embodied in statute¹⁰ and there is no valid reason why local government legislation cannot similarly establish a fiduciary duty on local authorities, by incorporating words that better define the relationship between local authorities and their service users. Improved relational labelling will ensure that ensuing obligations are better understood and applied.¹¹

A local authority is a statutory corporation, with a Parliamentary birthright, but this designation needs further unpacking: how we label relationships in law is significant, because we ascribe rights and duties by the way we allocate such labels. Like the labelling function on products, labels inform the public about what to expect.

⁹ Local Government Association, ‘Spending Review and Autumn Statement 2015: On the Day Briefing’ (25 November 2015) < <http://www.local.gov.uk/spending-review-2015> > accessed 27 September 2016

¹⁰ See Companies Act 2006, s 175. This provision incorporates the long standing common law rule that directors, like any other person who has fiduciary responsibilities, must respect the trust and confidence placed in them

¹¹ A call for a legislative infrastructure enforcing stewardship principles; this could be achieved by constitutional recognition in the preamble to a statute dealing with duties and powers imposed on local authorities

For example, when we say a person is an agent or executor, the layman may not understand what the role technically means or involves, but will certainly expect a bundle of rights and obligations to arise. It is central to understanding local government law that being a creature of statute, a local authority can only do that which its governing statute and delegated legislation permits. If a local authority acts outside its statutory powers, duties or discretion then it will have acted unlawfully. This limitation of action is termed the 'ultra vires' doctrine. An object of this thesis is to contend that in addition to a local authority's statutory existence their duties and powers are overlaid with not only common law and public law principles, but also equitable fiduciary principles.

This thesis explores whether, and if so, how a trusteeship paradigm 'fits' with the statutory nature of local authorities, and their local government environment. Can this relationship be understood in terms of trusteeship or is it some other sui generis category, such as a community service model that is a fixed fiduciary categorisation? Such a model focusses on the local authority as a service delivery vehicle, with emphasis on a public service ethos to its locality, rather than being profit orientated. This author advocates a local community service model which incorporates some fiduciary elements, replacing duty of care with a wider stewardship ethic of care. This thesis, therefore, considers alternative paradigms which include a fiduciary framework that centres the most vulnerable interests within a non-property based relationship.

Determination of the relationship between local authorities and their ratepayers has come before the courts on a number of occasions. This thesis will

consider, in particular, *Roberts v Poplar Borough Council*,¹² *Prescott v Birmingham Corporation*¹³ and *Bromley London Borough Council v Greater London Council and Another*,¹⁴ as illustrative of narrow judicial conceptions of the fiduciary nature of public law, in particular its emphasis on the protection of property rate payers, as opposed to the wider class of service users.

These seminal cases are instructive because they provide an insight into the way judges approach challenges to the way in which a local authority has used its discretionary power. Some of their Lordships in the *Poplar* case¹⁵ considered the relationship between a council and its ratepayers, to be ‘somewhat akin to’ or similar to the relationship between a trustee and beneficiary. Such analogical reasoning has not however identified the precise relational label involved, albeit references to a trustee-like role infers some form of comparable fiduciary type relationship, since the trustee-beneficiary relationship is firmly established as a status member of the conventional group of fiduciary relationships per se. Their Lordships may, therefore, have had some type of sui generis relationship in mind that would fit into an ad hoc fiduciary classification, as the relationship of local authorities and their service users is not typically recognised as a fiduciary relationship per se, although the courts have used language that suggests that it may be akin to a fiduciary relationship. Indeed, since the *Bromley* case, the courts have accepted that local authorities may, in certain circumstances, owe fiduciary obligations to their service users. This is illustrated in chapter six where there is clear evidence of a judicial overlay of a fiduciary duty on local authorities when they dispose of land under their statutory powers.¹⁶

¹² [1925] A.C. 1

¹³ [1955] Ch 210

¹⁴ [1983] A.C. 768

¹⁵ [1925] A.C. 1

¹⁶ Local Government Act 1972, s 123

Identifying whether the relationship involves fiduciary obligations between local authorities and their service users is extremely important to both parties, since it maps out the content and scope of such obligations, and aids certainty as regards what is expected from a local authority in the exercise of its public powers.

There has been much valuable and informative academic work on the characteristics of a fiduciary relationship, their content and scope of operation in a variety of areas.¹⁷ However, with the exception of Professor Martin Loughlin,¹⁸ Professor Davina Cooper¹⁹ and a number of American and Commonwealth scholars,²⁰ who have focussed on state public fiduciary relations, academics have not specifically addressed the object of this thesis, which aims to build upon this broader body of work to argue that the relationship between local authorities and their service users may be a fiduciary-like relationship. We shall see however, that there are serious obstacles to overcome if the relationship is deemed to fall within an ad hoc

¹⁷ For example, Stuart Richie QC and Andrew Stafford QC (ed), *Fiduciary Duties, Directors and Employees* (2nd ed., Jordon Publishing 2015)

¹⁸ Martin Loughlin, *Legality and Locality* (Clarendon Press 1996) 203-262 (chapter 4 'fiduciary duty in public law') also published online March 2012

¹⁹ Davina Cooper, 'Fiduciary government: Decentering property and the tax payer's interests', 6(2) *Social and Legal Studies*, pp 235-257.; <https://kar.kent.ac.uk/id/reprint/1516>.

²⁰ See, Paul Finn, 'The Forgotten 'Trust': The People and the State', in Malcom Cope (ed) *'Equity: Issues and Trends: the Importance and Persuasiveness of Equitable Principles'* (Federation Press 1995), p131; Paul Finn, 'A Sovereign People, A Public Trust' in Paul Finn (ed) *'Essays on Law and Government'* (vol 1, Law Book Co 1995); Lorne Sossin, 'Public Fiduciary Obligations, Political Trusts, and the Equitable duty of Reasonableness in Administrative Law' (2003) 66 *SASR L Rev* 129-82; Paul Finn, 'Public Trust and Public Accountability' (2004) 3 *Griffith L Rev* 224; Evan J Criddle, 'Fiduciary Foundations of Administrative Law', (2005) 54 *UCLA L Rev* 117; Evan Fox-Decent, 'The Fiduciary Nature of State Legal Authority' (2005) 31 *Queen's Law Journal* 259-310; Evan Fox-Decent and Evan Criddle, 'The Fiduciary Constitution of Human Rights' (2009) 15 *Legal Theory* 301; Evan Fox-Decent and Evan Criddle, 'A Fiduciary Theory of Jus Cogens' (2009) 34 *Yale Journal of International Law* 331; Evan J Criddle, 'Fiduciary Administration: Rethinking Popular representation in Agency Rulemaking' (2010) 88 *Tex L Rev* 441; Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford University Press 2011); David L Ponet and Ethan J Leib, 'Fiduciary Law's Lessons for Deliberative Democracy' (2011) 91 *Boston University Law Review* 1207-20; Ethan J Leib, David L Ponet and Michael Serota, 'Translating Fiduciary Principles into Public Law' (2013) 126 *Harv Law Rev F* 91

fiduciary classification and, if that was the case, identifying the scope of the fiduciary obligation arising, would also cause difficulties.

A major objective of this thesis is to examine the indicators used to establish whether a fiduciary relationship exists, and to test the relevance of these indicators in a local authority setting. Courts have confirmed that the list of currently accepted relationships that qualify as fiduciary relationships is not closed, but the problem of identifying the necessary elements of a fiduciary relationship where novel relationships appear is still an issue, particularly where the potential fiduciary is entrusted with non-economic interests, for example, the relationship between a counsellor and his client. Boundaries have been pushed in the Canadian courts²¹ by their willingness to consider the fiduciary nature of relationships outside those of a conventional fiduciary relationship. Such an approach aids this thesis, in so far as a new conception of the public trust doctrine, as applied to the relationship between local authorities and their service users and based on community stewardship and an ethic of care is a very real possibility.

Identifying the true relationship between local authorities and their service users necessarily triggers an enquiry into the nature and scope of the consequential duties that arise. Judges and academics alike struggle, not only in defining fiduciary relationships with sufficient conceptual certainty, but also, once established, the scope

²¹ See, Erika Chamberlain, 'Revisiting Canada's approach to Fiduciary Relationships' (7th biennial conference on the law of obligations, Hong Kong University, July 2014) She notes that the protection of non-economic interests represents a divergence from the traditional fiduciary paradigm, but argues that it can be justified by reference to the underlying values of fiduciary law
See also, *Norberg v Wynrib* [1992] 92 DLR (4th) 449 (McLachlin J). A painkiller (fiorinal/codeine) addict went to a Doctor W who demanded sexual favours in return for such drugs. After she left rehab she sued W for battery/assault, negligence and breach of fiduciary duty. The court stopped short of recognising a fiduciary duty, but McLachlin J, in a concurring decision did find a fiduciary duty arose because consent is vitiated by the unequal power dynamic

of the fiduciary duties that necessarily arise. A further objective is, therefore, to delineate with clarity the core nature of fiduciary duties and to examine whether such duties are owed by local authorities to their service users.

It should be noted that not all duties of a fiduciary will be of a fiduciary nature. Fiduciary obligations fall into two distinct classes; those which are traditionally proscriptive, as exemplified by the *Keech v Sandford*²² line of judgments; and those which are both proscriptive and prescriptive in nature and which are adopted in the modern approach. It will be argued that the prescriptive classification may best apply to local authorities in their service delivery role.

This author does not consider that categorising duties of good faith or a duty of care as singularly fiduciary is appropriate, save where such duties form part of our understanding of fiduciary loyalty. To do so, hinders a coherent approach. A common misconception has been to assume that once a fiduciary relationship is established, all duties transform into duties of a fiduciary nature: this is not the case.²³ The Trustee Act 2000²⁴ now determines the duty of care applicable in respect of investments. In this thesis the virtues of loyalty and trust will be singled out for analysis within a fiduciary context: how they could operate in a local government environment will be explored.

Conceptions of the public trust doctrine have been known in history and occupied the minds of renowned thinkers, such as Plato, Thomas Hobbes and John Locke. In more modern times, the concept has been used as a protective mechanism

²² [1726] Sel Cas Ch 61; *Price v Blakemore* [1843] 6 Beav 507

²³ See, Paul Finn, '*Fiduciary Obligations*', (Law Book Company 1977), p13: 'Simply put, not every relationship is fiduciary and not every element of a fiduciary relationship is necessarily fiduciary'

²⁴ Trustee Act 2000, s 1(1). Trustees are required to exercise such care and skill in relation to investments as is reasonable in the circumstances

for indigenous populations, such as the Aboriginals in Australia and in the field of natural resources.²⁵ The only attempt so far to define a public trust is by Jennifer Kreder.²⁶ This thesis explores the use of public trusts in this jurisdiction by historical reference to the turnpike trust movement in England and Wales.

Attempts to translate principles of equity into public law are, therefore, not new, but the challenge of this thesis is to examine whether the trust concept as understood in private trust law is an appropriate model to use in public law, or whether a public trust concept built on an ethical model of stewardship is more appropriate? This thesis will argue that the stewardship model of a public trust of property, place, person and purpose, better suits, the relationship between local authorities and their service users. The foundation of this author's thesis is that public office is an office of public trust, and that fiduciary architecture can assist us in determining how political power should be exercised legitimately. As Leib, Ponet and Serota state: 'part of the appeal of conceiving the political relationship between representative and represented in fiduciary terms is that it regards politics in more

²⁵ Professor Joseph Sax, 'The Public Trust Doctrine in Natural Resources Law: Effective Judicial intervention' (1970) 68 Mich L Rev 471

Further, see, Carol M Rose, 'Joseph Sax and the Idea of the Public Trust' (Yale Faculty Scholarship Series, Paper 1805, 1998)

See, in relation to public trust doctrine to Australian Aboriginals, Stephen Gray, 'Holding the Government to Account: The 'Stolen Wages' Issue, Fiduciary Duty and Trust Law' (2008) 32(1) Melb U Law RW 4, 115

See also, Evan Fox-Decent and Ian Dahlman, 'Sovereignty as Trusteeship and Indigenous Peoples' (2015) 16:2 Theoretical Inquiries in Law 507-535, where the authors challenge is to show that the trusteeship model is not irreparably colonial in nature, and to specify the scope and nature of indigenous peoples' sovereignty within the trusteeship model

Reference should also be made to contributions of Dr Gordon Christie, 'Government in conflict on fiduciary obligation' a 27 page paper presented to conference on fiduciary law, where he argues that even though the courts have decided the Crown's actions have created fiduciary or trust-like obligations in certain cases, fiduciary law as it would apply to two parties must be applied differently when the government is one of the parties involved. This paper is in Part 3: The Future of fiduciary relationships chapter entitled 'Considering the future of the Crown-aboriginal fiduciary relationship'. *'In Whom We Trust,'* Irwin Law (Canada), January 2002

²⁶ Jennifer Anglim Kreder, 'The Public Trust' (2016) 18 University of Pennsylvania Journal of Constitutional Law, pp.1-34 <
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554862> accessed 27 September 2016

realistic and textured ways-as a constellation of power relationships in a web of trust and vulnerability-rather than as a mere social contract no one ever signed.²⁷ Thinking of local authorities as public fiduciaries tells us much about the relationship between the governed and their governors.

This thesis examines the core nature of fiduciary principles and explores the meaning of virtues, such as trust and loyalty; it considers, how (if at all) such virtues ‘fit’ in a public law setting. In doing so major problems of translation may be exposed, which emphasise that the exercise of transposing equitable principles into the public law sphere may not be a straightforward or desirable one. The interplay of the diversity of the composition of the beneficiary service user class, and the involvement of complex polycentric issues create real hurdles to surmount. A local authority’s ‘public’ is not as easily identifiable, as that of beneficiaries under a fixed trust where there is certainty of object and a clear separation of legal and equitable interests. Beneficiary identification is blurred by the shifting nature of the ‘beneficiary’ class, a feature later analysed in detail.

As fiduciary principles are equitable in nature they have a different focus to public law, with its emphasis on legality and form rather than context and substance. Such matters are contentious in public law.²⁸ Thus a major theme of this thesis is to explore the unique qualities of equity, particularly its inherent functional quality in

²⁷ Ethan J Lieb, David L Ponet and Michael Serota, ‘Translating Fiduciary Principles into Public Law’ (2013) 126 Harv L Rev F 91; (2012), Fordham Law Legal Studies Research Paper No 2224330

²⁸ See, Professors John Bell, Jason M E Varuhas and Murray Phillip, ‘*Public Law Adjudication in Common Law Systems*’ (Bloomsbury Publishing 2016)
See further Timothy Endicott, ‘*Administrative Law*’ (3rd ed, Oxford University Press 2015) 289-295. Particularly Part 11, 6 Reasons; process and substance, Part III Substance: 7 Substantive fairness

bringing a more fact-sensitive and context-specific approach to deliberations.²⁹ In this respect the notion of fairness in equity and how it may differ from how fairness is understood in administrative law is discussed, by reference to the doctrine of substantive legitimate expectation, using the seminal *Coughlan*³⁰ case as a central reference point. By analysing substantive legitimate expectation challenges the courts are drawn into an examination of substance and therefore the merits of actions taken by a local authority. Such matters cannot be understood as being purely procedural. This author acknowledges that equity does not have a monopoly on ‘fairness’ in the widest meaning of the term. Notions of fairness are clearly present in public law principles.³¹

Analysing the relationship between local authorities and their service users is a valuable exercise because it emphasises the importance of understanding the constitutional position of a local authority. As a democratic institution, with its own regulatory space fixed largely within its locality, a local authority must be cognisant of the wider public interest, as part of the ‘other regarding’ consideration when making discretionary decisions; but, as a creature of statute, a local authority must abide by the terms of its statutory authority and, in this respect, it is understandable that notions of fairness in public law are somewhat inhibited. Notions of the ‘public interest’ and potential tensions between the need to further the public interest and thus fulfil ‘fiduciary’ duties are therefore explored.

²⁹ Paul Finn, *Fiduciary Obligations* (Law Book Company 1977) p. 6, states: ‘This is particularly true of equitable doctrines, such as fiduciary duty, which are more flexible and wide ranging in their application than their common law counterparts.’

³⁰ *R v North East Devon Health Authority* [2001] QB 213, This case is discussed in detail in chapter seven of this thesis

³¹ For example, applications of natural justice: there is a duty on local authorities to act fairly and not abuse their powers

The altruistic and utilitarian nature of fiduciary doctrine will be explored by examining the moralistic bias of fiduciary obligations. Two opposing schools of thought will be examined: the traditional approach which attributes a prophylactic quality to fiduciary relationships, and the other school of thought, known as contractarian that attributes no moral impetus to fiduciary obligations viewing it as simply a contractual term. Where judges apply the traditional approach, court judgments contain high moral rhetoric based on the notion that fiduciary duty is a default mechanism that exists to prevent opportunism by the fiduciary. In this way, it can be regarded as very sterile and negative with no other function than as a deterrent, described by one academic as a ‘sledgehammer.’³² A doctrine of ‘perfectability’ may be a better descriptor, since it proceeds on the basis that it is possible for self to be negated in all conflicted situations; allowing no bias tendency, other than that directed towards the total interests of the beneficiary, who has entrusted their property and interests to the fiduciary. Liability of the fiduciary is strict and no pleaded excuse—either that no harm came to the beneficiary or that a profit ensued for the beneficiary from the conflicted transaction is accepted by the courts. The court’s focus is entirely on the opportunistic conduct of the fiduciary. This protective societal overlay of fiduciary law, understandable from its early origins of action of conscience and the influence of clerics in Chancery, does however have its critics.

The second school of thought considers that the fiduciary concept has no moral impetus and is simply a contractual term, with no more significance than other terms. The concept can thus be amended or deleted by the autonomous will of the contracting parties.

³² Remus D Valsan, ‘Understanding Fiduciary Duties: Conflict of Interest and Proper Exercise of Judgment in Private Law’ (PhD thesis, McGill University 2012) 9

1.3 Methodology

This thesis considers the above issues using a mixed methodology of traditional doctrinal analysis, historical, and philosophical approaches, and case studies.

1.3.1. Doctrinal Analysis:

Throughout this thesis, the author has used a combination of research methods. First, this thesis engages traditional ‘black letter’ methodology,³³ which takes its name from the tendency of legalistic approaches to concentrate solely on the ‘letter of the law.’ The object of this approach will be to identify the current rules and law in relation to fiduciary obligations and to consider the extent to which such obligations could be utilised in an administrative law context.

Watkins and Burton³⁴ have criticised the black letter approach to legal analysis for a number of reasons: its focus on technicalities, its repetition of existing knowledge, and its failure to connect law to life by assessing the real world consequences of doctrinal frameworks. This thesis will, however, evaluate the potential applicability of equitable doctrines to the work of local authorities, so connecting law to life in a practical manner, considering the real world context in which local authorities operate.

Second, local authorities are subject to statutory duties and discretions in their service delivery, and service users (a body of users that includes not only residents of a locality, but also persons and groups who come to work, travel or visit the locality). An alternative methodology involving, in part, a social dimension that looks at the law in action is therefore required. This author is keen to extol the important social

³³ Mike McConville, and Wing Hong Chui, ‘*Research Methods for Law*’ (Edinburgh University Press, 2007) 4

³⁴ Dawn Watkins and Mandy Burton, ‘*Research Methods in Law*’ (Routledge 2013) 17

role that equity has to play in modern society. 'Equity is a response to human needs and aspirations'.³⁵

Third, a socio legal approach with its emphasises on the context and practice of law, as well as the impact of law, appeared best suited to the research under review, and allowed for this author's experience as a legal practitioner to inform the thesis.

The philosophical dimension of this thesis is illustrated by reference to fiduciary obligations as a default mechanism to prevent the fiduciary from being tempted to breach his position of trust and loyalty. Translating the moral duties of loyalty and trust into a command of political morality involves a philosophical approach.

1.3.2 Case Study approach

A case study methodology has been adopted. Although attempts have been made to define the term 'case study', there appears no agreed definition of what a case study is.³⁶ Different methods of filtering have been employed, circumscribing the area of research to the specific relationship of local authorities to their service users, and not including other public bodies. The case studies considered in this thesis draw on, and are confined, to the local authority as an institution and not individual officers in local government.

The case trilogy in chapter five selected itself, not only because of the involvement of local authorities and the clash of ratepayers and wider service user interests, including the public interest, but also because these cases illustrate the

³⁵ Leonard J Emmerglick, A Century of the New Equity (1944-1945) 23 Texas L R 244, 244-256

³⁶ Martyn Hammersley and Roger Gomm, '*Case Study Method*' (Sage 2009) 1

theoretical similitude of public and fiduciary obligations, enabling judicial conceptions of the fiduciary nature of public law over a fifty year time span to be examined. The fifty year period was considered sufficiently contained and long enough to avoid a too generalised approach.³⁷ The case study approach also showed that, far from being a purely theoretical construct, notions of public law as inherently fiduciary have been considered in history far back as 1898³⁸, when Lord Chief Justice Russell affirmed the non-self-seeking role of public bodies in contrasting public representative bodies, entrusted by Parliament with delegated authority, to private bodies who do not act only in the public interest.

This thesis advances knowledge in the field of fiduciary relations and public trusts through the multiple dimensions along which the research is undertaken, including its historical, philosophical and practical dimensions. The historical dimension demonstrates that the public trust doctrine has been known from antiquity, evidenced by the writings of Aristotle³⁹, Plato⁴⁰ Cicero⁴¹ to those of Thomas Hobbes⁴² and John Locke⁴³ and in the modern work of Professor Robert L Natelson.⁴⁴

³⁷ Robert E Stake, 'The Case Method Study in Social Enquiry' in Martyn Hammersley and Roger Gomm, *Case Study Method* (Sage 2009) 21

Stake points out that they 'have not yet passed the empirical and logical tests that characterise formal (scholarly, scientific) generalisations.'

³⁸ *Kruse v Johnson* [1898] 2 QB 91, 99, Kent County Council prohibited singing in any public place within 50 yards of any dwelling-houses, after being requested by an inhabitant or police officer. The appellant sought to have the by-law quashed on the grounds of unreasonableness. The validity of the by-law was upheld. Lord Russell CJ drew a distinction between by-laws made by railway and dock companies, which carry on their business for profit, and by-laws made by public representative bodies

³⁹ P D Chase (tr), *The Ethics of Aristotle* (E P Dutton & Co 1950)

⁴⁰ Plato, *The Republic* (H D P Lee (tr) 1961 (1955)

⁴¹ Marcus Tullius Cicero, *De Officiis* (Walter Miller (tr), Loeb ed 1956)

⁴² Thomas Hobbes wrote several versions of his political philosophy, including *The Elements of Law, Natural and Politics*, (also under the title *Human Nature and the De Corpore Politico* (De Cive 1642) published in English as *Philosophical Rudiments concerning Government and Society* in 1651. See further, C Finkelstein (ed), *Hobbes on Law* (Ashgate 2005).

⁴³ John Locke, *Of Civil Government* (2nd treatise 1690, Russell Kirk (intro) 1955) <<http://constitution.org/jl/2ndtreat.htm>> accessed 27 September 2016.

Natelson advocates that fiduciary obligations originated in English law in the Middle Ages when the common law dealt with many complaints against ‘feoffees’, persons who held title for the benefit of another in a proto-trust. Eventually with the heavy involvement of the early chancellors, who were a succession of clergymen, equity drew heavily on civil and canon law and took fiduciary duty under its wing. To some extent therefore public law owes its genesis to mixed foundations of both common law and equity. This grafting of principles from each body of law, adapted to its particular setting, adds to the richness of the legal system in England and Wales.⁴⁵

1.3.3 Comparative Analysis

This thesis provides a comparative analysis, where necessary to illustrate or highlight differences, as well as similarities, between approaches taken by other jurisdictions to fiduciary concepts. By ‘comparative’ the author means comparisons between different fields of doctrine within a single jurisdiction i.e. equitable and common law doctrine within English law. This comparative perspective is valuable when exploring the circumstances in which fiduciary duties arise in an administrative setting, and may help to de-mystify assumptions that the concept only has value in private civil trust and fiduciary law matters, with no quality of translation to the public law realm.

⁴⁴ Robert G Natelson, *The Government as Fiduciary: Lessons from the Reign of Emperor Trajan* (2001) 35 U Richmond L R 191. See also, Robert G Natelson, ‘The Constitution and the Public Trust’ (2004) 52 Buff L Rev 1077

⁴⁵ See further, Professor W S Holdsworth, ‘The relation of the Equity administered by the Common Law judges to the Equity administered by the Chancellor’ (1916) XXVI(1) Yale Law Journal 1-23, 2, where past evidence from the twelfth, thirteenth and early years of the fourteenth centuries that the common law courts and the courts of itinerant justices administered both law and equity is analysed to see whether ‘this early equity, administered by the common law judges, is so closely connected with the early equity administered by the chancellor, that these two periods of history can in any sense be said to be continuous.’

This thesis incorporates an extensive literature drawing on the considerable body of academic work in the USA and Commonwealth countries, such as New Zealand, Australia and Canada as well as England and Wales, including judgments and extra-judicial writings. This author adopts the approach of Paul Finn who states: ‘Looking at these jurisdictions...provides important points of comparison and contrast-as well as valuable commentaries by judges, academics, and practitioners- from which to gather further information about the fiduciary concept.’⁴⁶

The caveat by Professor Conaglen is acknowledged when he states ‘It is, therefore, important to be careful with accounts of equity which draw their sources from different jurisdictions without acknowledging the differences between those jurisdictions. That does not mean that comparative analysis of equity is futile: on the contrary there is much to be learned by looking at how equity is done in other places’⁴⁷

1.4 Thesis Overview - The structure of the thesis

This thesis comprises the present chapter and seven further chapters, the contents of which are now summarised.

Chapter Two

A major concern with any form of legal liability is the reach of its application. It is therefore critical to properly identify the types of relationships that are subject to fiduciary obligations.⁴⁸ Chapter two explores the kaleidoscope of fiduciary theories advanced by academics and judges, with a brief critique of each. The function of the

⁴⁶ Professor Paul Finn, ‘Fiduciary Obligations’, Sydney; The Law Book Company, 1977) p. 15

⁴⁷ Professor Mathew Conaglen, ‘Equity’s Role’, chapter 26 in P G Turner (ed), *Equity and Administration* (Cambridge University Press 2016) 525

⁴⁸ Robert Flannigan, ‘Access or Expectation: The Test for Fiduciary Accountability’, Canadian Bar Review, Vol. 89 (1), No.1.2010 < available at SSRN: <http://ssrn.com/abstract=1698794>.

chapter is to identify the key elements of a fiduciary relationship and to examine their value and extent to which such relational indicators may overlap.

Chapter Three

Chapter three examines the extent of fiduciary obligation, once a fiduciary relationship is established, recognising that not all of the functions of a fiduciary are fiduciary in nature. Having identified core notions of trust and loyalty in a fiduciary relationship, the concluding part of the chapter addresses these in the context of a local government framework.

Chapter Four

The question of ‘fit’ in translating a private law theory to a public law sphere is examined. Specific hurdles such as size of beneficiary class, polycentric considerations and loyalty between a diverse class of beneficiaries, with their often conflicting and complex needs and expectations are considered. The question of whether fiduciary government, in the context of service delivery by a local authority, is a false dream is addressed.⁴⁹ The chapter is structured so that all three models: private trusts, public trusts (the notion of a public trust is examined and historical reference is made to the use of the trust mechanism in toll trusts) and stewardship are explored in one chapter. This chapter considers alternative paradigms, including the implications of developing a fiduciary framework which centres the most vulnerable interests within a non-property based relationship. It advances the author’s alternative public trust model which is based on a community ethical stewardship concept.

⁴⁹ Professor Timothy Endicott suggests that fiduciary duties do not exist in public law. He states, ‘The administrative agency’s salient duty is to deal with the funds for public purposes, and the trustee’s duty to deal with the funds for the private benefit of beneficiaries.’ Timothy Endicott, *Equity and Administrative Behaviour: A Commentary*, in P G Turner (ed), ‘*Equity and Administration*’ (Cambridge University Press 2016), chapter 19, pp.367-397, p. 367

Chapter Five

Three seminal public law cases are considered. Focusing on the judicial language used; this analysis supports an examination of the relationship between local authority and their service users.

Chapter Six

This chapter considers the stewardship model advanced in chapter 4 as a better model for identification of the relationship between local authorities and their service users in the context of local authorities' use of their land disposal powers under section 123 of the Local Government Act 1972. It achieves this by reference to the way in which local authorities apply an ethic of stewardship to land disposal, and in addition judicial recognition of the concept of stewardship by local authorities as applied to interpretation of section 123 is analysed.

Chapter Seven

Chapter seven considers the equitable theme of 'conscience' in relation to notions of fairness in the context of public law adjudication and asks whether notions of fairness in equity are different from notions of fairness in public law; if so, how far equitable principles of fairness and conscience assist judicial outcomes in public law proceedings. Reference is made to procedural and to substantive fairness, but the chapter focusses on matters of substance, where a local authority has resiled from a promise made. The doctrine of substantive legitimate expectation is analysed; its characteristics and the loyalty between local authorities as executive organs of government and their local citizens is considered. The case of *R v North East Devon*

*Health Authority*⁵⁰ is used as a pivot for this analysis. The chapter considers the courts' approach pre *Coughlan*, *Coughlan* itself, and developments thereafter. The limitation of applying equitable estoppel principles in administrative law is considered. As a correlative issue, this chapter also examines whether the dominance of the public interest in public law jurisprudence stunts the roving commission of equity.

Chapter Eight

The conclusion to this thesis summarises the contributions and the value of the thesis to academic literature in the field of fiduciary and administrative law, with particular reference to the relational status and discretionary decision making activity of local authorities with and for their service users. The thesis concludes by suggesting further fruitful areas of research.

1.5 Limitations of the research

This thesis does not analyse remedies specific to breach of fiduciary duties, such as disgorgement of profits, or their potential application in the public law sphere. Nor does it deal with the release of fiduciary duties.⁵¹

While this thesis focusses mainly on English law cases and articles, it does for sake of completeness make reference to academic studies and case law in the USA and in the Commonwealth jurisdictions of New Zealand, Australia and Canada. It does so, for example, by reference to Canadian law to highlight the Canadian courts'

⁵⁰ *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213

⁵¹ See Professor Tamar Frankel, '*Fiduciary Law*', (2011), Oxford University Press, p197
See also, John H Langbein, 'Mandatory Rules in the Law of Trusts' (2004) 98 NWU L Rev 1105, 1122-23

progressive approach to the expansion of the fiduciary doctrine to protect non-economic interests.

CHAPTER TWO

The Theoretical Underpinnings of the Fiduciary Doctrine

2.1 INTRODUCTION

This chapter explains the theoretical underpinnings of the fiduciary doctrine and the main fiduciary theories advanced by academics and the judiciary. A central aim of this thesis is to explore whether the relationship between local authorities and their service users can be understood as a fiduciary relationship, so imposing correlative fiduciary duties on a local authority. To do this, a theoretical appreciation of the nature of the fiduciary relationship is needed. This and the following chapter present a general overview of fiduciary relationships-their nature and rationale-before explaining the key relational characteristics used by the courts to determine whether a fiduciary relationship exists. This approach will aid an examination in chapter 3 of the content and scope of fiduciary duties.

This author's central thesis investigates the relationship between local authorities and their service users, and examines whether the label 'fiduciary' fits that relationship or whether it falls within another classification, such as a hybrid form of quasi-trust or within its own unique classification.

It is oft-acknowledged that the fiduciary doctrine is an elusive¹ or enigmatic concept². Despite being acknowledged as a difficult animal to tame there has been a

¹ Professor D A DeMott, 'Beyond Metaphor: An Analysis of Fiduciary Obligation' (1988) 5 Duke LJ 879, 879: 'Fiduciary obligation is one of the most elusive concepts in Anglo-American law'; Professor L I Rotman, 'Fiduciary Doctrine; A Concept in Need of Understanding' (1996) 34 Alta L Rev 821, 821

² See, Professor Tamar Frankel, *Fiduciary Law* Oxford: Oxford University Press, 2011, where in her introduction she refers to the various terms used to describe this peculiar doctrine in English equity and their scholarly attribution and states:

steady increase in litigation against local authorities, incorporating claims of breach of fiduciary duty. Such claims have, however, become something of a ‘catch all’-pleaded, for example, in cases where other claims are meritless, or no other cause of action exists, or the main argument is weak and needs support. This has done the doctrine and its development no favours.³

Further, the courts have been guilty of misapplication of the doctrine by applying the descriptive label of ‘fiduciary’ to a relationship, simply to allow recourse to tracing or restitution of unauthorised profits made by a fiduciary. In doing so, the courts have resorted to labels without fully appreciating the consequences of their actions.⁴ The American jurist Oliver Wendell Holmes stated over one hundred years ago ‘it is one of the misfortunes of the law that ideas become encrusted in phrases and thereafter for a long time cease to provoke further analyses’.⁵ It is to this analysis that the chapter now turns.

The notion of fiduciary obligation is a useful tool for regulating socially valuable or necessary relationships, whether in a commercial or business setting.

‘**aberrant**’, D A DeMott, ‘Fiduciary Obligation under Intellectual Siege: Contemporary Challenges to the Duty to be Loyal’ (1992) 30 Osgoode Hall L J 471;
‘**ill-defined**’, P D Finn, *Fiduciary Obligations*, (Law Book Co 1977) 1;
‘**indefinite**’, L S Sealy, ‘Fiduciary Relationships’ [1962] Cambridge L J 69, 72;
‘**vague**’, J C Shepherd, *The Law of Fiduciaries* (Carswell 1981) 4;
‘**peripatetic**’, P D Finn, ‘The Fiduciary Principle’, in T G Youdan (ed), *Equity, Fiduciaries and Trusts* (Toronto: Carswell 1989) 1;
‘**trust-like**’, P D Maddaugh, Definition of Fiduciary Duty, in ‘*Fiduciary Duties*’, (Law Society of Upper Canada Special Lectures 1990 published De Boo 1991) 18

³ Professor Sarah Worthington, ‘Fiduciaries: When is Self-Denial Obligatory?’ (1999) 58(3) Cambridge Law Journal 500-508 states: ‘The drive for better remedies provides much of the modern impetus for a loose - and purely – instrumental - use of the fiduciary tag - the primary object in attaching a fiduciary label is often to obtain the advantages of a proprietary claim (via a constructive trust). p.500

⁴ *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch105 It has, for example, been argued that the relationship between the banks in Chase Manhattan was not a fiduciary relationship, but rather a commercial relationship involving an arms-length transaction

⁵ Ernest Weinrib, ‘The Fiduciary Obligation’, (1975) 25 University of Toronto Law Journal 1-22, 5; Oliver Wendell Holmes Jr, ‘*The Common Law*’ (Little Brown Co 1881) 1

Aspects of the ambit of the social role fiduciary obligations can play in a community service environment, where non-economic interests are involved, will be discussed in chapter six.

Fiduciary obligation has its roots in public policy, specifically society's need to protect certain types of relationships, particularly those that are deemed to be socially valuable or desirable⁶. The rationale is that relationships in which trust and confidence are reposed in one party to the relationship are deserving of greater protection.⁷ The interdependent nature of the fiduciary relationship with its emphasis on protecting the vulnerable, leads to the need for the law's protection in a wide ambit of personal and business relationships and this is where the theory of fiduciary law interacts with the practical usefulness of fiduciary principles in everyday life. Arguments are advanced that since individual beneficiaries or external factors, such as existing social mores or regulatory authorities, cannot completely eliminate the potential for those in a fiduciary position to abuse their position, equity fills the gap through fiduciary doctrine. This aspect of fiduciary law is seen by this author as equity's protective sheath.

2.2 Categorisation of the fiduciary relationship:

This section will first consider each relational characteristic of a fiduciary relationship and then consider its appropriateness to the relationship under review.

⁶ For example, use of charitable trusts or use of trusts as a mechanism to protect pension funds. It can however, be argued, depending upon one's political stance that protecting private assets by a trust mechanism is done to minimise tax liabilities, and in that sense not socially valuable

⁷ *York Buildings Co v Mackenzie* [1795] 8 Bro 42; 3 ER 432 (HL) 'The conflict of interest is the rock for shunning which, the disability under consideration has obtained its force by making that person, who has in part **entrusted** to him, incapable of acting on the other side, that he may not be seduced by temptation and opportunity from the duty of his trust.'(my emphasis)

The first question is: when will a fiduciary relationship arise? A starting point is to look at the various approaches taken to categorising the relationship, but, what do we mean when we speak of the terms, fiduciary, fiduciary office or fiduciary relationships? John Glover regards such phrases as providing suitable shorthand.⁸ Broadly classification of fiduciary relationships can be contained within three major groupings of established, diagnostic and contextual functional.

This chapter proceeds on the firm view that fiduciary relationships are not to be determined by placing an instant case into a pre-conceived category and then involving the duties thought to attach to that category.⁹ For example, the orthodox view of an employment contract is that, of itself, it does not give rise to a fiduciary relationship, but as Lord Woolf stated: ‘There is more than one category of fiduciary relationship, and the different categories possess different characteristics and attract different kinds of fiduciary obligation.’¹⁰

This author considers that the best approach to categorising a relationship as fiduciary, or not, is to carry out a meticulous examination of the facts of the case in hand.¹¹ This approach is also favoured by Professor Flannigan who states ‘It may be preferable to detach ourselves from our remaining dependence on the status ascription of fiduciary responsibility, and move to a fact based limited access test for all cases.’¹² Notwithstanding, ‘status categories are such a convenience for judges

⁸ Professor John Glover, ‘The identification of Fiduciaries’, chapter 8 in Peter Birks (ed), ‘*Privacy and Loyalty*’, (Clarendon Press 1997) 269

⁹ See statement by Professor Tamar Frankel: ‘Courts currently examine existing prototypes, such as agency, trust and bailment that are defined as fiduciary. Then, the courts create rules for new fiduciary relations by drawing analogies with those prototypes. I maintain that such a method of developing fiduciary law is unsatisfactory.’ Tamar Frankel, ‘Fiduciary Law’ (1983) 71 Calif L Rev 775, 799

¹⁰ *Attorney-General v Blake* [1998] Ch 439

¹¹ *Cook v Evatt* [1992] (No: 2) NZLR 676. (Fisher J)

¹² Professor Robert Flannigan, ‘The Boundaries of Fiduciary Accountability’ (2004), New Zealand Law Review 215

(and the rest of us), it is unlikely that they will be discarded easily. Status accountability, and analogy to it, currently dominate the field.’¹³

2.2.1 Established or ‘per se’ or status categories

This category consists of traditional relationships, such as guardian and ward, trustee and beneficiary, solicitor and client. There is little judicial or academic argument as to the acknowledged fiduciary status of these relationships, although the relationships identified as having fiduciary status differ according to jurisdiction and jurists. For example, Robert Flannigan advances a more exhaustive list,¹⁴ whereas, Ernest Weinrib a more restricted one¹⁵, limiting the category of established fiduciary relationships to trustee /beneficiary and corporate directors and their corporation. Paul. B. Miller provides a useful overview.¹⁶

2.2.2 Diagnostic Category

This approach concentrates on examining the relationship between the parties and does not merely rely on established categorisation. Fiduciary relationships exhibit similar characteristics, such as power imbalance and vulnerability, which stem from a

¹³ *ibid*, note 33, p.229

¹⁴ Robert Flannigan, ‘Justifying Fiduciary Duties’ (2013) 56(2) McGill L J 971, where he states, ‘fiduciary duties are critical to the integrity of a remarkably wide variety of relationships and institutions. Lawyers, doctors, investment advisers, and other professionals are fiduciaries of their clients. Trustees, executors, and agents are fiduciaries of their beneficiaries, testators. Directors, officers, and trustees of corporations, hospitals, universities and charities are fiduciaries of the legal entities under their charge. Parents and guardians are fiduciaries of their children and wards.’

¹⁵ Professor E Weinrib’s view was that a fiduciary relationship was only appropriate or desirable in certain circumstances where there was a separation of ownership and control. He states, ‘The fiduciary duty of unselfishness is appropriate only for a limited class of agency relationships in which the principal delegates open-ended powers to the agent, and not for those who exercise lesser power over the property of others, including co-investors, advisers, professionals, and those in confidential relationships.’ E Weinrib, ‘Fencing Fiduciary Duties’ (2011), 91 Boston University Law Review, 899-920, 899

¹⁶ Professor Paul B Miller, ‘The Fiduciary Relationship’ chapter 3 in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law*, (Oxford: Oxford University Press 2014)

voluntary transference of discretionary power from the beneficiary to the fiduciary. This approach obviously has its defects, since it is acknowledged that the search for a single unifying test is difficult; while of apparent practical use, on closer examination this categorisation may be considered to merely offer a group of overlapping indicia which may detract from its value as a diagnostic tool, especially in novel cases.

2.2.3 Contextual Functional category

This categorisation considers that fiduciary obligations perform a social public policy function on a number of levels: societal and personal. This supports the analysis of Professor Paul Finn, who argues¹⁷ that fiduciary principles operate in, and as an instrument of, public policy. Professor Tamar Frankel considers that fiduciary duties are imposed when public policy encourages specialisation in particular services, for example, in relation to specialisation in the provision of financial services. This author supports a functional approach and agrees with Professor Leonard I. Rotman when he states ‘using a functional approach to understanding fiduciary doctrine differs significantly from category-based modes of analysis. It provides a sound theoretical basis for the imposition of fiduciary principles rather than resorting to a list of relationships previously described as fiduciary on some level.’¹⁸

Professor Frankel’s terminology is that of ‘entrustor’ and fiduciary and she argues that the role of the law is to facilitate entrustors to enter fiduciary relationships by reducing their risk and the costs of preventing an abuse of ‘entrusted power’, and ensuring that quality fiduciary services are provided. Judicial enforcement of fiduciary duties and obligations shifts the entrustor’s costs of specifying and

¹⁷ Paul Finn, ‘The Fiduciary Principle’ in T G Youdan (ed) *Equity, Fiduciary and Trusts* (Toronto: Carswell 1989) 26-27

¹⁸ Leonard I Rotman, ‘Fiduciary Doctrine: A Concept In Need of Understanding’ (1996) 34(4) *Alberta Law Review*, pp. 821-852

monitoring the fiduciary's functions and actions to the taxpayer. By imposing fiduciary duties and obligations, the law limits the freedom of fiduciaries, but Frankel considers this to have a positive effect, because it increases a fiduciary's marketability by endowing fiduciaries with a reputation for honesty backed by regulation.¹⁹ This author understands the cost and risk aspects, but the marketability benefits only appear to exist if people are genuinely better able (or willing) to entrust others when they know that there is some form of protection or guarantee, whether by the courts, such as strict liability for breach of fiduciary duty or action taken by a fiduciary's own professional organisation²⁰ should their trust be abused.

In considering the functional approach, Leonard Rotman states 'An advantage of this approach is that acknowledging an underlying purpose for the imposition of fiduciary obligations promotes the flexible development of fiduciary law within a contextual framework'.²¹ Moulding fiduciary obligations to the individual circumstances of each case enables a consistent approach to be taken in a range of situations where non-economic interests, as well as economic interests, are present. For example, in counselling relationships there is a heightened sense of non-economic vulnerability, where an individual's dignity may suffer emotional, sexual or psychological harm. The extension of fiduciary duties to cover non-economic

¹⁹ Professor Tamar Frankel, definition of 'fiduciary duties' in *The New Palgrave Dictionary of Economics and the Law* (Vol 2 Palgrave XXXX) 128

²⁰ For example the Solicitors Regulation Authority will be available for claims against solicitors for breach of a fiduciary duty and conflicted behaviour. Further see, the Law Society, *Fiduciary Roles and retirement or departure from practice by a private client practitioner* (Practice Note 14 March 2016) < <http://www.lawsociety.org.uk/support-services/advice/practice-notes/fiduciary-roles-and-retirement-or-departure-from-practice-by-a-private-client-practitioner/>> accessed 27 September 2016. This author believes that such professional bodies, such as the Law Society, General Medical Council and Chartered Institute of Accountants can have a significant role in promoting and policing a fiduciary ethic amongst their members.

²¹ Professor Leonard I Rotman, 'Fiduciary Doctrine: A Concept in Need of Understanding' (1996) 34 *Alberta Law Review* 832. See further, section III 'Implementing the Functional Approach' pp.832-834

interests is supported by the work of Professor Richard Joyce,²² who argues that the question of whether fiduciary law can cover non-economic interests should be separated from the debate on the proscriptive/prescriptive models of fiduciary law. This is an important aspect in relation to the counselling services provided by local authorities, and will be covered in chapter three when the nature and scope of fiduciary duties are examined.

2.2.4. Summary:

Juridical examination tended to focus on whether the relationship under scrutiny belonged to an established list of relationships that were understood to be fiduciary in nature, such as trustee and beneficiary, guardian and ward. Because of this restricted approach, the nature of the particular relationship or the interaction of the parties involved became of secondary concern; accordingly no established guidelines existed for determining what could constitute a fiduciary relationship.²³ This conclusion is confirmed by academics, such as Professor Eileen Gillese, who states:

In times gone by we really were not troubled by the absence of a coherent definition. When pushed to answer the question of who a fiduciary is, we simply rattled off the standard categories of fiduciaries: trustee-beneficiary, agent-principal; director-company; guardian-ward and solicitor-client. The traditional approach was that although we could not define ‘the beast’ we could recognise one when we saw it so lack of definition was not a problem²⁴

It may be that fiduciary liability is entirely fact-based and that, to quote Flannigan, ‘status fiduciary liability is over-inclusive and should be cast from the

²² Richard Joyce, ‘Fiduciary Law and Non-economic Interests’ (2002) 28(2) Monash University Law Review, 239-267

Joyce focusses on the different approaches in the Canadian and Australian Courts to protection of fiduciary non-economic interests and in part II considers the question of relationship impacts on the types of interests that may be protected by fiduciary law

²³ Tamar Frankel, ‘Fiduciary Law’ (1983) 71 Calif L Rev 775, p.825

²⁴ Eileen Gillese, ‘Fiduciary Relations and their Impact on Business and Commerce’ (Insight Conference on Trusts and Fiduciary Relations in Commercial Transactions, 14th April 1988)

jurisprudence.’ In the context of this thesis, however, this author comes with no fixed view as to the categorisation of the relationship between local authorities and their service users. In a similar vein, Professor Leonard Rotman states:

The most vital aspect of fiduciary doctrine, and what ought to receive the bulk of juridical attention, is its focus upon the specific characteristics of individual relationships. Its own *milieu*, the basis of judicial theory is quite general and deliberately so ²⁵ (original emphasis)

This author’s opinion is that a more theoretical basis for such a socially valuable doctrine is needed, and the author therefore advances a situation specific approach coupled with acceptance that, if categorisation is used, then such categorisation is not treated as closed, but remains open ended. These two aspects will be discussed in further detail.

2.3. THEORETICAL FEATURES OF THE FIDUCIARY RELATIONSHIP

2.3.1 Situation – Specific Approach

The theoretical basis of this approach is that the fiduciary nature of a relationship arises from circumstances peculiar to that relationship and to the interaction of the parties, and not merely because the relationship belongs to an already established fiduciary category. La Forest J made a similar observation, and stated: ‘The imposition of fiduciary obligations is not limited to those relationships in which a presumption of such an obligation arises. Rather, a fiduciary obligation can arise as a matter of fact out of the specific circumstances of a relationship.’ ²⁶

²⁵ Leonard I Rotman, ‘Fiduciary Doctrine: A Concept in Need of Understanding’ (1996) 34(4) Alberta Law Review 821, 829

²⁶ *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 61 DLR (486)

This demands a case by case examination of all the facts to determine whether a fiduciary relationship exists. Further, the functional approach leads to an open-ended categorisation: in other words, that the categories of relationships which may be described as fiduciary should be viewed as ‘open-ended’.

This author supports Professor DeMott’s approach that ‘fiduciary principles cannot be properly implemented unless they are first understood in a general fashion and then given contextual application through their adaption to individual relationships.’²⁷ Because of its implementation on a case-by-case basis, the fiduciary doctrine is most appropriately described as situation-specific; context is all important. What this means is that a fiduciary relationship, with its concurrent duties and obligations, will not be imposed unless there is regard for the context within which it is to operate. For these reasons, any attempt to create a taxonomic definition of fiduciary relations in the absence of context is impossible or at very least, unwise.

The situation-specific approach stresses that the fiduciary doctrine cannot be boiled down into a simplified theory, capable of precise and identical application to all relationships. A ‘one cap fits all’ philosophy however, is not acceptable, because fiduciary principles are equitable in origin and a ‘one size fits all’ approach would destroy the very essence of equity: its flexibility. According to Professor Jeffrey Berryman, the methodology employed in the Courts of Equity did not distinguish between fact and law, resulting in an approach characterised as ‘pragmatic, robust and highly contextualised.’²⁸

²⁷ Deborah A DeMott, ‘Beyond Metaphor: An Analysis of Fiduciary Obligation’ (1988) 879 Duke Law Journal, 830

²⁸ Jeffrey Berryman, ‘*The Law of Equitable Remedies*’ (Irwin Law 2000) 2

DeMott argues that fiduciary obligations developed through a jurisprudence of analogy rather than principle,²⁹ insisting that ‘the law of fiduciary obligation is situation-specific’. She further argues that the characteristics of even the standard or conventional fiduciary relationship ‘are too variable to enable one to distil a single essence or property that unifies all in any analytically way.’ This author concurs with the view held by Professor DeMott that qualities, such as trust and loyalty have serious claims to unify the doctrine, and their presence in many judicial determinations provides cogent evidence that they are key elements of the fiduciary relationship.

The situation-specific approach does not rule out the existence of a fiduciary relationship between local authorities and their service users, even though the relationship may not be traditionally understood as fiduciary. The problem may lie in other problems of ‘fit’, which are discussed later in this thesis.

Fiduciary obligations have their origin in equity, with the consequence that they bear equity’s hallmarks of situation-specificity and flexibility.³⁰ Professor DeMott attributes the inability to find a comprehensive definition of a fiduciary relationship to the fiduciary concept itself, and to its genesis in equity and states: ‘moreover as equity developed to correct and supplement the common law³¹, the interstitial nature of Equity’s doctrines and functions made these doctrines and functions resistant to precise definition.’³²

²⁹ Deborah A DeMott, ‘Beyond Metaphor: An analysis of Fiduciary Obligation’ (1988) 879 Duke Law Journal 879

³⁰ *ibid*, 923: Professor Deborah A DeMott states: ‘...its continuing tie to Equity’s legacy makes it unusually context-bound as a legal obligation.’

³¹ Rene David, ‘*Major Legal Systems in the World Today*’ (3rd ed, Stevens & Sons 1985) 342

³² *ibid*, 881

2.3.2 THE CATEGORICAL OPEN-ENDED APPROACH

The open-ended nature of the fiduciary doctrine holds that no relationship should be precluded from being classified as fiduciary, simply because it does not fit into an established class of fiduciary relationships. As Professor Tamar Frankel states, ‘this area of law has existed for centuries *because* it is open ended’.³³

The open-endedness of fiduciary categorisation is well recognised in Canadian jurisprudence³⁴ and in English authorities such as *Tate v Williamson*, in which the court determined that the relationship between an impecunious intestate young man and a cousin was fiduciary in nature. Lord Chelmsford L C said:

The jurisdiction exercised by Courts of equity over the dealings of persons standing in certain fiduciary relations has always been regarded as one of a most salutary description. The principles applicable to the more familiar relations of this character have been long settled by many well-known decisions, but the Courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise. Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage³⁵

Cases such as *Tate v Williamson*³⁶ although 150 years old, still assist to illustrate equity’s approach, as do judicial statements in the earlier case of *Billage v Southee*.³⁷ *Billage* involved the setting aside of a promissory note obtained by a doctor from his poor patient in respect of excessive fees. This case is important, not

³³ Professor Tamar Frankel, ‘Fiduciary Law in the Twenty-First Century’, (2011) 91, BULR 1290

³⁴ Professor Deborah DeMott, ‘Breach of Fiduciary Duty; On Justifiable Expectations of Loyalty and their Consequences’ (2006) 48 Arizona Law Rev 925, 934-935
See also, *Laskin v Bache & Co Inc* [1971] 23 DLR (3rd) 385, 392 (Arnup J): ‘In my opinion, the category of cases in which fiduciary duty and obligations arise from the circumstances of the case and the relationship of the parties *is no more ‘closed’ than the categories of negligence at common law.*’ (Emphasis added).

³⁵ *Tate v Williamson* [1866] 2 L R Ch App 55 (Ch) 60-61

³⁶ *Tate v Williamson* [1866] 2 L R Ch App 55 (Ch) 60-61

³⁷ [1852] 9 Hare 534; 68 ER 623

because of its factual content nor because the parties fell within an accepted category of fiduciary relationship (doctor and patient), but because of the way in which Sir G J Turner VC cogently expressed the role of a Court of Equity in dealing with such matters. He said:³⁸

no part of the jurisdiction of the Court is more useful than that which it exercises in watching and controlling transactions between persons standing in a relation of confidence to each other; and in my opinion this part of the jurisdiction of the Court cannot be too freely applied, either as to the persons between whom, or the circumstances in which, it is applied. The jurisdiction is founded on the principle of correcting abuses of confidence, and I shall have no hesitation in saying it ought to be applied, *whatever the nature of the confidence reposed or the relation of the parties between whom it has subsisted*. I take this principle to be one of universal application, and the cases in which the jurisdiction has been exercised—those of trustees and *cestui que trust*, guardian and ward, attorney and client, surgeon and patient—to be *merely instances of the application of the principle* (Emphasis added)

This statement is very important, not only because it endorses the fact that the categories of fiduciary relationship are not closed, but also because it emphasises the way in which a Court of Equity sees its core role in such matters: as one of preventing abuse of confidence.

As Professor Henry E. Smith states: ‘Like equity generally, fiduciary law features a constrained residuum of open-endedness to deal with the new and creative ways of being opportunistic, but, as with equity as a safety valve, this open-endedness in fiduciary law is limited. It is in personam, here in the sense of only targeting those who have taken on certain duties known to have this quality, as well as certain other actors in very special situations, like parents.’³⁹

It is argued that a relationship is fiduciary because of its actual (rather than presumed) characteristics. It is the facts of the case that drive the analysis, rather than status or established categories of fiduciary relationships. It is, of course, the need to

³⁸ *ibid*, 541

³⁹ Professor Henry E Smith, ‘Why Fiduciary Law is Equitable’, chapter 18 in Andrew S Gold and Paul B Miller (eds) ‘*Philosophical Foundations of Fiduciary Law*’ (Oxford: Oxford University Press 2014)

settle on how to establish a fiduciary relationship that causes difference of opinion. Commonly cited characteristics, however, include loyalty, trust, power, vulnerability, inequality and confidence. To that extent, fiduciary liability is formally structured, even if we cannot fully define the formal properties of the kind of relationship on which fiduciary obligations are built.

Professor E. J. Weinrib⁴⁰ states that:

The existence of a list of nominate relations dulls the mind's sensitivity to the purposes for which the list has evolved and tempts the court to regard the list as exhaustive and to refuse admittance to new relations which have been created as a matter of business exigency.

As Sachs J observed in *Lloyds Bank Limited v Bundy*⁴¹, fiduciary relationships 'tend to arise when someone relies on the guidance or advice of another, where the other is aware of that reliance and where the person upon whom reliance is placed obtains, or may well obtain, a benefit from the transaction or has some other interest in it being concluded.'⁴²

It may be concluded that established heads of fiduciary relationships are not exhaustive. As stated by Dickson CJ in *Guerin v R*:⁴³ 'It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director and the like. I do not agree. It is the *nature of the relationship*, not the specific category of actor involved that gives rise to the fiduciary duty.'⁴⁴ (Emphasis added)

There must, however, be a word of warning. Not every example of a relationship of trust or confidence creates a fiduciary relationship. Fletcher-Moulton

⁴⁰ Professor E J Weinrib, 'The Fiduciary Obligation' (1975) 25 UTLJ 1, p.5

⁴¹ [1975] 1 QB 326 (CA) 341

⁴² *ibid*, 341

⁴³ *Guerin v R* [1984] 13 DLR 4th, 321 (SCC)

⁴⁴ *ibid*, 341, the open-endedness of fiduciary categorisation is well recognised in Canadian jurisprudence.

L J in *Re Coomber*⁴⁵ pointed out ‘that fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where one is wholly in the hands of the other because of his infinite trust in him’. His Lordship recognised that there are levels of relationship and only some merit the label fiduciary; this is further explained by statements, such as that made by Sachs J in *Lloyds Bank v Bundy* which captures the specific nature of a fiduciary relationship:

Everything depends on the particular facts, and such a relationship has been held to exist in unusual circumstances as between purchaser and vendor, as between great uncle and adult nephew, and in other widely differing sets of circumstances. Moreover, it is neither feasible nor desirable to attempt closely to define the relationship, or its characteristics, or the demarcation line showing the exact transition point where a relationship that does not entail that duty passes into one that does...⁴⁶

Professor Weinrib, when speaking of this situation-specific quality, stated ‘the tremendous importance of this characteristic is reflected in the notion that a relationship ought to be described as fiduciary only if its nature, as well as the circumstances under which it exists, warrants its classification as fiduciary.’⁴⁷

2.3.3 A Functionalist Approach

A functional approach to understanding fiduciary relationships differs significantly from category-based modes of analysis. This approach provides a sound theoretical basis for the imposition of fiduciary principles, rather than resorting to a list of relationships previously described as fiduciary on some level. Using a functional

⁴⁵ *Re Coomber* [1911] 1 Ch 723 728-9 Whilst this is an undue influence case Fletcher-Moulton LJ did make reference to fiduciary relationships and his observations, whilst obiter, are valuable in that context

⁴⁶ *Lloyds Bank v Bundy* [1975] 1 QB 326 (CA) (Sachs J)

⁴⁷ Professor E J Weinrib, ‘The Fiduciary Obligation’ (1975) 25 UTLJ 1, 829

approach provides solid guidelines for determining the application of fiduciary principles to specific relationships, as well as parameters for the application of fiduciary principles to relationships at large. This assists us in translating fiduciary principles to a public law setting. Fiduciary law has its origins in considerations of public policy,⁴⁸ and its social purpose is to prevent opportunism and exploitation in situations where a person has entrusted property or interests to another.⁴⁹

It must be understood, however, that parties to a relationship may have a duality of roles and while aspects of the relationship might be properly described as fiduciary for some purposes, this designation may not be appropriate for other aspects; aspects within a relationship may well combine obligations of a fiduciary nature and obligations of a non-fiduciary nature.

2.4 Misapplication of Fiduciary Doctrine

There are, of course, valid reasons to limit the categorisation of fiduciary relationships, not least because of certainty under the rule of law, but also on remedial grounds, where the penalties imposed on fiduciaries for breach of fiduciary duty are onerous. Applications of fiduciary 'loyalty' should not be haphazard, but rather should be corralled under a functional umbrella; they should be based upon a careful consideration of the particulars of the relationship at hand and imposed only where necessary, not simply where their application would provide a convenient resolution to a problematic solution. The court's inability to use the principle of unjust enrichment resulted in the artificial creation of a fiduciary relationship in order to

⁴⁸ Professor P D Finn, 'The Fiduciary Principle' in T G Youdan (ed) *'Fiduciaries and Trusts'* (Toronto: Carswell 1989) 2

⁴⁹ See *Welles v Middleton* [1784] 1 Cox 112, 124-125; 29 ER 1086, where the fiduciary status was justified by Thurlow LC as 'necessary for the preservation of mankind.'

provide a remedy. This is illustrated by *Sinclair v Brougham*.⁵⁰ The basis of the court's finding was explained by necessity rather than by the actual existence of a true fiduciary relationship. Perhaps the prime example of judicial creation of a fiduciary relationship in an attempt to right an obvious wrong occurred in the case of *Reading v Attorney-General*.⁵¹ In this case, an army sergeant used his service uniform to enable use of lorries smuggling spirits and drugs to pass through army checkpoints. The House of Lords held that the sergeant was a fiduciary and therefore had to account to the Crown for monies received from the smugglers. Yet Sergeant Reading was not given the mandate or empowered to act in such a dishonest way: he would have had a duty to act with fidelity to his employers, but could not be considered a fiduciary in the traditional sense.

Misapplication of the fiduciary doctrine is relevant because its effect is to undermine the search for a coherent classification of what relationships are fiduciary. Professor Rotman identifies this as a results orientated approach and, referring to the *Chase Manhattan* case, states 'Goulding found a fiduciary relationship to exist merely to substantiate his imposition of a constructive trust. The problem with this

⁵⁰ [1914] A.C. 398

⁵¹ [1951] A.C. 507 (HL) In the Court of Appeal [1949] 2 KB 232, 236, Asquith LJ summarised the characteristics of a fiduciary relationship as follows 'a fiduciary relationship exists (a) whenever the plaintiff entrusts to the defendant property ... and relies on the defendant to deal with such property for the benefit of the plaintiff or purposes authorised by him, and not otherwise, and (b) whenever the plaintiff entrusts to the defendant a job to be performed and relies on the defendant to procure the best terms available...'

It is interesting to note that there is reference to characteristics we shall identify shortly, of entrustment, property, reliance and trust, but not voluntary assumption of the fiduciary role, which was of course something not taken upon by Reading.

This decision has received much academic criticism. Paul Finn criticised the finding of a fiduciary relationship on the basis that someone holding public office would be better regulated by public law at 215; Professor Gareth Jones, 'Unjust Enrichment and the Fiduciary's Duty of Loyalty' (1968) 84 Law Quarterly Review has argued that it was unnecessary to impose the fiction of a fiduciary relationship in *Reading* in order to achieve the remedy of account of profits and considers the case better understood as one of unjust enrichment: p.472.

practice is that it uses fiduciary principles where the indicia of a fiduciary relationship are absent.⁵²

2.5 FIDUCIARY THEORIES

2.5.1 Overview

It is now necessary to examine a range of doctrinal theories advanced in respect of fiduciary relationships and obligations. The purpose is to see whether it is possible to identify an appropriate theory and indicators of ‘fiduciariness’, which would allow the elusive animal of fiduciary relationships to be defined, but not caged. The essence of the theories is recognition of the ethic of altruism over individualism, where self-interest is negated in favour of the interests and welfare of others. Altruism has its roots in culture, religion and ethics and enjoins us to make sacrifices for others on a personal, collective or political stage. Major issues raise their heads when considering the extent of loyalty and obligations owed by local authorities to their service users, and whether it is possible to conceptualise such matters within fiduciary doctrine.

The derivation of the word fiduciary may help us.⁵³ The traditional definition of fiduciary is derived from Latin; the words ‘fiducia’, which means trust like and reliance, and ‘fiduciarus’, which roughly translates as entrusting or giving something to someone in trust. Importantly these two words are derivations of the verb ‘fido’ which means ‘to trust’. There has always been a close association of fiduciary duty

⁵² Leonard I Rotman, ‘Fiduciary Law’s “Holy Grail”’ (2011) 91 Boston University Law Review 921, 929 - reference is to Goulding J.

⁵³ Professor Len S Sealy, ‘Some Principles of Fiduciary Obligation’, (1963) Cambridge Law Journal 119. He considered the term ‘Fiduciary’ of limited use and not definitive of single classes of relationship to which fixed sets of rules and principles apply, 73

with virtues of trust and trust like obligations⁵⁴ and reliance on such moral virtues. Indeed, in *Bristol & West Building Society v Mothewe*, the virtues of trust and loyalty were explicitly referenced by Millett LJ: ‘A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter on circumstances which give rise to a *relationship of trust and confidence*. *The distinguishing obligation of a fiduciary is loyalty* (Emphasis added)⁵⁵

The primary methods of determining the existence of a fiduciary relationship are reasoning by analogy and reasoning from key relational indicators. This chapter will consider the key relational indicators that may lead to a conclusion that a fiduciary relationship is triggered between the parties.

The main theories that will be explored in this chapter are those of entrustment, contract, power and vulnerability; in addition, a few subsidiary theories (which are more descriptive and illustrative of elements found in judicial reasoning, such as reliance and inequality) will be considered. Examining such relational indicators will show how the undoubted similarity of purpose in some theories overlaps with other theories in the relationship under review. For example, over-reliance, may lead to power dependency, which in turn leads to vulnerability on the part of one party to the relationship. It is necessary to state that fiduciary relationships are notoriously difficult to pin down: they are elusive. Some commentators have attempted to define them through taxonomy. Others argue that a

⁵⁴ See E Coles, ‘*An English Dictionary*’ (1677) describes a ‘Fiduciary’ as ‘...trusty, also a feoffee in a trust’, whereas to ‘fiduciate’ is to ‘commit a trust, or make condition of trust

⁵⁵ [1998] Ch 1, 18 (Millett LJ)

fiduciary relationship cannot be encapsulated, but may be rendered specific by class reference.⁵⁶

Fiduciary doctrine is seen by some commentators as a bundle of unrelated principles which have been improperly grouped together for the sake of convenience of jurisprudential inequality theory.^{57 58} One reason for the vagueness of the fiduciary concept is that any attempt to contain the ephemeral and shifting notions of loyalty, good faith and trust is difficult, because of the variety of relationships to which a fiduciary label might be attached. Lastly, there are, commentators, including Professor Rotman and this author, who consider that the fiduciary doctrine cannot be understood in the absence of context. This is because the word ‘trust’ implies other qualities and virtues, such as utmost good faith, candour, fidelity and integrity. These stem from the core dynamics of a fiduciary relationship, whereby one party (the principal) places trust in the other (the fiduciary) that their interests are paramount. Professor Frankel does not use the terms ‘agent’ and ‘principal’ (with their association to a purely contractual economic business relationship), nor does she use the terms ‘trustee’ and ‘beneficiary’. Instead, she prefers to use the terms ‘entrustor’ and ‘entrusted’. The label we use may, of course, emphasise our own point of view. Professor Frankel’s terminology emphasises her view, that entrustment is essential in any fiduciary relationship.

⁵⁶ See, S M Beck, ‘The Quickening of Fiduciary Obligation: *Canadian Aero Services v O’Malley*’ (1975) 53 Can Bar Rev 771

The reader will be aware that within this thesis the author looks at the parallel paths of fiduciary doctrine and the local authority service user relationship in the United Kingdom, in an attempt to awaken debate of fiduciary obligation in the context of public law and more specifically the local government sphere

⁵⁷ Professor P D Finn, ‘The Fiduciary Principle’ in T G Youdan (ed) ‘*Fiduciaries and Trusts*’ (Toronto: Carswell 1989) 2

⁵⁸ Professor Len S Sealy, ‘Fiduciary Relationships’, (1962) Cambridge L J 69

Theories may be organised into a number of theoretical categories, which will now be analysed. In the context of this thesis, the categories should be treated as a broad classification providing different points of emphasis as to when a particular relationship might be described as fiduciary.

2.5.2. Voluntary Assumption theory

This theory can usefully be classified as centring on the importance of the fiduciary undertaking itself. Its focus is on the fiduciary, not the beneficiary. Professor Austin W. Scott, a leading exponent of fiduciary law, commenced an article on fiduciary principles⁵⁹ with reference to the stewardship principle, as represented by the parable of the unfaithful steward in St Luke's Gospel chapter 16: 1-8. In this parable, the steward was accused of manipulating his position to curry favour with his master's debtors, and to the detriment of his master's financial interests. Scott stressed the voluntary nature of a fiduciary relationship, where the fiduciary is aware of the risks of office, yet voluntarily undertakes to carry out a role in which self is to be negated in favour of the principal. Scott considered it immaterial that the undertaking was in contractual form or otherwise, remunerated or unpaid. The essence of this theory can be summed up by justifying the imposition of fiduciary obligation and all it entails through the fiduciary's voluntary assumption of the role. Professor Finn, however, disagrees with this voluntary assumption approach and states that: 'A fiduciary relationship, ultimately, is an imposed not an accepted one. If one needs an analogy here, one is closer to tort law than contract; one is concerned with an imposed standard of behaviour.'⁶⁰

⁵⁹ Professor Austin W Scott, 'The Fiduciary Principle' (1949) 37(4), Article 1, California Law Review, pp.539-555

⁶⁰ Professor Paul Finn, The Fiduciary Principle in T G Youdan (ed) '*Equity, Fiduciaries and Trusts*' (Carswell 1989) 54.

At the heart of fiduciary relationships lies an undertaking by the fiduciary to perform the mandate given to him by the principal. It signifies that fiduciary obligation is triggered voluntarily. The law will only impose a fiduciary duty on those who have expressly or impliedly undertaken to act for, or on behalf of, another to the exclusion of other interests, including their own. The person labelled the ‘fiduciary’, therefore, goes into the relationship with his eyes open as to what is expected of him and what the strict remedial consequences will be should he breach his fiduciary duties.

James Edelman, Justice of the Supreme Court of Western Australia recently reviewed ⁶¹the necessity for an undertaking in fiduciary law. He focuses on Australian law⁶², but the voluntary assumption approach is also evident in Canadian⁶³ and English case law.⁶⁴ Edelman’s argument is that although not all undertakings involve fiduciary duties, a fiduciary duty will not be imposed upon a person without an undertaking. He states ‘at the heart of the fiduciary duty lies an undertaking.’⁶⁵ An

⁶¹ Justice James Edelman, ‘The Importance of the Fiduciary Undertaking’ (Conference on fiduciary law, University of New South Wales 22nd March 2013).

See further James Edelman, When do fiduciary duties arise? *Law Quarterly Review* 2010

⁶² *Hospital Products v USSC* [1984] 156 CLR 41, 96-97 (Mason J): ‘The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense.’

⁶³ See *Pilmer v The Duke Group (in liq)* [2001] 207 CLR 165. The joint judgment of McHugh, Gummow, Hayne and Callinan JJ: ‘it is the pledge (undertaking) by one party to the other which makes fiduciary relationships distinct from other relationships.’

⁶⁴ See critical analysis of the ‘undertaking test’ and the decisions of the English courts in *Yukong Line v Rendsburg Investments Corp* [2001] 2 Lloyd’s Rep 113, *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) and *Vivendi SA v Richards* [2013] EWHC 3006 (Ch); Colin R Moore, ‘Obligations in the Shade: The Application of Fiduciary Directors’ Duties to Shadow Directors’ SLS Conference, Nottingham 2014 (c.r.moore@kent.ac.uk). The author examines the scope of shadow directors and whether the application of general equitable principles results in shadow directors owing fiduciary duties to the relevant company. See further, *Bristol & West Building Society v Mothew* [1998] Ch 1, 271 (Millett LJ) and *White v James* [1995] 2 AC 206 (HL) 271

⁶⁵ Justice James Edelman, ‘The Importance of the Fiduciary Undertaking’ (Conference on fiduciary law, University of New South Wales 22nd March 2013)

undertaking is clearly a necessary component of the fiduciary relationship, but is not constitutive of one. Edelman considers that it is the construction of the undertaking that determines the scope and extent of the fiduciary duty.⁶⁶ He clearly sees the undertaking as an essential component of a fiduciary relationship, and one which shapes the content of that duty. Construing the undertaking is therefore of utmost importance. A fiduciary relationship may be founded on a contract and, if so, the contractual undertaking is determinative. This approach is clear in a number of cases, including *Henderson v Merrett Syndicates Ltd*, where Lord Browne-Wilkinson⁶⁷ said that if a contract exists between the parties, the extent and nature of the fiduciary duties inter se are determined by reference to that contract.⁶⁸

Justice Edelman, however, points out that the ‘need to construe fiduciary undertakings in order to determine the content of fiduciary duty is not confined to undertakings which arise in a contractual context.’⁶⁹ This assumption of responsibility may occur outside of a purely contractual nexus, for example in a trust instrument: Buss J A said in *Elovalis*, ‘where a fiduciary relationship arises out of a

⁶⁶ Justice James Edelman, ‘The Importance of the Fiduciary Undertaking’ (Conference on fiduciary law, University of New South Wales, 22nd March 2013) p1

⁶⁷ *Henderson v Merrett Syndicates Ltd* [1994] UKHL 5; 1995 2 AC 145, 206 (Lord Keith, Lord Goff, Lord Browne-Wilkinson, Lord Mustill and Lord Nolan) This case involved a claim by underwriting members at Lloyds (‘Names’) against their managing agents in an attempt to recoup heavy losses they had suffered (for the period 1979-1985) due to catastrophic events, mainly in the USA, which had led to unprecedented insurance claims.

⁶⁸ *ibid*, 543-544 (Lord Goff): ‘The extent and nature of the fiduciary duty owed in any particular case, falls to be determined by reference to any underlying contractual relationship between the parties. The existence of a contract does not exclude the co-existence of concurrent fiduciary duties (indeed, the contract may well be the core.)’

See Mathew Harding, *Fiduciary Undertakings*, chapter 3 in ‘*Contract, Status and Fiduciary Law*’ Paul B Miller and Andrew S Gold ed, Oxford: Oxford University Press, publication date 17th November 2016

⁶⁹ Justice James Edelman, ‘The Importance of the Fiduciary Undertaking’ (Conference on fiduciary law, University of New South Wales 22nd March 2013). p.7 (Edelman J)

trust instrument, the terms of the trust instrument must be examined to determine the nature and extent of the fiduciary's undertaking.⁷⁰

Justice Edelman usefully focused on the historical pedigree of the use of undertakings, declaring that they are not a novel concept: indeed, the use of undertakings 'has deep historical foundations at common law as well as in equity.'⁷¹ This author argues that administrative law is based on equitable principles and that fiduciary law itself partakes of both an equitable and common law genesis. Edelman's analysis starts from Lord Devlin's judgement in *Hedley Byrne & Co Ltd v Heller & Partners Limited*,⁷² in which the assumption of responsibility as an express or implied undertaking was considered a relationship 'equivalent to contract' where, but for the lack of consideration, there would be a contract. Edelman reasons from the early form of action for *assumpsit* and states⁷³ 'The notion of an assumption of responsibility, or probably much more accurately, an objective undertaking, was probably borrowed by Sir Roundell Palmer from the form of action of *assumpsit* which claimed that the defendant 'undertook and faithfully promised.'⁷⁴

There are, however, instances where it is difficult to determine the precise nature of the party's 'undertaking'. This author agrees with Professor DeMott who, after considering the usefulness of an undertaking as a prerequisite to establishing a

⁷⁰ *Elovalis v Elovalis* [2008] WASCA 141 (66)

⁷¹ Justice James Edelman 'The Importance of the Fiduciary Undertaking' (Conference on fiduciary law, University of New South Wales, 22nd March 2013) p 9 (Edelman J)

⁷² *Hedley Byrne & Co Ltd v Heller & Partners Limited* [1964] A.C. 465, 529

Edelman, 'When do fiduciary duties arise?' *Law Quarterly Review* 2010, states: 'We have seen that voluntary undertakings can be either contractual or non-contractual. Terms in those undertakings can be express or implied. *Hedley Byrne* is a typical example of the latter. The decision shows that terms such as an undertaking of care and skill will be implied into the undertaking, unless circumstances show that the parties could not reasonably be taken to have included such a term. p.8

⁷³ Justice James Edelman 'The Importance of the Fiduciary Undertaking' (Conference on fiduciary law, University of New South Wales, 22nd March 2013) p. 10

⁷⁴ David J Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: Oxford University Press 1999)

fiduciary relationship, states: ‘A search for the party’s dispositive ‘undertaking’ of fiduciary obligation will only waylay analysis of the party’s relationship. Surely the appropriate enquiry is broader and encompasses whether the relationship was characterised by mutual trust and confidence.’⁷⁵

The need for an undertaking as a pre-condition to the existence of a fiduciary relationship is dispensed with by Professors Smith and Conaglen. Both involve fiduciary relationships being imposed by law in circumstances where no undertaking (express or implied) has been given; it follows, therefore, they do not involve construction of an undertaking. Conaglen’s argument is that there is an alternative way of understanding fiduciary duties, which explains just as well (and, in a number of cases, actually explains better) a number of facets of fiduciary doctrine which Justice Edelman argues can only be understood by treating fiduciary duties as expressed or implied undertakings. In other words, the argument that this is the only way of understanding fiduciary duties is incorrect. The essence of Conaglen’s thesis is that fiduciary duties are not determined by an undertaking, but instead, exists to protect non-fiduciary duties, and argues that there are a number of inherent dangers in treating fiduciary duties in the way Justice Edelman advocates.⁷⁶ Edelman considered the approaches of Professor Smith and Professor Conaglen and said:

Even on the assumption that we could liberate the law from the weight of authority concerning undertakings which those theses appear to require, these two approaches considered in this paper suggest new, and different, conceptions of the fiduciary duty, but each of these approaches has analytical difficulties to overcome before they can be accepted as an overarching thesis of fiduciary law.⁷⁷

⁷⁵ Deborah A DeMott, ‘Beyond Metaphor: An Analysis of Fiduciary Obligation’ (1988) 879 *Duke Law Journal*, 830, p.911

⁷⁶ Professor Mathew Conaglen, ‘Fiduciary Duties and Voluntary Undertakings’ (2013) 7(1) *Journal of Equity* 105-127; (Cambridge Private Law Centre Seminar, June 2014)

⁷⁷ Justice James Edelman ‘The Importance of the Fiduciary Undertaking’ (Conference on fiduciary law, University of New South Wales, 22nd March 2013) p.16

Professor Robert Flannigan considers that, as the beneficiary has allowed access to his assets on the basis of the fiduciary's undertaking, 'It is that access, and not the nominate undertaking per se, that exposes the other party to the opportunism mischief.'⁷⁸ Flannigan's argument is that limited access arrangements⁷⁹, whereby one acts in the sole interests of another⁸⁰ give rise to fiduciary obligations because the fiduciary will 'invariably acquire access to the assets (and opportunities) of their beneficiaries. The mischief associated with that access is that the value of the assets will be diverted or exploited for self-interested ends.'⁸¹ Flannigan considers that .opportunism is a generic mischief and it attracts a generic regulation across all limited access relations. Where there is limited access, the proscription on self-regard is engaged.'⁸²

This author's view is that whilst in the majority of cases there will be a voluntary undertaking, there is no reason why fiduciary obligations could not attach to non-voluntary relationships. As Professor Gregory Klass⁸³ states 'Edelman is probably wrong to claim that all fiduciary relationships originate in the fiduciary's consent or agreement. Courts have held, for example that parents owe a fiduciary

⁷⁸ Professor Robert Flannigan, 'The Core Nature of Fiduciary Accountability', [2009] NZLR 375, 380

⁷⁹ Robert Flannigan, 'The Core Nature of fiduciary accountability' [2009] New Zealand Law Review 375, By 'limited access,' Professor Robert Flannigan means that 'the actor has access to the assets of the other, rather than simply the actor's own assets, to produce value for that other (guidance, management, investment and care-giving). Because the necessary and co-incident access to the assets is acquired for the purpose of performing the undertaking, it is understood to be a *limited* access.' p.379

⁸⁰ Professor Robert Flannigan, 'The Boundaries of Fiduciary Accountability' [2004], New Zealand Law Review 215, 216

⁸¹ *ibid.*

⁸² Robert Flannigan, 'The Core Nature of Fiduciary Accountability' [2009] New Zealand Law Review 375-411, 383

⁸³ Gregory Klass, 'What If Fiduciary Obligations Are Like Contractual Ones?' chapter 4 in Paul B Miller and Andrew S Gold (eds) '*Contract, Status, and Fiduciary Law*' (Oxford: Oxford University Press 2016) (forthcoming, estimated 17th November 2016)

obligation to their children.’⁸⁴ Klass refers to the way a person can become an executor or trustee de son sort⁸⁵, who does not necessarily consent to that role-it is imposed by the court. Edelman did acknowledge that there are many obligations which are imposed upon people without any manifest undertaking, giving examples of such duties as ‘not to defame another person, not to trespass, not to convert goods, not to imprison falsely, not to commit battery and so on.’⁸⁶ His view was that they cannot meaningfully be described as fiduciary.⁸⁷ This author considers that Professor Criddle identifies correctly fiduciary entrustment when he states: ‘Even in the absence of express or implied consent courts superimpose the fiduciary concept.’⁸⁸

⁸⁴ See, for example, *M (K) v M (H)* [1992] 3 SCR 6 (Australia). In that case a 28 year old claimant sued her father for sustained sexual battery while she was a child. There was no doubt the father had committed the tort of battery. The father was held liable for breach of fiduciary duty. This was not seen as duplicating the tortious duty. It was the Supreme Court of Canada, said, an obligation which depended upon ‘the factual context of the relationship in which it arises.’ at 66.

See also Elizabeth S Scott and Robert E Scott, ‘Parents as Fiduciaries’ (1995) 81 Va L Rev 2401, 2402-2403, where they represent biological and adoptive parents as fiduciaries, with the autonomy and legal protection of parenthood. They recognise that their analogy is imperfect and state: ‘Particular features of the parent-child relationship distinguish it from most traditional fiduciary relationships, however, and thus present unique challenges.’ An earlier definition is found in John Locke’s 1690 work, *The Second Treatise of Government* (Peter Laslett (ed), Cambridge University Press, 1980)

Cf. Professor Margaret F Brinig, ‘Public servants and Private Fiduciaries, Parents: Trusted But Not Trustees or (Foster) parents as Fiduciaries’, Notre Dame Law School, 2011, Scholarly Works Paper 654, where she discusses whether foster parents and parent carers can be classed as fiduciary relationships

⁸⁵ Gregory Klass, ‘What If Fiduciary Obligations Are Like Contractual Ones?’ in Paul B Miller and Andrew S Gold (eds) *Contract, Status, and Fiduciary Law* (Oxford: Oxford University Press 2016) (forthcoming). p.11

See *Mara v Browne* [1896] 1 Ch 199 (CA) where Smith LJ said ‘it is said on the facts that there should be imputed to Mr Browne (the defendant) the character of a trustee, or in other words a trustee de son tort.’

⁸⁶ Justice James Edelman, ‘The Importance of the Fiduciary Undertaking’ (Conference on fiduciary law, University of New South Wales, 22nd March 2013) p 8, para 82

⁸⁷ *ibid.* para 82

⁸⁸ Professor Evan Criddle, ‘Fiduciary Foundations of Administrative Law’ (2006) 54 UCLA Law Rev 117, 126

2.5.2.1 Voluntary Assumption theory in a Local Government context

The challenge is analysing whether there is any distinction between undertakings given by governmental actors and undertakings given by private actors. We have seen that the undertaking may be found in the parties' relationships, through a statutory imposition of responsibility, or under an express agreement. Fiduciary application, is in this author's view, hampered and 'at odds' with the very nature of local government's role to act in the best interests of all of its service users. Thus, a broad responsibility to act in the public interest will no doubt mean that there are few circumstances in which a local authority will owe an exclusive duty of loyalty to a particular person or particular group.⁸⁹ To act in the best interests of an individual service user is clearly a lesser formulation of the duty of loyalty expected from fiduciary relationships, an approach supported by the Supreme Court of Canada. The problem is that the phrase 'best interests' is entirely 'open-ended', and can mean different things to different people in different situations. As Professor Lionel B Smith⁹⁰ states 'in Kantian terms, the duty is a very wide one, like the duty of beneficence, and for this reason it could only be a duty of virtue and not a duty of right.'

Mutual consent usually forms the basis of a fiduciary relationship but, as Miller states, 'More rarely a fiduciary relationship may be established through unilateral undertaking by the fiduciary', for example, voluntary assumption of

⁸⁹ *Alberta v Elder Advocates* [2011] 2 SCR 261

⁹⁰ Professor Lionel B Smith, *Can We Be Obligated to Be Selfless?*, Chapter 6, in '*Philosophical Foundations of Fiduciary Law*', Andrew S Gold and Paul Miller (eds) (Oxford: Oxford University Press 2014) 141 at p.143

fiduciary power or by decree through legislation or by court order.⁹¹ On this basis, it may be possible to argue that the duties imposed by local government legislation create a fiduciary relationship between local authorities and their service users in respect of the statutory discretionary powers granted. There is an implied undertaking that local authorities will exercise their statutory duties and powers in a fiduciary-like manner, with the interests of their service users paramount.

2.5.3 Entrustment theory

The main academic proponent of this theory is Professor Tamar Frankel.⁹² She emphasised the significance of entrustment stating ‘All definitions of fiduciaries share three main elements; entrustment of property and power; entrustor’s trust of fiduciaries, and risk to the entrustor emanating from the entrustment.’⁹³ The essence of the entrustment theory is that property is ‘entrusted to its holder, subject to judicial

⁹¹ Paul B Miller ‘The Fiduciary Relationship’ in (eds), chapter 3, in *Philosophical Foundations of Fiduciary Law* Andrew S Gold and Paul B Miller (Oxford: Oxford University Press 2014) p 63`

⁹² Tamar Frankel, ‘Fiduciary Law in the Twenty-First Century,’ (2011) 91, BULR 1293 Professor Tamar Frankel provides specific examples of entrustment: ‘Fiduciaries cannot perform their services unless they are entrusted with property or power. No property manager can effectively manage client’s money unless he has some control over it. No doctor can operate on a patient without acquiring full control of the patient’s body.’

Professor Larry Ribstein is also a supporter of entrustment: ‘My definition of fiduciary duties, like Professor Frankel’s arises from the concept of entrustment. However my definition focusses on the particular type of entrustment that arises from a property owner’s delegation to a manager of open-ended management power without corresponding economic rights.’ Professor Larry Ribstein, ‘Fencing Fiduciary Duties’ 91 Boston University Law Review, 899-920, 901

⁹³ Professor Tamar Frankel, *Fiduciary Law*, Oxford: Oxford University Press, 2011

constraint.^{94 95} In trust law the concept of entrustment appears to be an established causal element in finding a fiduciary relationship has arisen.⁹⁶

This theory does, however, fail to explain why some relationships, such as that in *Reading v Attorney General*⁹⁷, are categorised as fiduciary. It is unrealistic to conclude that Sergeant Reading's principal, the Crown, 'entrusted' to their employee the power to extract bribes from third parties.

2.5.3.1 Entrustment theory in a Local Government context

Local authorities are entrusted with statutory power by a democratically elected Parliament and are given a mandate for their policies by electors in local government elections which are held every four years. It is, however, a conditional form of entrustment, in the sense that a local authority in exercising their lawful duties and discretions is bound by legislative boundaries and must observe public law principles. To this end Professor Michael Taggart compiled a list to include the rule of law, fairness (usually procedural, but occasionally substantive); impartiality; constancy; rationality; stability of practice, accountability, transparency and of course human rights.⁹⁸

⁹⁴ Professor J C Shepherd, '*Law of Fiduciaries*', Carswell, (1981) 5

The idea conveyed is that the fiduciary received property that is burdened by the weight of the duties involved.

⁹⁵ Professor Tamar Frankel, 'Fiduciary Law', 71 Calif. L. Rev. 795 (1983)

⁹⁶ *Ex parte Lacey* [1802] 6 Ves Jun 625, 626; 31 ER 1228 (Eldon LC): '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.'

See also *York Buildings Co v Mackenzie* 8 Bro 42; 3 ER 432 (HL), where entrustment was emphasised and said of a common agent acting on behalf of creditors of a bankrupt's estate in Scotland that 'no man can serve two masters. He that is entrusted with the interest of others, cannot be allowed to make the business an object of interest to himself.'

⁹⁷ [1951] App Cas 507

⁹⁸ Professor Michael Taggart compiled two lists – See 'The Province of Administrative Law Determined' in Michael Taggart (ed) (Hart Publishing 1997) 3, and 'The Nature and Functions of the State' in P Cane and M Tushnet (eds) '*The Oxford Handbook of Legal Studies*' (Oxford: Oxford University Press, 2003) 103

Entrustment in a government context operates on two levels; Firstly, that of entrustment by local voters that their elected councillors will carry out their powers for the well-being of the locality and secondly in national parliamentary elections entrustment that the elected body will exercise its law making powers in a responsible way. Professor Finn captures this power entrustment when he states:

Where the public's power is entrusted to others for the purposes of civil governance, the institutions and officials who are the repositories of that power hold it of the people to be exercised for the people. They are trustees. ...Those entrusted with public power are accountable to the public for the exercise of their trust ⁹⁹

2.5.4 Incomplete Contract theory/Contractarian Theory

This theory is based on an economic model of fiduciary law, best described as an incomplete contract approach. The main proponents of a contract analysis of fiduciary obligations include Judge Easterbrook and Professor Daniel E. Fischel, ¹⁰⁰whose main thesis is that fiduciary obligations do not stand alone, but are simply part of a contractual arrangement between two or more parties. According to this contractarian theory, fiduciary obligations are an implied term in the contract and are used by the court to achieve justice in a given situation. This school of thought would, therefore, be better referred to as an incomplete contract theory. Such theorists are often referred to collectively as contractarians.

The contractarians' view is that the fiduciary obligation acts as a 'plug' to remedy a contractual gap. Easterbrook and Fischel state that: 'the law is designed to promote the parties' own perception of their joint welfare. That objective calls for filling gaps in fiduciary relations the same way the courts fill gaps in other contracts.

⁹⁹ Paul Finn, 'Public Trust and Public Accountability,' (1994) 3(2) Griffith Law Review, pp. 224-244, 228

¹⁰⁰ Judge Frank H Easterbrook and Professor Daniel E Fischel, 'Contract & Fiduciary Duty,' (1993), 36 Journal of Law & Econ, 425

The subject matter may differ, but the objective and therefore the process is identical.’¹⁰¹

This theory only operates where the terms of the contract made between the parties offer insufficient protection to one contracting party. The essence of this approach is that if the contracting parties had given thought to such matters they would have included a clause dealing with the fiduciary aspects of their relationship, but as they did not the court will do so. The court considers its role is not to rewrite the contract, but simply to give effect to the assumed intention of the parties. It is not difficult to understand, therefore, that this approach is also termed the ‘hypothetical contract’ theory.

Contractarian theory does not give any elevated status to fiduciary obligations, which are treated as mere contractual terms (and are more akin to duties of good faith), between bargaining parties. The Hon J .R. M. Gauthreau¹⁰² says ‘there is no difference in principle between contractual duties of care based on Hedley Byrne principles and fiduciary duties. They involve the same elements. The difference is only in degree.’ The duty of loyalty is simply seen as replacing or supplementing detailed contractual terms; somewhat akin to adding a fidelity clause into the contract.

¹⁰¹ *ibid*, 429

¹⁰² J R M Gauthreau, ‘Demystifying the Fiduciary Mystique’ (1989) 68 Can Bar Rev 1, 8. See further seminal economic analysis of fiduciary law by Robert Cooter and Bradley J Freedman, ‘The Fiduciary Relationship: Its Economic Character and Legal Consequences’ (1991) 66 NYU L Rev 1045 and Judge Frank H Easterbrook and Professor Daniel R Fischel, ‘Contract and Fiduciary Duty’ (1993) 36(1) JL & Econ 425 who promote ideas underpinning an economic contractarian model of fiduciary law

This approach is carried on by Professor Robert H Sitkoff, ‘The Economic Structure of Fiduciary Law’ (Harvard Law School discussion paper no: 689 3/2011): ‘the purpose of this essay is to restate the economic theory of fiduciary law in an updated and accessible synthesis.’ W Bishop and D D Prentice, ‘Some Legal and Economic Aspects of Fiduciary Remuneration’ (1983), 46 Mod L Rev, 289

This approach asserts that fiduciary duties are not special duties¹⁰³: they have no moral footing; they are the same sort of obligations, derived and enforced in the same way as other contractual undertakings. Applying contract law labels to fiduciary obligations may be an attempt to attach them in a more concretised way to established principles of contract law. The analogy has, however, some rather obvious flaws: contract law requires offer and acceptance, supported by consideration, for formation of a contract, whereas a fiduciary relationship may arise in situations which are devoid of such formal requirements and in situations where one of the parties is a volunteer.

We continue the theme of outlining the major differences between the classic elements of a contract and fiduciary engagement. Courts proceed on the basis that a contract does not preclude one party owing fiduciary duties to the other, but finding a fiduciary relationship between the parties represents ‘obligations of a different character from those derived from the contract itself.’¹⁰⁴ There is no need for elements of intention to be present to create legal relations in a fiduciary relationship, although there will often be a legal nexus between parties. Professor Scott Fitzgibbon states, ‘when the parties’ expressions of agreement are scant, courts may refuse to recognise a contract. Fiduciary law is readier to recognise a binding relationship than

¹⁰³ Judge Frank H Easterbrook and Professor Daniel R Fischel, ‘Contract and Fiduciary Duty’ (1993), 36 *Journal of Law & Econ*, 425, ‘Scholars of non- or anti-economic bent have had trouble in coming up with a unifying approach to fiduciary duties because they are looking for the wrong things. They are looking for something special about fiduciary, relations. There is nothing to find. There are only distinctive and independently interesting questions about particular consensual (and thus contractual) relations...’ p 427

See also Professor John Langbein, who states ‘despite decades of pulpit-thumping rhetoric about the sanctity of fiduciary obligations, fiduciary duties in trust law are unambiguously contractarian.’ John Langbein, ‘The Contractarian Basis of the Law of Trusts’ 105 *Yale L J* 625, 629

¹⁰⁴ *Re Goldcorp Exchange Ltd* [1995] 1 A.C. 74, a Privy Council appeal from New Zealand, involving a bullion contract
See also Professor L S Sealy (1995) 8 *JCL* and (1995) 9 *JCL* 37

is contract law’,¹⁰⁵ because the courts will look to whether the arrangements formed by the parties meets the criteria for classification as fiduciary, not whether the parties intended the legal consequences for such a relationship.¹⁰⁶ Indeed Lord MacNaghten stated in *Lyell v Kennedy*: ‘Nor ... can it make any difference whether the duty arises from contract or is connected with some previous request, or whether it is self-imposed and undertaken without any authority whatsoever.’¹⁰⁷

There is a fundamental difference, however, between contract law and fiduciary law: in the former, it is the contract or agreement that is the centre of judicial focus, whereas fiduciary law places greater emphasis on the relationship between the parties and the degree of reliance by the beneficiary on the fiduciary; a relational emphasis. Contract law monitors the activities of all parties to the contract, whereas fiduciary law focuses its attention solely on the actions of the fiduciary. In this respect, contract law may be considered ‘to concern itself with transactions while fiduciary law concerns itself with relationships.’¹⁰⁸

The parties to a fiduciary relationship or a contractual arrangement have different perspectives, since there is more capacity in a fiduciary relationship to accommodate changes as the relationship develops, whereas contracting parties encapsulate their agreement at the moment of the contract’s inception. Daniel Markovits astutely notes this difference and comments:

..moreover, contract sharing so understood is not simply less other-regarding than altruism, but rather differently other-regarding. The altruist must adjust open-endedly to the interests of the other as circumstances develop ex post. But the contractual promisor properly looks not to the changing interests of her promisee ex

¹⁰⁵ Professor Scott Fitzgibbon, ‘Fiduciary Relationships are not Contracts’ (1999) 82(2) Marquette Law Review, 317

¹⁰⁶ Professor Tamar Frankel, ‘Fiduciary Law’ (1983) 71 Calif L Rev, 795, 821

¹⁰⁷ *Lyell v Kennedy* (1889) 14 App Cas 437 (HL) 463

¹⁰⁸ Rafael Chodos, ‘The Nature of Fiduciary law and its relationship to other legal doctrines and categories’ (2011) 91 Boston University Law Review 837, 846

post but rather *to the contract*. Contract sharing is thus *ex ante*. It takes the terms of the contract as its loadstar.¹⁰⁹

Ideological underpinnings are also fundamentally different. Contract law is closely tied to the morals of the market place and its emphasis on profit and commercial dealing, freedom and sanctity of the contract are paramount; the parties must be free to make their own bargain. This unfettered notion of contract was captured by Jessell M R in *Printing & Numerical Registering Co v Sampson*¹¹⁰ when he said: ‘If there is one thing which more than any other policy requires is that all men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice.’ Statute and commercial standards of reasonableness, as well as market pressures, impact on the unfettered notion of freedom of contract. Control is no longer purely in the hands of the contracting parties: for example, unconscionable bargains can be upset by notions of undue influence; unfair terms can be rendered voidable by the Unfair Contract Terms Act 1977.

Fiduciary law, however, is based upon morals higher than the market place, to use the phrase of Lord Justice Cardoza in the US case of *Meinhard v Salmon*,¹¹¹ where he clearly stated that the fiduciary standard is the mirror image of contract’s reliance upon party’s self-interest. Professor D Gordon Smith emphasises a major

¹⁰⁹ Professor Daniel Markovits, ‘Sharing Ex Ante and Ex Post: The Non-Contractual Basis of Fiduciary Relationships’ chapter 10 in Andrew S Gold and Paul B Miller (eds) *Philosophical Foundations of Fiduciary Law* (Oxford: Oxford University Press) 2014, 213

¹¹⁰ [1875] LR 19 Eq 462, 465

¹¹¹ 164 NE 545 (NYCA) (1928)

See further quote by Professor Tamar Frankel, ‘Fiduciary Law’ (1983) 71 Calif L Rev 795, 797: ‘In contrast to contract ... both parties seek to satisfy their own needs and desires through the relation, fiduciary relationships are designed not to satisfy both party’s needs, but only those of the entruster.’

difference of approach between the fiduciary relationship and relationships of a purely commercial nature, stating ‘the fiduciary must refrain from self-interested behaviour, whereas contracting parties may act in a self-interested manner even where the other party is injured, so long as such outcomes are reasonably contemplated by the contract.’¹¹²

Where a fiduciary relationship exists, however, the interests of the fiduciary are subsumed by the interests of the principal. As Professor Frankel states:

In the world of contract, self-interest is the norm, and restraint must be imposed by others. In contrast, the altruistic posture of fiduciary law requires that once an individual undertakes to act as a fiduciary, he should act to further the interests of another in preference to his own¹¹³

Professor Daniel Markovits is supportive of this ‘go the further fiduciary mile’ approach,¹¹⁴ asserting that ‘a contract promisor....must honour her contract but go no further, while a fiduciary must take the initiative on her beneficiary’s behalf.’¹¹⁵

Whilst a hypothetical contract approach may assist in ascertaining the parties manifest intentions,¹¹⁶ ‘contract sharing and fiduciary sharing proceed qualitatively differently, and contract and fiduciary relations display different structures. Fiduciary law thus cannot be understood on the contractarian model.’¹¹⁷ Further,¹¹⁸ ‘Because of the significant differences between contract and fiduciary principles, it is suggested

¹¹² Professor Gordon Smith, ‘The Critical Resource Theory of Fiduciary Duty’ (2002), 55 Vand L Rev, 1399, 1410

¹¹³ Professor Tamar Frankel, ‘Fiduciary Law’ (1983) 71 Calif L Rev 795, 810

¹¹⁴ Professor Daniel Markovits, *Philosophical Foundations of Contract Law* (Oxford: Oxford University Press 2015) 282: ‘if a beneficiary asks his fiduciary to walk a mile with him, she must, altruistically walk with him twain’.

¹¹⁵ Professor Daniel Markovits, ‘Sharing Ex Ante and Sharing Ex Post: The Non-Contract Basis of Fiduciary Relations’ chapter 10 in Paul B Miller and Andrew Gold (eds) *Philosophical Foundations of Fiduciary Law*, (Oxford: Oxford University Press 2014)

¹¹⁶ *ibid*, 887

¹¹⁷ *ibid*, Professor Markovits, p. 210

¹¹⁸ Professor Leonard I Rotman, ‘Fiduciary Doctrine: A Concept In Need Of Understanding’ (1996) 24(4) Alberta Law Review 821, p. 847

that the former's usefulness as a tool to aid an understanding fiduciary doctrine is outweighed by the dangers inherent in its use. Consequently, the use of contract principles, even in the limited form of analogy, ought to be abandoned'.

The arguments against, and dangers of, absorbing fiduciary principles into contract law is succinctly put by Professor Frankel: 'The consequences of the sub-categorisation of fiduciary law into contract is not only to reduce the duties of fiduciaries to the contractual level (and the mercy of the parties' ability to exclude the fiduciary duty), but also to water-down the remedies of their breach-avoiding punitive damages and lift the stigma that is attached to a breach of trust (a stigma attached to a thief that was trusted). Finally, an important reason to treat fiduciary law as a distinct body of law is the growing need for regulating fiduciary relations. After a long period of negation, recognition of the importance of singling out fiduciary relationships is emerging again.'¹¹⁹ This author joins Professor DeMott when she states¹²⁰ 'even considering the obligation's elusive nature, descriptions drawn exclusively from contract principles are surely mistaken.'

2.5.4.1 Hypothetical Contract theory in a Local Government context

Applying the contract approach described above would suggest that the relationship between local authorities and their service users is not fiduciary, as it is not possible to point to a contractual nexus. Further, the local authority's obligations may be seen as fundamentally statutory and public law based. In an age of contractualisation, however, many local authority functions are now being performed under contract, and contract theories may suggest ways in which outsourced services involving a greater

¹¹⁹ Tamar Frankel, 'Fiduciary Law' (1983) 71 Cal L Rev 237, 795-836

¹²⁰ Deborah A DeMott, 'Beyond Metaphor: An Analysis of Fiduciary Obligation', Duke Law Journal Vol.1988. 879-924, p.880

number of parties than would normally be found might create fiduciary type relationships with concurrent fiduciary obligations being imposed on the outsourcee. Further exploration of this topic is, however, outside the scope of this thesis.

2.5.5 Property theory

This theory has its basis in property ownership. For a fiduciary relationship to arise there must be some property or proprietary element involved. This is illustrated by the archetypal fiduciary relationship of trustee and beneficiary, whereby the legal estate in the trust fund is held by the trustees, subject to the equitable interests of the beneficiary (s) which take effect 'behind the curtain'.

The property theory of fiduciary law holds that a fiduciary relationship exists only where a person possesses de facto or de jure control of property belonging to another person or body. The trustee and beneficiary relationship exemplifies a classic de facto ownership situation; de jure control is illustrated by the fiduciary relationship between a director and his company, whereby the director does not have de facto ownership of a company's assets, but does have considerable management power under corporate law to deal with them. Professor Larry Ribstein subscribed to the view that, where there is separation of ownership from control, fiduciary duties are necessary to prevent the fiduciary from using the property entrusted to it for a personal benefit.

Both Professor Cooter and Professor Freedman, describe a fiduciary relationship as arising in any situation where 'a beneficiary entrusts a fiduciary with control and management of an asset.'¹²¹ The property based fiduciary theory is

¹²¹ Robert Cooter and Bradley Freedman, 'The Fiduciary Relationship: Its Economic Character and Legal Consequences' (1991) 66 NYUL Rev 1045, 1046

helpful because it draws a clear line in determining whether a fiduciary relationship exists or not: if there is no property interest in the traditional common law understanding, then there can be no fiduciary relationship. Property theory is the key starting point for most economic analyses of fiduciary doctrine.

The term ‘property’ is, however, dropped by Professor Paul B Miller in favour of the term ‘practical interests’. That phrase replaces ‘property’ in his definition of discretionary authority: ‘to have fiduciary power is to enjoy authority over the practical interests of another.’¹²² This approach is not to be understood, however, as not requiring a property interest, rather that the term ‘practical interests’ is used as a substitute and broader conception of the term ‘property.’

2.5.5.1 Property theory in a Local Government context

The issue is whether property justifications alone are adequate for justifying the existence or otherwise of a fiduciary relationship between local authorities and their service users. In the Canadian case *Alberta v Elder Advocates of Alberta Society*,¹²³ McLachlin CJ referred to a legal or substantial ‘practical interest’ of the beneficiary. This wide property definition is informative to this thesis in its exploration of the type of relationship that exists between local authorities and their service users, as it may be difficult to point to any specific property interest of the service user. What is the

¹²² Professor Paul B Miller, ‘A Theory of Fiduciary Liability’ (2011) 56(2) McGill L J 235, 272

¹²³ [2011] 2 SCR 261, 36 This case involved class proceedings by 12,000 residents of Alberta’s long term care facilities who claimed that Alberta had artificially increased charges for accommodation so that they could use those monies to subsidise medical expenses which they were in fact in law responsible. At first instance the chambers judge struck out the plea of breach of fiduciary duty, which was reversed by the Court of Appeal See Brent R H Johnston and Eileen M Patel (Hunter Litigation Chambers, Vancouver BC), ‘Fiduciary Duties and Public Authorities Two Years after *Alberta v Elder Advocates: Where Are We Now?*’ (Continuing Legal Education Society of British Columbia, May 2013), which deals with the judgement in a very informative way as well as reviewing fiduciary claims against the Crown in Canada following the *Elder* case

‘substantial practical interest of the service user’? On purely financial grounds service users have quite a weak position in proving a property interest, since a local authority’s revenue source derives from not only council tax-domestic and commercial¹²⁴ - but, also contributions from central government grants and subsidies. It could be forcefully argued that council tax payment is in return for council services, a form of implied service contract, and does not entitle council tax payers to build up some beneficial interest in council assets. Further, not all service users in a locality pay council tax in that locality. It would be difficult, therefore, to identify any property interests with precision and particularity. This author’s view is that where property rights are absent, judges may be reluctant to extend the existing categories of fiduciary relationships. This may have serious consequences for service users in a vulnerable category following the increase in contracted out services by a local authority, where imposing a fiduciary duty between a private service supplier and user would be extremely difficult. As a consequence, many people would find themselves vulnerable and without legal protection, especially if their service contract excludes a fiduciary duty. Contractual clauses in the outsourcing contract between the local authority and the outsourced supplier may be inadequate to give the service user sufficient protection against abuse in what is a fiduciary type relationship, for example, an elderly resident in outsourced nursing home.¹²⁵

¹²⁴ In 2014-15 local authorities collected a total of £24.6 billion in Council tax (wrote off £191 million uncollected tax), irrespective of the year to which it related.

In 2014-2015 a total of £22.9 billion was collected in non-domestic rates (wrote off £213 million)-this information is taken from data from 326 billing authorities compiled by the Department for Communities and Local Government, Local Government Finance-Statistical Release 1st June 2015

See Table A, Collection of rates and receipts of council tax and non-domestic rates in England 2015-16 (revised), 11th July 2016, gov.uk/government/statistics/collection-rates-for-council-tax-and-non-domestic-rates-in-england-2015-to-2016

¹²⁵ See, Professors Ellie Palmer and Maurice Sunkin, ‘Resource Allocation, welfare rights-mapping the boundaries of judicial control in Public Administrative Law’ (2000) OJLS 63-88, where the gap of service user protection is identified

The requirement that a council tax payer or service user holds a property interest (legal or equitable) may therefore cause difficulty in a local government context, since at any given moment they will be unable to establish equitable ownership in a local authority's assets, whether in whole or in part, to the degree necessary. Atkin L J in *Roberts v Scurr* stated: 'For the proposition that there are any equitable rights in the ratepayers as such, which can be enforced by the inference of a court of equity with the honest administration of affairs, I know of no authority.'¹²⁶

Professor Patrick Parkinson,¹²⁷ however, suggests that rather than characterising trusts in the traditional manner, as a form of property ownership (A holds property on behalf of B, with the legal estate vested in A and the equitable interest in B), the law of trusts is better conceptualised as a species of obligation.¹²⁸ He states 'It is enough that the trust *obligation* is defined with sufficient certainty that a court can decide, in the event of a dispute, how much money or property is held on trust or should be devoted to the purposes of the trust'.¹²⁹ (Emphasis added)

A local authority's assets will include real and personal property, and will rarely be kept in designated funds unless required by the terms of, for example a development agreement or statutory accounting requirements; instead, the assets will consist of a fluctuating mass¹³⁰ leading to an obvious difficulty in the ability of any service user to identify 'their' asset, or share thereof.

¹²⁶ *Roberts v Scurr* [1942] 2 KB 695

¹²⁷ Patrick Parkinson, 'Reconceptualising the Express Trust', (2002) 61(3), Cambridge L J pp.657-683

¹²⁸ *ibid*, 659

¹²⁹ *ibid*, 664

¹³⁰ *Hunter v Moss* [1994] 1 WLR 452; [1994] 3 All ER 215 This case concerned an oral declaration of trust in respect of 50 out of 950 shares held by S in a private company. The Court of Appeal held that there was a valid trust. The argument that the trust failed for lack of certainty of subject matter, because S had not specifically identified the 50 shares subject to his trust obligation was unsuccessful

Parkinson's work on emphasising the obligatory nature of trusteeship certainly aids this thesis argument, as 'classification of the trust in terms of obligation rather than ownership also opens up fruitful lines of enquiry.'¹³¹ This author supports an obligations-approach as does the work of Nicholas McBride.¹³² Such an approach 'would allow for the orderly exposition of equitable obligations with respect to property which takes account of cases which might otherwise be regarded as anomalous'¹³³, such as the position of local authorities.

2.5.6 Reliance theory

Reliance theorists emphasise that a fiduciary relationship exists where one person reposes trust and reliance in another. It is the easiest fiduciary theory to understand and is often relied upon to establish a fiduciary relationship, in conjunction with elements of other theories. Such theorists use the terms 'entrustor' and 'trustee' for the principal and fiduciary respectively, and argue that the fiduciary relationship arises where the entrustor's trust is placed in the trustee. Reliance is not, however, the sole province of protection by fiduciary law, as reliance forms the basis of other

cf *Re London Wine Co (Shippers) Ltd* [1986] PCC 121 (which was endorsed by the Privy Council in *Re Goldcorp Exchange Limited (in receivership)* [1995] 1 AC 74). The case involved bottles of wine held in bulk stock for customers, but at no stage were specific bottles or cases allocated to a specific customer. Oliver J held that the company was not a trustee because the subject-matter of the purported trust was uncertain

This case was highly criticised. See, David Hayton, 'Uncertainty of Subject Matter of Trusts' (1994) 110 LQR 335. Professor Hayton's view is that there must be property segregation from the mass capable of identification, either by specifying a fraction or separating out a parcel of shares

cf Jill. Martin, 'Certainty of Subject-Matter: A Defence of *Hunter v Moss*' [1996] Conv 223

¹³¹ Patrick Parkinson, 'Reconceptualising the Express Trust', (2002) 61(3), Cambridge L J, pp.657-683,p.676

¹³² Nicholas McBride, 'On the Classification of Trusts' chapter 2 in P Birks and Francis Rose (eds), '*Restitution and Equity*' (Vol 1: Resulting Trusts and Equitable Compensation, Mansfield Press 2000) 23-24

¹³³ *ibid.* See specifically Part IV The Trust as Obligation. p. 678

independent heads of civil obligation: for example, in the law relating to negligent misrepresentation, which is not a part of fiduciary doctrine.¹³⁴

Calibration is a problem where reliance becomes a factor. There will, of course, be different levels of reliance in any relationship, fiduciary or not, and it is difficult to determine from case law what level of reliance is needed to conclude that a fiduciary relationship exists. It is true that, coupled with the purported vulnerability indicia, reliance can be an important factor in determining whether a fiduciary relationship exists. It also emphasises the prophylactic nature of fiduciary law: protection against abuse of reliance that has been legitimately placed in another. The reliance theory seems to rest on a dual moral and public-policy orientation. In this author's opinion, however reliance should more properly be viewed as important indicia, but not a determinant.

2.5.6.1 Reliance theory in a Local Government context

Reliance plays a major element in the relationship between local authorities and their service users. Service users place trust in their local authority to provide services at a competent and adequate standard, not only for services of importance to specific and often vulnerable sections of the community, (day centres for the elderly and infirm, housing for the homeless and children's services), but also for services that serve the needs of the citizenry more generally (refuse collection). All such services are necessary for the well-being of a locality. Reliance as a fiduciary indicator is therefore easier to identify in the relationship of local authorities and their service users than other indicia.

¹³⁴ For a more detailed discussion of the relationship between fiduciary law and some of these other concepts see F A Reid, 'The Fiduciary Concept - An Examination of its Relationship with Breach of Confidence, Negligent Misrepresentation and Good Faith', (LL.M Thesis, Osgoode Hall Law School 1989)

2.5.7 Power theory: inequality and vulnerability

It can be argued that fiduciary obligations arise in relationships that involve one party exercising some measure of control over the other party; it is the power relationship that triggers the fiduciary relationship and the fiduciary actor is a power holder. Tamar Frankel states that all fiduciary relations give rise to the problem of abuse of power....the purpose of fiduciary law should be to solve the problem.¹³⁵ Professor Gary Ribstein states that it is ‘open ended delegation of power that characterises a fiduciary relationship.’¹³⁶ Commentators like Professor L Rotman refer only to an inequality theory, preferring to include references to a beneficiary’s vulnerability where appropriate. It is the power base that may result in inequality and vulnerability, if the discretionary mandate given to the fiduciary is not monitored.

The essence of the inequality theory is that the balance of power between the fiduciary and the beneficiary is unequal: the weight of power is in the hands of the fiduciary. As a consequence, that power is open to abuse by opportunism and therefore requires the protective element of fiduciary law, which tempers this power imbalance. It does so by imposing in very strict terms a duty on the fiduciary to act solely in the interests of the beneficiary. No deviation from the self-negation principles is tolerated by the courts, as illustrated by the severe penalties for breach, including disgorgement of profits (if any) and liability imposed even where no harm has been caused to the beneficiary.

¹³⁵ Professor Tamar Frankel, ‘Fiduciary Law’ (1983) 71 Cal L Rev 795, pp. 807-808

¹³⁶ Professor Gary Ribstein, ‘Are Partners Fiduciaries’ [2005] U Ill Rev 209, 299 This statement is useful because it emphasises that other confidential relationships do not necessarily involve the broad, open ended delegation he refers to. The author has in mind non-consensual power exercised by someone in your confidence, such as duress and undue influence, which are outside the ambit of fiduciary principles

A criticism of this theory is the notion that all fiduciary relationships exist between dominant and subservient parties. This approach needs to be unpacked. It may be true, for example, in a relationship of guardian and ward or the relationship between a medical practitioner and patient, but this may not be the case in a commercial partnership or in the relationship between a sophisticated experienced investment client and his broker,¹³⁷ where there is no obvious power imbalance. The premise that there must always be a dominant actor is, therefore, not correct in every case. This author agrees with Rotman's suggestion that insistence on inequality 'may be due to excessive judicial categorisation of acceptable classes of fiduciary relationships.'¹³⁸

Even taking the most established fiduciary relationship of all, that of trustee and beneficiary under a trust, there may be a minimal imbalance of power, since the trustee deals with day to day administration of the trust and yet the trustee's position may be weak. For example, the trust fund may be substantial, such that the beneficiaries, particularly under a bare trust, will occupy a powerful position in their own right. Indeed, beneficiaries have, in certain circumstances, the right to demand that the trust be terminated and the legal estate be transferred to them.¹³⁹

¹³⁷ See Canadian case *Hodgkinson v Simms* [1994] 117 DLR (4th) where a financial adviser was held to be a fiduciary towards a fairly experienced and sophisticated investor cf *Burdett v Miller* 957 F2nd 1375, 1381 (7th Cir 1992) where again a financial adviser was held to be a fiduciary, but in very different circumstances: 'when he knew that his client took his advice uncritically and unquestionably and that she sought no 'second opinion' or even, any documentary confirmation of the investments to which he steered her.'

¹³⁸ Leonard I Rotman, 'Fiduciary Doctrine: A Concept In Need of Understanding' (1996) 34(4) *Alberta Law Review*, pp. 821-852. p.843

¹³⁹ *Saunders v Vautier* (1841) 4 Beav 115 That case laid down that if an adult beneficiary of a trust with full legal competence and entitled to the whole beneficial interest may direct the trustee to transfer the legal estate to him or her and thereby terminate the trust (known as the 'doctrine of acceleration')

The rule has been extended to where there is more than one beneficiary with full legal competence ('sui generis') and who are collectively entitled to the whole beneficial interests may request the trustee to terminate the trust and distribute the trust property to them. It is

The position is of course different in relation to discretionary trusts. This is the established position under *Gartside v IRC*¹⁴⁰ and *Sainsbury v IRC*¹⁴¹ that beneficiaries under a discretionary trust have no actual proprietary interest in the fund, merely a ‘right’ to be considered as a potential beneficiary by trustees. The relationship between local authorities and their service users under any trust analogy may better be considered under a discretionary purpose trust heading and is discussed in chapter four.

In order to be a beneficiary of a fiduciary relationship a person need not be ‘vulnerable’. As explained by Professor Frankel,¹⁴² ‘even entrustors who are in a strong bargaining position before they enter the relationship become vulnerable immediately after they entrust power or property to their fiduciaries’. The power imbalance can lead to vulnerability, and in some cases, over-dependency on the fiduciary. Inherent in the fiduciary’s position is the ability to influence positively or negatively the interests of the beneficiaries, by virtue of the mandate granted to the fiduciary.

Whilst there is divergence of opinion, it is acknowledged by many judges¹⁴³ and commentators¹⁴⁴ that vulnerability is an important factor in fiduciary interactions,

essential that all beneficiaries agree in their direction to the trustee (See, *Re Sandeman’s Will Trusts* [1937] 1 All ER 368; *Lloyd’s Bank plc v Duker* [1987] 1 WLR 1324)

¹⁴⁰ [1968] A.C. 553

¹⁴¹ [1970] Ch 712

¹⁴² Professor Tamar Frankel, ‘Fiduciary Duties as Default Rules’ (1995) 74 Or L Rev 1209, 1216. ‘The entrustors vulnerability to abuse of power does not result from an initial inequality of bargaining power between the entrustor and the fiduciary. The relation may expose the entrustor to risk even if he is sophisticated, informed and able to bargain effectively. Rather, the entrustor’s vulnerability stems from the *structure and nature* of the fiduciary relation.’ (original emphasis)

¹⁴³ In *Lac Minerals v International Corona Resources Ltd* 1989 SCR 574, 63, Sopinka J identifies vulnerability as ‘the one feature ... which is considered to be indispensable to the existence of the relationship.’ In the same case La Forest J found that vulnerability is not essential, but rather is one of a number of relational indicators that point to the existence of a fiduciary relationship. p.30

but vulnerability alone is not conclusive of the fiduciary character of the interaction:¹⁴⁵ something additional is necessary. This author views vulnerability as a corollary of dependence. The degree of vulnerability faced by the beneficiary might be controlled in various ways (for example, by monitoring and enforcement mechanisms or limitation of the discretionary mandate granted to the fiduciary). There is a susceptibility of the beneficiary to some risk of adverse influence by the fiduciary in the exercise of his powers.

Power arises from the grant of some form of discretion, whether limited or unlimited; the greater the discretion, the greater the power that can be exercised by the fiduciary. Paul B Miller has expounded what he calls his ‘substituted power-based theory of fiduciary liability’.¹⁴⁶ After stating that fiduciary relationships comprise both definitive properties and structural properties, Miller examines the exercise of power relative to the beneficiary. Miller concludes that power is

In *Murray v Murray* (1995) 119 DLR (4th) 47, 54, McClung JA stated, ‘Central to any fiduciary relationship is a finding that the beneficiary is at the mercy of the fiduciary, or even vulnerable to the other, who administers the discretion or power over the relationship.’

¹⁴⁴ See, Shaunnagh Dorsett, ‘Comparing Apples and Oranges: The Fiduciary Principle in Australia and Canada after *Breen v Williams*’ (1996) 8(2) Bond Law Review 166-169, where Dorsett reviews aspects of vulnerability in the Australian and Canadian jurisdictions. See, L S Sealy (1995) 9 JCL 37, 40 where he criticised focusing on vulnerability as evidencing a departure from the core fiduciary notion of the defendant’s selflessness. See, Professor Leonard I Rotman, ‘while vulnerability is an important factor in fiduciary interactions, its presence on its own, is not conclusive of the fiduciary character of an interaction’; Leonard I Rotman, *Fiduciary Law’s ‘Holy Grail’: Reconciling Theory and Practice in Fiduciary Jurisprudence*, 91, Boston, Rev, 921-971, (2011). p. 931. On the same page Rotman gives a useful example of the relationship between pedestrians and motor car drivers. He states: ‘The law recognises this inequality by providing a right of way to pedestrians lawfully crossing streets. This does not create a fiduciary relationship, however, but imposes legal weight to enforce a socially valuable norm and prescribes penalties for non-conformity.’

¹⁴⁵ *International Corona Resources Ltd v Lac Minerals Ltd* (1988) 62 OR (2nd) 1 (CA) 633: La Forest J defined vulnerability as ‘susceptibility to harm’ and its importance as an indicia ‘vulnerability is not ... a necessary ingredient in every fiduciary relationship ... when it is found it is an additional circumstance that must be considered in determining if the facts give rise to a fiduciary obligation.’ p 662

¹⁴⁶ Professor Paul B Miller, ‘The Fiduciary Relationship’ chapter 3, in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford: Oxford University Press 2014)

conceptually ambiguous and may mean authority, dominance, control, influence or strength over another person or their property, concepts which are, in turn, ambiguous. According to Miller, Hohfeld's ¹⁴⁷ definition of legal power will not suffice, for it does not capture the kind of legal power wielded within the fiduciary relationship. Miller is keen to distinguish fiduciary power from other types of power and states:

fiduciary power is distinguishable from other varieties of power by virtue of the fact that it is a form of *authority* ordinarily derived from the *legal personality* of another (natural or artificial) person. The fiduciary, by virtue of the power vested in her, stands in substitution for the beneficiary or a benefactor in exercising a legal capacity that is ordinarily derived from the beneficiary or benefactor's legal personality. ¹⁴⁸

Power passes from the beneficiary to the fiduciary giving the fiduciary power to act within the terms of the mandate granted in the name of the beneficiary. Miller's central thesis contends that fiduciary power is derived from the personality of another and/or is expressly devoted to the ends of another. Instead of a property type theory he uses the expression 'discretionary power over the 'significant practical interests' of another. Such 'Practical interests include matters of personality, welfare, or right pertaining to persons or their causes.'

¹⁴⁷ Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913), 23 Yale L J 16, 55, He defined 8 types of fundamental legal relations.

The two of specific interest to this thesis are-

Jural Opposites < Power/disability

Jural Correlatives < Power/liability

A useful article is by Alan D Cullison, 'A Review of Hohfeld's fundamental Legal Concepts' (1967) 16 Clev-Marshall L Rev 559.

¹⁴⁸ Professor Paul B Miller, 'A Theory of Fiduciary Liability,' McGill Law Journal Vol.56, No.2, 2011, 235, 143 p.14

See Professor Tamar Frankel, 'Fiduciary Law' [1983] Calif L R 795, 806: 'A central feature of fiduciary relations is that the fiduciary serves as a substitute for the entrustor: The purposes of this substitution may vary: A may desire B to act for him in matters in which B is more expert: A may wish to be relieved from performing the activities personally; or he may want to give up the time or make the commitment that the activity requires.'

Miller concentrates on the power of the fiduciary and yet there is a further power dimension involved, namely that of third parties. Another compelling feature of powers is that they can change legal relations between people other than the holder of the power. For example, a fiduciary agent may enter into a contract on behalf of his principal. This creates a right-duty contractual arrangement affecting the principal and the third party. In Hohfeldian terms, the agent has at least two powers in this kind of situation: a power as against his principal and a power as against the third party. The principal has a correlative liability as does the third party.’¹⁴⁹

2.5.7.1 Power theories in a Local Government context

The power imbalance between local authorities and their service users would seem to be self-evident. Local authorities have wide-ranging statutory powers. Seth Davis states that ‘Fiduciary theorists focus upon the vulnerability of citizens that arises from a public official’s discretion.’¹⁵⁰ Professor Evan Criddle, a supporter of fiduciary government states:

Public officials serve as fiduciary representatives for persons subject to their power, because all agents and instrumentalities of the state...are vested by law with discretionary administrative powers’ for the public, who ‘is uniquely vulnerable to officers’ inept or unreasonable misuse of administrative power’¹⁵¹

The ‘power’ of the taxpayers and of service users is limited to influencing council decisions where there is a community involvement agenda, but ultimately it is for the local authority to make the decisions. This is not an absolute power, since it is constrained by public law principles and subject to challenge in the courts, and

¹⁴⁹ Alan D Cullison, ‘A Review of Hohfeld’s Fundamental Legal Concepts’(1967) 16 Clev-Marshall L Rev 559, 60-61

¹⁵⁰ Professor Seth Davis, ‘The False Promise of Fiduciary Government’ (2014) 89:3 Notre Dame Law Review 1143-1207, 1156

¹⁵¹ Professor Evan Criddle, ‘Fiduciary Administration; Rethinking Popular Representation in Agency Rulemaking,’ 88 Tex L Rev 472-73

arguably by local government elections. Whilst the exercise of democratic power give local authorities legitimacy to act, its real power is granted by Parliament. Vulnerability of one actor alone, whilst a powerful recurrent characteristic in finding a fiduciary relationship, will not on its own be sufficient to support a fiduciary relational nexus in a local government context. Vulnerability of a person or class will be difficult to establish, but the unique vulnerability of the local government service user is captured by Professor David M Lawrence, who states: ‘the corpus of the local government fiduciary relationship is created by the actions of the fiduciary, with no necessary participation or consent by the principal or anyone acting on the principal’s behalf.’¹⁵² He illustrates this by reference to the fact that a shareholder contributes to the corpus of the business corporation by buying shares, but the ‘corpus of the local government is created largely by taxation, a process that is often under the complete control of the fiduciary with no consent necessary from the council taxpayer.’¹⁵³

This author considers that there are two problems associated with the concept of vulnerability. Firstly, it may be too broad to be useful in identifying a fiduciary relationship, because elements of vulnerability are, to a lesser degree, found in many commercial and non-commercial transactions that are not fiduciary. The second problem is that vulnerability is also a distinctive feature in other private law doctrines, such as duress and undue influence. It is therefore unclear how the vulnerability relevant to fiduciary relationships is specific to fiduciaries. In conclusion it is suggested that the better view is that vulnerability may or may not be present, but is clearly not decisive.

¹⁵² David Lawrence, ‘Local Government Officials as Fiduciaries: The Appropriate Standard (1993-1994) 71 U Detroit Mercy L Rev 1- 30, 23

¹⁵³ *ibid*, 23-24 Professor Lawrence, further states: ‘But a person becomes a principal of a local government fiduciary by action of the law, without any voluntary action ... however, the state decides whether there will be a local government in that location and the type of government.’

2.5.8 Discretionary theory

It is argued by some¹⁵⁴ that the feature which qualifies or determines the scope and content of the ‘power’ requirement of a fiduciary relationship is discretion. Discretionary theory is the theoretical complement of reliance theory, in the sense that the nature and scope of the discretionary mandate granted to the fiduciary determines its power and can result in inequality and vulnerability. Central to this theory is the need for some form of discretion to be granted to the fiduciary. Professor Weinrib states ‘the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other’s discretion.’¹⁵⁵ In any co-operative relationship, it is inevitable that one party will hold some amount of discretionary and unobservable decision-making authority that can affect the welfare of the other party, but the greater the discretion given to the fiduciary, the greater is the temptation for the fiduciary to abuse his position through self-interest and opportunistic behaviour.¹⁵⁶ Professor Weinrib considers that fiduciary obligation is the law’s ‘blunt tool for the control of...discretion’¹⁵⁷ Discretionary authority is captured thus by Professor Paul. B. Miller: ‘To have fiduciary power is to enjoy authority over the practical interests of another...the discretionary character of authority means that the fiduciary has scope for judgement in determining how to act

¹⁵⁴ See, Professor Paul B Miller, ‘A Theory of Fiduciary Liability’ (2011) 56:2 McGill Law Journal 235. See also footnote 83 in above article. Professor Ernest Weinrib was amongst the first to argue that something akin to discretionary power is an essential characteristic of all fiduciary relationships; Ernest J Weinrib, ‘The Fiduciary Obligation’ (1975) 25:1 UTLJ 1. He noted that the fiduciary relationship is one in which the principal’s interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him’. He elaborated, ‘Two elements thus form the core of the fiduciary concept and these elements can also serve to delineate its frontiers. First, the fiduciary concept must have scope for the exercise of discretion, and second, this discretion must be capable of affecting the legal position of the principal.’

¹⁵⁵ Professor Ernest J Weinrib, ‘The Fiduciary Obligation’ (1975) 25:1 UTLJ 1, 7

¹⁵⁶ See, Robert P Bartlett III, ‘Commentary, Contracts as Organisations’ (2009) 51 Arizona L Rev 47, 48

¹⁵⁷ Professor Ernest J Weinrib, ‘The Fiduciary Obligation’ (1975) 25, University of Toronto L J 1, 4

under that authority. The scope of the authority, and thus the ambit of rightful conduct, is broader than would be the case if authority were fixed.’¹⁵⁸

The concept of fiduciary power, must however, be disambiguated from other forms of power. Miller ¹⁵⁹ considers that such power can be distinguished from other varieties of power by virtue of the fact that it is a form of authority ordinarily derived from the legal personality of another, whether a natural or artificial person. Miller’s substitutionary approach is echoed by Professor Evan J Criddle when he states: ‘Fiduciaries stand in as *stewards* with discretion over an aspect of their beneficiaries’ welfare.’ ¹⁶⁰ (Emphasis added)

This author considers the reference to ‘stewards’ as important and that stewardship is the very essence of fiduciary principles and this will be examined further in chapter six, when stewardship, its content and application in the context of the relationship between local authorities and their service users- will be analysed.

2.5.8.1 Discretionary theory in a Local Government context

Miller’s power substitution approach does, however, present problems with the range of principals found in a local government setting. How can a local authority adopt the corporate personality of its taxpayers or service users? Professor Evan Fox-Decent addresses the issue of power within an administrative context. He says:

The kind of power a fiduciary exercises is more than a simple possessory or dispositive control over another party’s interests. It is a complex of powers the

¹⁵⁸ Professor Paul B Miller, ‘A Theory of Fiduciary Liability’ (2011) 56(2) McGill Law Journal 235, 272-275

¹⁵⁹ Paul B Miller, ‘The Fiduciary Relationship’ in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Law* (Oxford; Oxford University Press 2014)

¹⁶⁰ Professor Evan J Criddle, ‘Fiduciary Foundations of Administrative Law’ (2006) William and Mary Law School Paper 1523

See, Professor Tamar Frankel, ‘Fiduciary Law’ (1983) 71 Calif L R 795, 801. ‘The fiduciary may be entrusted with a wide variety of delegated power, depending upon the entrustor’s needs.’

incidents of which are best captured and thematically unified by the idea of administration. Administration implies a capacity to exercise discretion on behalf of a principal in respect of certain interests, and vis-à-vis third parties ¹⁶¹

In this author's opinion, whilst a discretionary element is present in a large body of fiduciary case law, the discretionary theory is overstated. For example, a judge may, in certain circumstances, possess wide discretionary power over civil litigants, but the judge's position vis- a-vis those parties does not entail a finding that a fiduciary relationship exists between judge and litigant.

More importantly, in public law, constraints on the decision-maker are not as dependent on its relationship with the person challenging the decision: they are usually determined externally by matters, such as statutory construction and departmental guidance. Professor Jonathan Evans captures this major difference when he states that 'The limits on its discretion are not determined by the nature of the framework with the affected member of the public, or the immediate factual context, but rather on the overall framework in which the power is established' ¹⁶²

Nonetheless, the idea of ceding power is important in our context. A useful comparison may be drawn from Justice Binnie's identification of 'discretionary control' as the essential characteristic of the fiduciary relationship in an aboriginal rights case¹⁶³ where he stated that the relationship between the Crown and the aboriginal peoples is recognised as fiduciary 'to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of

¹⁶¹ Professor Evan Fox-Decent, 'The Fiduciary Nature of State Legal Authority' (2005), 31 *Queens L J* 259, 301

¹⁶² Jonathan Evans, 'Challenging trustee decisions: differing approaches to the supervision of the exercise of trustee's powers' (2012) *Trust L I*, 56

¹⁶³ *Wewaykum Indian Band v Canada* [2002] 4 SCR 245 considered the Crown's fiduciary duty to aboriginals

aboriginal peoples.’¹⁶⁴ This will be considered further in chapter five, when the public trust doctrine is examined.

2.5.9 Utility theory

Utility theory is a theory related to the underlying purpose of fiduciary law. Its approach is functional and purposive, emphasising that courts will uphold relationships of a fiduciary nature where there is a determined need to protect the integrity of particular types of relationship. The protective element may arise due to the relative status of the parties, such as guardian and ward, or because of a perceived commercial utility, for example to prevent director(s) or employees seizing corporate rewards by unfair means. Thus the focus is on the utility of the relationship and the public interest in ensuring that such aberrant behaviour is not tolerated. Millett LJ stated that fiduciary relationships exist to protect persons ‘subject to disadvantage or vulnerability.’¹⁶⁵ This need to deter fiduciary misfeasance is very common in fiduciary literature. Robert Flannigan uses the graphic term ‘sledgehammer’ to emphasise the courts’ approach to fiduciary liability and the need to eliminate any possibility of opportunistic manipulation of the beneficiary’s interests.¹⁶⁶ The late Professor Gareth H Jones stated that ‘policy may demand a public sacrifice of the fiduciary’s profit’ even where a fiduciary has been honest and did not cause a loss to his beneficiaries,¹⁶⁷ as illustrated by *Boardman v Phipps*.¹⁶⁸

¹⁶⁴ *ibid*, 99

¹⁶⁵ *Bristol & West Building Society v Mothew (t/a Stapley & Co)* [1998] Ch 1, 17

¹⁶⁶ Professor Robert Flannigan, ‘The Strict Character of Fiduciary Liability’ [2006] *New Zealand Law Review* 209, 217

¹⁶⁷ Professor Gareth H Jones, ‘Unjust Enrichment and the Fiduciary’s duty of Loyalty’ (1968) 84 *LQR* 472, 487

¹⁶⁸ [1967] 2 AC 46 (HL)

2.5.9.1 Utility theory in a Local Authority context

Utility theory is of importance to this thesis, since it impacts on the relationship between elected councils and their constituents; it has a societal perspective. This is captured by Lady Justice Arden who, in referring to fiduciary liability, said ‘equity imposes stringent liability on a fiduciary as a deterrent...’¹⁶⁹. Its commercial utility is shown by the *FHR* decision,¹⁷⁰ where Lord Neuberger stated: ‘secret commissions are also objectionable as they inevitably tend to undermine trust in the commercial world...one would expect the law to be particularly stringent in relation to a claim against an agent who has received a bribe or secret commission.’¹⁷¹ Although Lord Neuberger speaks of the need for trust in the ‘commercial’ world, as we have demonstrated trust is a vital component of the relationship between local authorities and their service users—we trust that they will abide by their statutory powers and the trust placed in them.

This author agrees with Professor Scott FitzGibbon when he says that ‘social fiduciary relationships are supported by traditional virtues such as loyalty, civility, self-sacrifice, vocational excellence, and high standards of honesty’.¹⁷² The problem with the utility theory is that it does not provide an answer as to how and to what extent socially valuable relationships are indeed fiduciary; the fact that a relationship is socially useful does not necessarily render it fiduciary. It may be argued that the promotion of social goals is not an intrinsic aim of private law, but a task better suited to other social sciences or branches of law. Ultimately, of course, there will be

¹⁶⁹ *Murad v Al-Saraj* [2005] EWCA Civ 959, 74

¹⁷⁰ *FHR European Ventures Plc & Others v Cedar Capital Partners LLC* [2015] AC 250, See paras [33-34] arguments based on principle and practicality

¹⁷¹ *ibid*, 43

¹⁷² Scott FitzGibbon, ‘Fiduciary Relationships Are Not Contracts’, [1999] Marq L Rev 303, 340

diverse and conflicting views of what activities and services are considered to fall within the phrase ‘socially useful’; this will, in part, be determined by a wide range of indeterminate factors, including social class, background, cultural, social and political leanings, to mention a few.

2.5.10 Descriptive theories

The theories of dependency, vulnerability and inequality referred to above, are more descriptive than analytical; their sole purpose is to explain the law’s motivation for intervening to regulate the relationship between the parties.

Another theory that comes within this descriptive grouping is that of ‘unjust enrichment’. This theory addresses the issue of fiduciaries who take advantage of their position or status within the relationship in a way that is contrary to the welfare and interests of their principal. Unjust enrichment theory is remedy-driven: it focuses on the remedial consequences of a fiduciary taking advantage of the inequality of power and their dominance over the beneficiary, namely forfeiture of any profits made by the fiduciary. This theory does not, however, help us to identify the circumstances in which a particular relationship will be considered fiduciary in nature. ¹⁷³Professor L.S. Sealy ¹⁷⁴ considers that the unjust enrichment theory espoused by Fry J in *Re West of England and South Wales District Bank, Ex parte Dale and Co* ¹⁷⁵ ‘is really not a definition at all: although it describes a common feature, it does not teach us to recognise a fiduciary relationship when we meet one.’

Academic writing has shown that the unjust enrichment theory is, in essence, circular

¹⁷³ Professor Gareth Jones, ‘Unjust Enrichment and the Fiduciary’s Duty of Loyalty’ (1968), 84, L. Q. Rev 472

¹⁷⁴ Professor L S Sealy, ‘Fiduciary Relationships’ (1962), Cambridge L J 69, 78
Professor Sealy is referring to Fry J’s statement of what is a fiduciary relationship – ‘It is one in respect of which if a wrong arise, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the *cestui que trust.*’ p.778.

¹⁷⁵ [1879] 11 Cd D 772, 778

in reasoning - as stated by Judge F H Easterbrook and Daniel E Fischel ‘the description can fit any rule while predicting no outcomes.’¹⁷⁶

There is a continuing debate about unjust enrichment and whether it is a stand-alone concept or merely part of the law of restitution.¹⁷⁷ This debate is outside the scope of this thesis, but the body of work on this theory contains interesting comments on competing taxonomies and attempts to explain why trusts cannot stand outside the common law taxonomy. Unjust enrichment as a factor is just that: its presence does not necessarily indicate that a fiduciary relationship exists; it merely indicates that a person or body has been unjustly enriched at the expense of another. This leads to the conclusion that ‘because of the ideological proximity of actions based upon fiduciary doctrine and those based upon unjust enrichment, the use of unjust enrichment theory within the ambit of fiduciary doctrine requires careful monitoring so that situations of unjust enrichment which do not give rise to fiduciary relations are kept within their own independent sphere’.¹⁷⁸ Unjust enrichment, like concepts of reliance, is illustrative rather than indicative of the existence of a fiduciary relationship.

2.5.11 Cognitive theory of Fiduciary Relationships

For the sake of completeness, mention should be made of the cognitive theory of fiduciary relationships.¹⁷⁹ This theory concentrates not on the relationship between the parties, but rather on judicial reasoning in determining whether a relationship is

¹⁷⁶ Judge F H Easterbrook and Daniel R Fischel, ‘Contract and Fiduciary Duty’ (1993), 36 JL & Econ, 425, 435

¹⁷⁷ Ian M Jackman, *The Varieties of Restitution* (The Federation Press 1998); see response by Peter Birks, ‘Equity, Conscience and Unjust Enrichment’ (1999) 23(1) Melb U Law Rev 1

¹⁷⁸ Professor D A DeMott, ‘Beyond Metaphor: An Analysis of Fiduciary Obligation’ (1988) 5 Duke LJ 879, p.848

¹⁷⁹ Professor G S Alexander, ‘A Cognitive Theory of Fiduciary Relationships’ (2000) 85 Cornell Law Review, 767

fiduciary or not. Professor G S Alexander focusses on the behavioural claim that ‘cognitive factors lead courts to analyse fiduciary relationships, at least those that are property based, differently than they evaluate contractual relationships.’¹⁸⁰ Alexander takes a non-contractarian viewpoint.¹⁸¹ Cognitive theory emphasises the extent to which schemas influence our inferences and our causal explanations. Schemas are knowledge structures that are comprised of assumptions, expectations, and generic prior understandings.¹⁸² Alexander’s concern is that judge’s schemas influence their determinations of whether a fiduciary relationship exists in a given situation.

2.5.11.1 Cognitive theory in a Local Government context

In this author’s opinion Professor Alexander’s work has value in the context of local authorities and their service users, because its aim is to explore whether there is anything special or distinctive about fiduciary relationships in general, or whether ‘the term is nothing more than a label that obscures rather than clarifies’.¹⁸³ This is achieved by concentrating on the different roles we assign to relational roles according to hierarchical or non-hierarchical categories. Professor Atkinson states:

For example, friends, business partners, and co-workers relate to each other nonhierarchically, which means that they hold positions of relative equality of power and knowledge. Doctor-patient, lawyer-client, and parent-child relationships, by contrast, tend to be hierarchically structured relationships in which one party occupies a role of dominance and responsibility for the other¹⁸⁴

¹⁸⁰ *ibid*, p.768

¹⁸¹ *ibid*, p.770: ‘At a minimum, cognitive theory checks the excessively reductionist tendencies of many law-and-economic scholars, including those who reduce all fiduciary relationships to ‘mere’ contracts’.

¹⁸² *ibid*, p.770

¹⁸³ *ibid*, p.767

¹⁸⁴ *ibid*, p.774

Such an approach helps us to place the relationship between local authorities and their service users in a hierarchically structured relationship, especially when related to the relational indicators discussed of power and dependency.

2.5.12 Instrumental description

Instrumentalism assumes that the law is created with a particular result or goal in mind.¹⁸⁵ Viewed from an instrumental perspective, fiduciary obligation is a legal device that enables a court to respond to a range of situations in which a person's discretion, entrusted to another, ought to be controlled and regulated because of the very characteristics of that relationship. This approach is related to the functional utility purpose of fiduciary law referred to above. As stated by Professor De Mott:¹⁸⁶ 'described instrumentally, the fiduciary obligation is a device that enables the law to respond to a range of situations in which, for a variety of reasons, one person's discretion ought to be controlled because of characteristics of that person's relationship with another'

2.6 Conclusion

Analysis of the fiduciary theories set out above not only illustrates the range of theories (and evidences to an extent, why a commonly agreed definition of the fiduciary relationship cannot be found), but also illustrates the divergence of academic and judicial views. None of these theories, however, fully capture the myriad applications of fiduciary relationships. Joining Professor J C Shepherd, this

¹⁸⁵ Lewis Kornhauser, 'Three Roles for a Theory of Behaviour in a Theory of Law' (Stanford Journal of Legal Studies 24 February 1999): 'if the particular goal is not achieved, then the legal rules and institutions designed to forward it are not effective. Institutionalism assumes that legal rules and institutions can shape the behaviour of private individuals...' This author would add institutions, such as local authorities

¹⁸⁶ Deborah A DeMott, 'Beyond Metaphor: An Analysis of Fiduciary Obligation' (1988) 879 Duke Law Journal, 830. p.914

author feels it may be more accurate to speak of relationships having a fiduciary component rather than speak of fiduciary relationships as such.¹⁸⁷ This chapter concentrated on identification of a fiduciary relationship i.e. how do you ‘spot’ the circumstances in which a fiduciary relationship arises. It is clear that, although fiduciary theorists appear to agree on a general set of norms, such as that no single theory is dominant-they provide different conceptual points of emphasis. Further, no single theory identified in and of itself provides a satisfactory basis for complete understanding of the fiduciary doctrine, or is able to address the multifarious relationships that ought properly to be considered as fiduciary

The fiduciary relationship is indefinable; as Sealy states, ‘the word ‘fiduciary....is not definitive of a single class of relationships to which a fixed set of rules and principles apply....the mere statement that John is in a fiduciary relationship towards me means no more than that in some respects his position is trustee-like.’¹⁸⁸ One can do no better than quote Professor Paul D Finn,¹⁸⁹ whose comments have general application to all the indicia discussed in this chapter. He states:

It is obviously not enough that one is in an ascendant position over another; such is the invariable pre-requisite for the unconscionable principle. It is obviously not enough that one has the practical capacity to influence the other; representations are made, information is supplied (or not supplied) as of course with the object of, and in fact, influencing a host of contractual dealings. It is obviously not enough that the other party is in a position of vulnerability: such is the almost inevitable state in greater or lesser degree of all parties in contractual relationships. It is obviously not enough that some degree of trust and confidence are there: It isnot enough that there is dependency by one party upon another: Indeed elements of all the above may be present in a dealing-and consumer transactions can illustrate this-without a relationship being in any way fiduciary¹⁹⁰

¹⁸⁷ J C Shepherd, *The Law of Fiduciaries* (Toronto: Carswell, 1981)

¹⁸⁸ L S Sealy, ‘Fiduciary Relationships’ (1962) Cambridge L R 69, 73

¹⁸⁹ Paul D Finn, ‘The Fiduciary Principle’, in Timothy G Youdan (ed) *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989)

¹⁹⁰ Paul D Finn, ‘The Fiduciary Principle’, in Timothy G Youdan (ed) *Equity, Fiduciaries and Trusts* (Toronto: Carswell 1989)

These theories are, at best, a set of loosely-fitting aids which function by coming together in various different contextual situations; they operate as a guide, or ‘blueprint for the protection and continued efficacy of independent social relations.’

¹⁹¹ Terms such as fiduciary, fiduciary office or fiduciary relationships provide suitable shorthand, ¹⁹² but only take us so far in discovering the core nature of fiduciary relations or the core duties of a fiduciary.

A number of the theories appear to be relevant to the relationship between a local authority and their service users. For example, by virtue of their democratic rights local citizens entrust power to their local authorities, which involves, in some instances wide discretionary power granted by statute. Those statutory powers often encompass service users who may not be voters, but are vulnerable in the sense that they rely on local authorities to carry out their statutory role, in a way that seeks to protect that vulnerability-entrustment of power can lead to vulnerability; it is not only the old, infirm, disabled or economically disadvantaged who fall within that ‘vulnerability’ category, but also asylum seekers and children needing protection.

Proceeding on the basis that the relationship between local authorities and their service users may fall within its own special fiduciary categorisation, the next question is to discover what the ensuing fiduciary duties would look like.

¹⁹¹ Professor D A DeMott, ‘Beyond Metaphor: An Analysis of Fiduciary Obligation’ (1988) 5 Duke LJ 879

¹⁹² As suggested by John Glover, ‘The Identification of Fiduciaries’ in Peter Birks (ed) *‘Privacy and Loyalty’* (Clarendon Press 1997) 269.

CHAPTER 3

Defining Fiduciary obligations within the legal framework of local government

The phrase ‘fiduciary duties’ is a dangerous one, giving rise to a mistaken assumption that all fiduciaries owe the same duties in all circumstances. This is not the case¹

3.1 Introduction

Chapter two examined the main theories that identify the circumstances in which a fiduciary relationship might arise in English law. The object of this chapter is to extend the analysis beyond the relational context to consider the nature of fiduciary duties and obligations that arise when such a relationship exists. This is essential, because it identifies the scope of fiduciary duty imposed on local authorities should they in given circumstances be in a fiduciary relationship with their service users. This is not merely academic, but very important since recognition of a duty as fiduciary can lead to the availability of particular remedies, but also possibly in terms of causation, remoteness and limitation.²

It must first be recognised that even where a relationship is deemed ‘fiduciary’, this does not mean that all obligations arising will be fiduciary in nature: some obligations may be contractual³ or tortious⁴, as in such situations established contract law and tort law will provide the guiding principles. It is not unusual in a relationship to have a blending of both fiduciary and non-fiduciary obligations.

¹ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 206 (Lord Browne-Wilkinson)

² J D Heydon, ‘Are the Duties of Company Directors to Exercise Care and Skill fiduciary?’ in Simone Degeling and James Edelman (eds) *Equity in Commercial Law* (Law Book Company of Australasia 2005) 185, 189

³ Contractual liability can arise, for example with a local authority contracted with printers for stationery supplies, or computer supplies for new software programmes.

⁴ Tortious liability can arise from injury suffered by tripping up on defective pedestrian flagstones

This chapter will first consider whether fiduciary duties are purely proscriptive in nature or whether they are comprised of both proscriptive and prescriptive duties. The narrower view confines fiduciary duty to a proscriptive role, exemplified in the no conflict, no profit rule. This is the conventional and historical based understanding of the extent of the duties involved when a fiduciary voluntarily holds property for the benefit of another. The broader view comprises a set of prescriptive duties, which includes the traditional no conflict of interest rules, but, it has been argued extends to include duties such as the duty of good faith, the duty of care and the duty of confidentiality. For the sake of clarity, each approach will be analysed separately. Recent case law and scholarship has reignited debate about whether fiduciary obligations are purely proscriptive in character.⁵ Kelvin F.K. Low states: ‘the wider content of fiduciary obligations continues to elude us. Whilst we know that fiduciaries are expected to avoid unauthorised profits and conflicts of interests, whether any fiduciary duties exist beyond this core remains controversial.’⁶ Some cases suggest the prescriptive nature of fiduciary obligation⁷, some courts⁸ and academics,⁹ fiercely defend the proscriptive nature of fiduciary duties. Professor Flannigan defends the orthodox proscriptive view based on historical grounds and the difficulty of the courts’ practical task of policing fiduciary accountability.

⁵ See, Darryn Jenson, ‘Prescription and Proscription in Fiduciary Obligations’ (2010) 21(2) Kings Law Journal; (University of Queensland, Beine School of Law, Research Paper No 10-29)

See also, Rebecca Lee, ‘Rethinking the content of the fiduciary obligation’ [2009] Conv 3, 236-253 who has suggested that fiduciary obligations have a prescriptive and ‘directional’ dimension

⁶ Kelvin F K Low, ‘Fiduciary duties: the case for prescription’ (2016) 30(1) Tru L I 3-25, 1.

⁷ In England, see *Knight v Frost* [1999] 1 BCLC 364, 374; *Regentcrest plc v Cohen* [2001] 2 BCLC 80, 120; *GHLM Trading Ltd v Maroo* [2012] EWHC 61 (Ch), 85

In Australia, see *Westpac Banking Corp v The Bell Group Ltd (in liq)* (2012) 270 FLR 1.

In USA, see *In Re Trados Inc Shareholder Litigation* 73 A 3d 17 (Del 2013)

⁸ *Breen v Williams* (1996) 186 CLR 71, cf. *Bristol & West Building Society v Mothew* [1998] Ch 1

⁹ See, eg, Professor Mathew Conaglen, ‘The Nature and Function of Fiduciary Loyalty’ (2005) 121 LQR 452; Robert Flannigan, ‘The Adulteration of Fiduciary Doctrine in Corporate Law’ (2006) 122 LQR 449

Having analysed the arguments presented on both sides, the chapter will proceed to apply them to a local government setting, specifically in relation to the duties owed by local authorities to their service users. This chapter will demonstrate that only a proscriptive view of fiduciary duty offers sufficient certainty to both fiduciary and beneficiary; it is historically and doctrinally sound. However, in the context of the relationship between local authorities and their service users, the chapter will acknowledge that the prescriptive approach offers greater scope for imposing accountability upon local authorities.

It is important to consider whether fiduciary duty is confined only to economic interests or whether it can or should encompass non-economic interests. This issue is highly relevant to this thesis, since a local authority's service delivery function is not always concerned with purely financial implications: for example, the provision of children and vulnerable adult services, where welfare factors may be seen as more important than fiscal considerations.¹⁰

For the purpose of this thesis, by non-economic interests this author means interests in physical and emotional health, as opposed to financial or property interests. Richard Joyce states:

In seeking to exclude the application of fiduciary law in relation to non-economic interests, one approach open to the courts is to place the relationship in which non-economic interests are at stake outside the range of relationships in which fiduciary obligations exist. Another approach is to take a broad view of the relationships that

¹⁰ A further example is the provision of youth offending services. This ordinarily consists of Youth Offending teams which are multi-agency organisations, supervising children and young people aged 10-17, including key partners to children, young people and their families to support them in moving away from offending behaviour and achieve more positive outcomes, such as Health, Education, Police, Probation and Social-Care and were set up by the Crime and Disorder Act 1998. Each local authority must have at least one Youth Offending Team, which tackles issues associated with youth crime. Local authorities must also ensure that an annual Youth Justice plan is available to outline how such services will be delivered. The non-commercial activity involves a wide range of interventions

may give rise to fiduciary obligations, but to define the scope of fiduciary obligations so as to exclude non-economic interests¹¹

This author sees no justification for limiting claims for breach of fiduciary duty to economic loss only, for to do so may well lead to injustice, particularly in the context of local authority decision-making.

3.2 The Nature of ‘Fiduciary Duty’

The moral foundation of fiduciary obligation provides a protective sheath against abuse by the fiduciary. Moralistic elements are prevalent in the conceptual framework of fiduciary duty and also in judicial pronouncements about fiduciary duty. This is largely due to fiduciary law being a creature resting heavily on principles of conscience: a different focus to the common law. Professor Tamar Frankel has said: ‘The Courts regulate fiduciaries by imposing a high standard of morality upon them.’¹² As Frankel further says, ‘the moral standard is not left to the fiduciary or custom. The courts do consider the parties expectations and professional customs; but, in the last analysis it is the function of the court to determine the standards. This moral theme is an important part of fiduciary law. Loyalty, fidelity, faith and honour form its basic vocabulary.’¹³ Similarly, John C Coffee Jnr¹⁴ has stated: ‘Fiduciary law is deeply intertwined with notions of morality and the desire to preserve a traditional form of relationship’, and Professor Austin Scott relied on

¹¹ Richard Joyce, ‘Fiduciary Law and Non-Economic Interests’ (2002) 28(2) Monash University Law Review, 239-267. Joyce contrasts the Australian and Canadian approach to recognition of fiduciary duty extending to non-economic issues, but notwithstanding the comparative limitation this article contains useful information on contrasting courts’ approaches in different jurisdictions

¹² Professor Tamar Frankel, ‘Fiduciary Law’ (1983) 71 Calif L R 795, pp.830-831.

Professor Frankel discusses the moral dimensions of fiduciary law.

For work on the judges’ role, see Jeremy Waldron, ‘Judges as moral reasoners’ (2009) International Journal of Constitutional Studies 2

¹³ Professor Tamar Frankel, ‘Fiduciary Law’, (1983) 71 Calif L R 795, 830

¹⁴ John C Coffee Jnr, ‘The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role’ (1989) 89 Colum L Rev 1618, 1658

philosopher Josiah Royce to conclude that loyalty, properly defined, 'is the fulfilment of the whole moral law.'¹⁵

Fiduciary obligation has a double-sided approach. This author means it has a negative and a positive side. The negative side is represented by acting to purge opportunistic behaviour on the part of the fiduciary and, at the same time, has a positive side, in that it coerces the fiduciary to act with loyalty towards the beneficiary. This author therefore considers fiduciary obligation to be dualistic in essence: it is concerned with consequences of both the bad behaviour of the fiduciary and the trusting approach of the beneficiary.

3.2.1 Proscriptive Duties

Proscriptive duties are expressed in negative terms; ¹⁶ they ensure that a fiduciary avoids any situation where their duty to their principal and their own self-interest might conflict. ¹⁷

There is dispute as to whether these proscriptive duties are fourfold, threefold, twofold or comprise one single obligation. The rules are: the 'no-conflict rule, the 'no-profit rule, the 'no self-dealing' rule and the 'fair dealing' rule. It may be helpful to illustrate briefly how each duty is engaged. The 'no conflict' rule is an all-encompassing rule and states that a fiduciary is not allowed to place themselves in a position or circumstances where their own personal interest might clash with the interests of their principal.

¹⁵ Josiah Royce, 'The Philosophy of Loyalty' at 15, cited in Austin Scott, 'The Fiduciary Principle' (1949) 37:4 Cal L Rev 539, 540

¹⁶ Charles Harpum describes fiduciary obligations as 'negative principles': Charles Harpum, 'Fiduciary Obligations and Fiduciary Powers: Where Are We Going?' chapter 7 in P Birks (ed) '*Privacy and Loyalty*' (Clarendon Press 1997) 145, 147. See also, Nolan (1998) 12 and L S Sealy (1989) 268

¹⁷ A clear example would be the purchase by the fiduciary of trust property at a market undervalue

The ‘no-profit’ rule is self-explanatory: the fiduciary must not retain any unauthorised benefit or property that has arisen from their fiduciary position. The principle is enunciated in *Bray v Ford*¹⁸ ‘It is an inflexible rule of a Court of Equity that persons in a fiduciary position are not, unless otherwise expressly provided, entitled to make a profit.’ It remains the case as Lord Thurlow stated in *Forbes v Ross*,¹⁹ that: ‘there is no one more sacred rule of a Court of Equity than that a trustee cannot so execute a trust as to have the least benefit to himself.’

The no ‘self-dealing’ rule renders voidable by the beneficiary any dealing by the fiduciary of entrusted property, even if there has been complete honesty on the part of the fiduciary. The severity of this rule is illustrated by Lord Eldon LC in *Ex p James*²⁰ where he said: ‘This doctrine as to the purchase by trustees, assignees and persons having a confidential character, stands more upon general principle than upon the circumstances of any individual case. It rests upon this: that the purchaser is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance.’ See further judicial statements by Arden MR in *Campbell v Walker* and extra judicial comments by B H McPherson J.²¹ Some doubt about the application of the no self-dealing rule was expressed by the

¹⁸ *Bray v Ford* [1896] AC 44, 51 (Lord Herschell)

¹⁹ *Forbes v Ross* [1788] 2 Cox 112, 116; 2 Bro C C 430

This was a probate case involving a trustee, with his co-trustee’s consent, borrowing estate monies at interest of 4%. Ross had borrowed money from the testator during his lifetime at rate of 4%. The will stated that monies lent should be at such a rate as the two trustees thought reasonable. The court held that the matter was different where a trustee was concerned, he could not bargain for himself, so as to gain an advantage and a 5% rate was ordered to be paid

²⁰ [1803] 9 Ves 337, 344

²¹ *Campbell v Walker* [1800] 5 Ves 678, 680 (Arden MR) ‘Any trustee purchasing the trust property is liable to have the purchase set aside, if in any reasonable time the beneficiary of the trust chooses to say, he is not satisfied with it’.

See further, comments by Hon Mr Justice B H McPherson J, ‘Self-dealing Trustees’ in Oakley, *Trends in Contemporary Trust Law* (Oxford : Oxford University Press 1996) 135-152

Court of Appeal in *Holder v Holder*²², where Sacks LJ considered that it should only be considered a rule of practice.²³ The strict approach was, however, affirmed in *Kane v Radley-Kane*²⁴ by Sir Richard Scott V-C,²⁵ who said it is ‘a general and highly salutary principle of law that a trustee cannot validly contract with himself and cannot exercise his trust powers to his own advantage.’

The ‘fair-dealing’ rule links with the self-dealing rule and means that a purchase by the fiduciary of a beneficial interest from one or more beneficiaries will be voidable, unless the fiduciary can show the transaction was entirely fair and was carried out with the beneficiary’s informed consent.²⁶ Jessell MR stated that ‘informed consent is only effective if it is given after ‘full disclosure’.²⁷ The rationale for a slightly more relaxed approach in dealings between a trustee/fiduciary and a beneficiary is that negotiations would have taken place between the fiduciary and beneficiary and there is less risk, therefore, that a trustee might exploit his position.

If for our initial discussion a core element of loyalty is accepted in a fiduciary relationship it is not difficult to identify the existence of a breach of loyalty in each of the four situations described above. To quote Richard Nolan: ‘Fiduciary obligations promote loyalty by prohibiting disloyalty, and activity that might lead to disloyalty:

²² [1968] Ch 353

²³ *ibid*, (Sacks LJ)

²⁴ [1998] 3 All ER 753, a case involving an intestate estate where the widow and sole administratrix appropriated private shares valued at death of £50,000 to herself in satisfaction of her statutory legacy under section 46 of the Administration of Estates Act 1925 as amended. Later those shares were sold for £1,131,438. The appropriation was set aside under the self-dealing rule

²⁵ *ibid*, 757

²⁶ *Thomson v Eastwood* [1877] 2 App Cas 215 (HL), Lord Cairns stated courts of equity would ‘ascertain the value paid by the trustees, and will throw upon the trustee the onus of proving that he gave full value, and that all information was laid before the beneficiary when it was sold.’ The Privy Council confirmed this approach in *Wright v Morgan* [1926] AC 788, when they set aside a sale even though the trustee had an independent valuation carried out.

²⁷ *Dunne v English* [1874] LR 18 Eq 524, 533

fiduciary obligations are proscriptive in nature, and do not encompass the positive duties laid on those described as fiduciaries.....loyalty is the goal.’²⁸

The absence of any conclusive determination as to the relationship between these rules is illustrated by the different views that have been expressed as regards the no conflict rule and the no profit rule. For example, *Snell’s Equity*²⁹ and Underhill & Hayton,³⁰ and the decisions in *Boardman v Phipps*³¹ and *Swain v The Law Society*,³² treat the no-profit rule as part of the wider no-conflict rule, whereas the editors of Lewin³³ argue persuasively that it is better to speak of two distinct, though allied, rules.

There has been much debate whether these rules are autonomous and distinct or simply one rule with several facets of application. This author subscribes to the latter approach adopted by Lord Upjohn in *Boardman v Phipps*³⁴ where he says: ‘A fundamental rule of equity is that a person in a fiduciary capacity must not make a profit out of his trust which is part of the wider rule that a trustee may not place himself in a position where his duty and his interest may conflict.’

²⁸ Professor Richard Nolan, ‘Conflicts of Interest, Unjust Enrichment, Wrongdoing’ in W R Cornish, *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (Hart Publishing 1998) 87-89

²⁹ John McGhee QC, ‘*Snell’s Equity*’ (33rd ed, Sweet & Maxwell 2014)

³⁰ David Hayton, Paul Mathews and Charles Mitchell, ‘*Law of Trusts & Trustees*’ (18th ed, Butterworths Law, 2010)

³¹ (1967) 2 AC 46 (HL)

See, Bryan, ‘*Boardman v Phipps* 1967’ in Mitchell and Mitchell (eds) ‘*Landmark Cases in Equity*’ (Hart 2012)

³² (1983) 1 AC 598 (HL)

³³ Lynton Tucker, Nicholas Le Poidevin and James Brightwell (eds) ‘*Lewin on Trusts*’ (19th ed, Sweet & Maxwell 2014). They point out that the *Boardman* case applied the no profit rule and yet there was no conflict of interest present

See further, statement by Assistant Professor Rebecca Lee, ‘Having shown that the no-profit rule is subsumed under the wider no-conflict rule (i.e. there is only one single negative duty to conflict.)’ Rebecca Lee, ‘Rethinking the content of the fiduciary obligation’ [2009] Conv, 236

³⁴ [1967] 2 AC 46 (HL), 123, this case illustrates how rigorously English courts interpret the scope and ambit of a fiduciary’s duty of loyalty

Similar debates have taken place on the conceptual independence or otherwise of the ‘dealing’ rules. This author considers that all of these rules stem from one source, namely to prevent conflict of interest. In *Re Thompson’s Settlement*³⁵ Vinelott J stated: ‘It is clear that the self-dealing rule is an application of the wider principle that a man must not put himself in a position where duty and interest conflict or where duty to one conflict with his duty to another.’

Whether the rules are seen as independent or interdependent, it does not alter their prophylactic nature, and scholars and judges alike agree that there is strict liability for breach of any or all of them.³⁶

3.2.2 Prescriptive duties

A prescriptive fiduciary duty is framed in a positive way: it is a duty to be exercised by the fiduciary in the interests of the beneficiary. *Item Software UK Ltd v Fassihi*,³⁷ which involved imposing a positive duty on a company director to disclose information, is sometimes used as an example of a fiduciary being under a positive

³⁵ [1986] 1 Ch 99, 115

See comments of Deane J in Australian case *Chan v Zacharia* [1984] 154 CLR 178, 198-199 where Lord Upjohn’s reasoning in his dissenting judgment in *Boardman v Phipps* was relied upon that the reasonable man must perceive a real personal possibility of conflict between the fiduciary’s interest and duties before liability is imposed

³⁶ *Keech v Sandford* [1726] Sel Cas Ch 61, a trustee was unable to renew a lease of a market in Romford for the infant beneficiary and therefore renewed it in his own name and for his own purposes. Lord King said he ‘should rather have let it run out, than to have had the lease to himself. The trustee is the only person of all mankind who might not have the lease ... the rule should be strictly pursued.’ The reasoning is to have allowed an exception in this instance would have created problems in like or comparable circumstances and would have weakened the strict nature of the no conflict rule

See generally, Mathew Conaglen, ‘A Re-Appraisal of the Fiduciary Self-Dealing and Fair Dealing Rules’ (2006) 64 CLJ 366

³⁷ [2004] EWCA Civ 1244

Arden LJ’s use of a director’s general duty to act in the interests of the company to derive a particular duty to confess his own wrongdoing has proven to be somewhat controversial - see Alan Berg, ‘Fiduciary Duties: A Director’s duty to Disclose his own Misconduct’ (2005) 121 LQR 213; Adam Cloherty, ‘Directors’ Duties of Disclosure’ [2004] JBL 252

duty. In this case, Arden L J held that failure by a director to disclose an intention to compete with his company would be evidence of disloyalty. *Fassihi* was further analysed in *Shepherds Investments Ltd v Walters*³⁸ by Etherton J, who considered that there was no independent duty of disclosure and that the case represented a straight conflict of interest situation between the director's personal interest and that of his company.³⁹

3.2.3 Fiduciary duties as both Proscriptive and Prescriptive duties

The premise of the prescriptive approach is that the fiduciary obligation is not to be regarded as a project of restraint, but as a more liberating application. 'A prescriptive duty requires action by the person owning it; a proscriptive duty requires restraint.'⁴⁰ Professor Paul Finn,⁴¹ for example, considers that fiduciary obligation can be identified as a generic notion and split into eight segments that include not only the negative, proscriptive rules outlined above, but also positive duties, such as, a the duty of good faith, duty of fidelity, duty of care, duty to treat beneficiaries fairly, duty of candour, duty of confidentiality, and a general duty to grant beneficiaries access to information. However, as Professor Devdeep Ghosh states 'a high burden of proof

³⁸ [2006] EWHC 836 (Ch); [2007] 2 BCLC 91, 63-68. Mr F, a director, hence a fiduciary of his company sabotaged his company's efforts in negotiating the renewal of a contract with its chief suppliers in order to improve his prospects of securing the business

³⁹ Paul S Davies and Graham Virgo, *'Equity & Trusts'* (Oxford: Oxford University Press 2013) state 'Etherton J's interpretation of *Fassihi* maintains the idea that fiduciary duties are proscriptive only. Admittedly, the Court of Appeal in *Fassihi* did not clearly adopt this analysis, but it is the preferable approach and consistent with logic and orthodoxy.'

⁴⁰ Harold Ford, W A Lee and others, *'The Law of Trusts'* (3rd ed LBC 2012) 9.1000.

See also, Vicki Vann, 'Causation and Breach of fiduciary duty' (Monash University research paper No 2006/60) 67

⁴¹ Paul Finn, *'Fiduciary Obligations'* (Law Book Co 1977)

must be imposed on he or she who seeks to import prescriptive duties into a fiduciary relationship.’⁴²

This approach, can, however, be criticised as these positive duties may also apply to a wide spectrum of non-fiduciary actors.⁴³ The positive duties listed by Paul Finn are, in this author’s view, useful, provided they are linked to a central core of devotion to the beneficiary and are not taken as independent duties. For example, compliance with a duty of good faith may be viewed as equivalent to compliance with an overall duty of loyalty to one’s beneficiary. This interpretation accords with Millett L.J’s reference to the duty of good faith in *Bristol and West Building Society v Mothew (t/a Stapley & Co)*:⁴⁴

A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty.....This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict. He may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are defining characteristics of the fiduciary....he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary⁴⁵

⁴² Devdeep Ghosh, ‘Fixing the Fiduciary Obligation: The Prescription-Proscription Dichotomy’ (2012) 11(1) Canberra Law Review 24-32, 32

⁴³ Paul Finn, ‘The Core Nature of Fiduciary Accountability’ (2009) New Zealand Law Review 375, Fn 2. The author supports Professor Robert Flannigan when he states, ‘it is not often clear for example, whether terms such as trust, confidence, faithfulness, good faith, loyalty, or fidelity are used as synonyms for conventional fiduciary duty or as labels for distinct duties in novel, and invariably undeveloped taxonomies.’

⁴⁴ [1998] Ch 1 (CA)

⁴⁵ [1998] Ch 1 (CA), 16, a solicitor incompetently failed to notify his building society client when sending in his requisition on title and cheque of knowledge that the borrower was proposing taking out a second loan on the residential property concerned. The borrower defaulted and the building society sued the solicitor for breach of duty and damages for their loss. In an important judgment Millett LJ dealt with fiduciary obligations and the issue whether this error was a breach of a solicitor’s fiduciary obligation. Held - where a person tries their incompetent best they are not in breach of their obligation of good faith

This author's view is that good faith demands consideration, but not an over emphasis of single attention.

Millett LJ's statement clearly links the traditional (proscriptive) rule of no conflict with a positive (prescriptive) duty of good faith, illustrating the proscriptive and prescriptive obligations of a fiduciary.⁴⁶ Support for this approach can also be found in Canadian law in the statement of Laskin J in *Canadian Aero Service Limited v O'Malley*: 'A fiduciary relationship...in its generality betokens loyalty, good faith and avoidance of a conflict of duty and self-interest',⁴⁷ and in a recent Scottish Appeal Court case⁴⁸ where fiduciary duty was declared as a duty to '...act in good faith in the interests of (the principal), to act for a proper purpose, and not to allow....personal interests to conflict with those of the principal.'

Assistant Professor Rebecca Lee⁴⁹ re-examined the orthodox content of fiduciary obligation and concluded 'that the heart of the fiduciary obligation does not merely rest on the two proscriptive no-conflict and no-profit rules, which upon closer analyses do not exhaust the content of the fiduciary obligation'.⁵⁰ Lee, like this author, considers that the no-profit rule is subsumed under the no-conflict rule, but emphasises the fact that fiduciary obligations also have a positive and directional aspect. By directional she means that the fiduciary has a positive duty to act towards

⁴⁶ See, Australian case, *Bell Group Limited (in liq) v Westpac Banking Corporation* (No 9) [2009] 70 ACSR 1 4552, where Owen J reviews fiduciary obligations and questions the traditional model of labelling the fiduciary obligation as strictly proscriptive

⁴⁷ [1974] SCR 592, 606

⁴⁸ *Dryburgh v Scotts Media Tax* [2014] CSH, 45

The liquidator brought proceedings against two directors for breach of fiduciary duty in depriving the company of £750,000 in relation to a dividend payment when the company had insufficient distributable assets to justify it.

⁴⁹ Rebecca Lee, 'Rethinking the content of the fiduciary obligation', [2009] Conv 3, 236-253

⁵⁰ *ibid*, 237

promoting and enhancing the interests of their principal.⁵¹ This formulation frees the court from constraint by the predominant no-conflict rule; it allows the court to consider the extent to which the fiduciary has enhanced the principal's interests.

Lee considers that exclusively proscriptive content is inadequate, stating that 'the fiduciary who is told not to conflict has not been told what his obligation of loyalty entails or what he should do....on the contrary, once we have a positive duty, the notion of negation can help us devise all the proscriptive rules.'⁵² Lee maintains her formulation of fiduciary obligation as both positive and directional and, in support of her position, refers to *Regal (Hastings) v Gulliver*,⁵³ where the duty imposed on the directors was positive and directional in nature.⁵⁴ Lee's conclusion is that it is 'the directional nature of the fiduciary obligation which is its core content and which distinguishes it from other non-fiduciary obligations.'⁵⁵

3.3. Duty of loyalty

At the core of fiduciary duty is loyalty.⁵⁶ As Professor Paul B. Miller states: 'The boundaries of fiduciary obligation are poorly defined, but there is consensus on its

⁵¹ *ibid*, 245 'Thus, when a fiduciary acts, it triggers a positive duty to act solely towards the enhancement of the beneficiaries interests.'

⁵² *ibid*, 239

⁵³ [1967] 2 A.C. 134 (HL)

⁵⁴ *Bristol & West Building Society v Mothew (t/a Stapley & Co)* [1998] Ch 1 (CA), 18 (Millett LJ): 'single-minded loyalty means that loyalty can only be *directed solely* towards the person to whom loyalty is owed'.

See Rebecca Lee's definition of directional - A directional approach to the content of the fiduciary obligation proposes that although the content of the fiduciary obligation does not mandate a positive duty to advance the beneficiary's interests in the first place; if the fiduciary does act in a way which may affect the interests of the beneficiary, his fiduciary duty is to act solely towards the enhancement of the interests of the beneficiary, *which duty then becomes positive and directional.*' (my emphasis)

⁵⁵ Rebecca Lee, 'Rethinking the content of the fiduciary obligation', [2009] Conv 3, 236-253.p. 253

⁵⁶ See, Professor Deborah DeMott, 'if a person in a particular relationship with another is subject to a fiduciary obligation, that person (the fiduciary) must be loyal to the interests of the other party. 'Beyond Metaphor: An Analysis of Fiduciary Obligation' (1988) 37:5 Duke LJ 879, 882

essence...whatever else fiduciary law might require of fiduciaries, it undeniably demands that they act faithfully toward beneficiaries.’⁵⁷

In this author’s opinion, whatever fiduciary theory is adopted, whether singly or in combination, there will still be a significant space for loyalty. It is, therefore, important to understand what is meant by loyalty in the context of fiduciary law. This will be especially true when we look at the relationship between local authorities and their service users and discuss whether a fiduciary relationship exists between those parties. Demonstrating ‘loyalty’ in such circumstances may be impossible, unless loyalty is conceived as loyalty to a purpose, rather than as loyalty to a person or a legal entity.

Professor DeMott states ‘Many connections tie duties of loyalty to other duties owed by a fiduciary’⁵⁸ ; she illustrates this point by reference to the solicitor’s advice in *Nocton* ⁵⁹that self-interest may bias or affect how other duties are

Professor Ethan Lieb, states: ‘the core fiduciary duty is the duty of loyalty, a duty of unselfishness’. Ethan Lieb, ‘Friends as Fiduciaries’ (2009) 86:3 Washington University Law Review 665, 673; Professor Ernest E Weinrib, stated that the duty of loyalty is ‘the irreducible core of the fiduciary obligation’ *Fiduciary Obligation*; Professor Lynn Stout, states: ‘The keystone of the duty of loyalty is the legal obligation that the fiduciary use her powers not for her own benefit but for the exclusive benefit of her beneficiary. It is highly improper - indeed proscribed - for a fiduciary to extract a personal benefit from her fiduciary position without her beneficiary’s consent, even when she can do this without harming the beneficiary.’ ‘On the export of US-style Corporate Fiduciary Duties to Other Cultures: can a transplant take?’ in Curtis J Milhaupt (ed), ‘*Global Markets, Domestic Institutions: Corporate Law and Government In a New Era of Cross-Border Deals*’, Columbia University Press 2003, 46,55

See further, Assistant Professor Rebecca Lee, who states ‘Fiduciary duty refers to an obligation of loyalty.’, ‘Rethinking the content of fiduciary obligation’ (2009) Conv 3, 253; Parker Hood, ‘What is so special about being a fiduciary’ (2000) 4(3) Edin L R 308, 308-335. ‘A fiduciary owes a duty of ‘loyalty’ to his principal, which is a higher standard of conduct than a party in an ‘arm’s length’ transaction.’

⁵⁷ Professor Paul B Miller, ‘Justifying Fiduciary Duties’ (2013) 58(4) McGill Law Journal, 969-1023, 976

⁵⁸ Professor Deborah DeMott, ‘Beyond Metaphor; An Analysis of Fiduciary Obligation’ (1988) 37 Duke L J 939

⁵⁹ *Nocton v Lord Ashburton* [1914] AC 932, a solicitor, Norton, was held liable for bad advice given during a fiduciary relationship with a client.

performed. In this respect, she supports the views of Professor Mathew Conaglen⁶⁰ when he contends that the role of ‘loyalty’ is to ensure performance by the fiduciary of his other obligations. Conaglen attributes an insulating role to loyalty: that its role is ‘to insulate fiduciaries against situations where they might be swayed from providing such proper performance’.⁶¹ The same approach is taken by Professor Steven Elliott.⁶²

As Millett L J points out in *Mothew*, the duty of loyalty has been expressed in the form of a number of more particular duties, concerning profits, conflicts of interest and transactions with the principal’s property. Sceptics, like Professor James Penner, have, however asked whether ‘loyalty properly characterises the relationship of the fiduciary to his principal concluding that it ‘is actually doubtful.’⁶³ Most fiduciary scholars do, however, identify loyalty as the paradigmatic fiduciary obligation. Professor Lionel Smith states:⁶⁴ ‘data suggest that a requirement of loyalty is found in all fiduciary relationships, and is essential to their categorisation as such’.

The fiduciary duty of loyalty has recently attracted significant academic attention. It is usually viewed as loyalty specifically related to a person or group who

⁶⁰ Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-fiduciary Duties* (Hart Publishing 2010). Professor Conaglen shows that the concept of loyalty lies at the heart of fiduciary doctrine which operates as a form of protection designed to enhance the likelihood of due performance of non-fiduciary duties, by seeking to avoid influences or temptation that may distract from the fiduciary performing such proper performance

⁶¹ *ibid*

⁶² Steven Elliot, ‘Fiduciary Liability for Client Mortgage Frauds’ (1999) 13 *Trust Law Int’l* 74, 81. With reference to directors and trustees state they ‘are held to fiduciary standards in order to ensure that they are not distracted from their primary duties.’

⁶³ James Penner, ‘Is Loyalty a Virtue, and Even if it is, Does it Really Help Explain Fiduciary liability’. Chapter 8 in Andrew S Gold and Paul B Miller, *Philosophical Foundations of Fiduciary Law*, (Oxford: Oxford University Press 2014).242-252

The views of Penner, Irit Samet, and Lionel Smith on conceptions of fiduciary loyalty are usefully sketched in Andrew S Gold and Paul B Miller, *Philosophical Foundations of Fiduciary Law* (Oxford: Oxford University Press 2014) 5-8

⁶⁴ Professor Lionel Smith, ‘Fiduciary Relationships; ensuring the loyal exercise of judgment on behalf of another’, (2014) *LQR* 2

claim a right to receive the fiduciary's loyalty. This section will examine the role of fiduciary duty in a local government setting and question whether loyalty can be extended beyond persons or groups to loyalty toward abstract purposes. This author's research has been greatly helped by the recent article of Paul B. Miller and Andrew S. Gold⁶⁵ where they examine the structure of fiduciary liability and conclude that there are two types of mandate, governance and service mandates. Their extended definition of the fiduciary relationship emphasises their view that all fiduciary mandates are purposive, although the purposes specified for some mandates are defined in terms of the interests of determinate persons, as is the case with ordinary trusts, whilst others are abstract in that they are defined so as to transcend the interests of determinate persons.

This section addresses three questions that naturally arise, if, as this author argues loyalty is the central core of a fiduciary relationship. Firstly, is loyalty a defining characteristic of fiduciary duty?⁶⁶ There are dissenting voices.⁶⁷ Secondly, what is the core nature of loyalty and what is meant by, 'loyal', 'loyalty', and 'loyally' in academic, judicial and laymen's terms? Thirdly, to what extent is the virtue of loyalty relevant to the concept of fiduciary obligations, particularly in a local

⁶⁵ Paul B Miller and Andrew S Gold 'Fiduciary Governance' (2015) 57 William & Mary Law Review 513

⁶⁶ The concept of loyalty is now well established as the core - indeed defining - concept of fiduciary doctrine. See, for example, England & Wales - *Hilton v Barker-Booth & Eastwood* (a firm) [2005] UKHL 1 WLR 567, 30; *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd* [2005] EWCA Civ 722, 20; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), 1286; *Hageman v Holmes* [2009] EWHC 50 (Ch), 52
New Zealand - *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, 680-81 & 687; *Chirnside v Fry* [2004] 3 NZLR 637, 51
Australia - *Gibson Motorsport Merchandise Pty Ltd v Forbes* [2006] FCAFC 44, 11
Canada - *Hodgkinson v Simms* [1994] 3 SCR 377, 452

⁶⁷ Associate Professor Laura Hoyano, 'The Flight to Fiduciary Heaven' chapter 6 in Peter Birks (ed), '*Privacy & Loyalty*' (Oxford: Oxford University Press 1997) 182. 'Definitions of a fiduciary relationship which turn on the duty of loyalty ultimately are circular, and provide no guidance on which a fiduciary obligation should be attached to a relationship between parties.'

government setting? In other words to avoid using the words in question loosely and vaguely, it is necessary to be clear about what is meant by loyalty. For the purposes of this thesis, it is not necessary to engage in a full philosophical analysis of loyalty and what it means, but it is nevertheless essential to understand what is meant by 'loyalty' in judicial terms. Regrettably the courts have not defined the word 'loyalty' in the context of a fiduciary relationship. The word loyalty is often used without any specific definition of its meaning. It has, therefore, been left to academics to determine a meaningful definition of loyalty in the context of fiduciary relationships. One truism, however, is that opinions as to what loyalty is per se, are divergent. As Professor Eileen Scanlen, says: 'loyalty is almost as difficult to define as the concept itself.'⁶⁸ It is sometimes said, without much elaboration or specificity, that fiduciary law is concerned with ensuring that fiduciaries behave morally.⁶⁹ It will benefit our enquiry to briefly enquire what leading contemporary philosophers have said about the nature of loyalty in order to understand how fiduciary obligation with its emphasis on notions of loyalty, might fit with day to day administrative decision making by local authorities.

To accomplish our aims, we must first identify who is the object of loyalty in a local authority setting. Is loyalty owed to council tax payers as a determinate class of objects or, as argued by this author, to a wider group of service users? What can a person, group, organisation or local authority express loyalty towards? In attempting

⁶⁸ Eileen Scanlen, 'Promises Broken v Promises Betrayed: Metaphor, Analogy and the New Fiduciary Principle' (1993) 4 U Ill L Rev 897

See further literature - R E Lewin, 'Loyalty and Virtues' (1992) 96 Philosophical Quarterly 403, 405; George P Fletcher, *Loyalty, An Essay on the Morality of Relationships* (OUP 1995) 21, loyalty is defined as 'an obligation implied in every person's sense of being historically rooted in a set of defining familial, institutional and national relationships'. Fletcher is valuable to this thesis because it is interested in the role that loyalty should play in decisions made by the state. See Fletcher, 1271

⁶⁹ Paul B Miller, 'Justifying Fiduciary Duties', 58 McGill L J, 969, 995

to address these questions we immediately encounter disagreement among those who have written on the subject of loyalty. Perhaps, as a matter of logic, one could talk about being loyal to oneself - ‘to thine own self be true’, said Polonius to Laertes in Hamlet.⁷⁰ As a matter of usage, however, that is exactly what loyalty is not: it is defined as the antithesis of self-interest. Josiah Royce, a turn of the century American philosopher wrote an entire book about loyalty, and is used as a starting point for an enquiry into loyalty and its characteristics.⁷¹ Loyalty in Royce’s terms is illustrated by examples of devotion to, for example, a patriotic cause, and loyalty includes ordinary expressions of loyalty, such as between family, work colleagues or club or union affiliations.

Loyalty, therefore, involves some element of association with others. It is part of the make-up of society and the relationships that are formed between people and groups of people. Josiah Royce considered loyalty a primary virtue: ‘the heart of all the virtues’, the central duty amongst all duties. Royce presents loyalty as the basic moral principle from which all other principles can be derived, and argues that loyalty is ‘The willing and practical and thoroughgoing devotion of a person to a cause’.⁷² According to Royce the cause has to be an objective one; it cannot be one’s personal self. The devotion is active, a surrendering of one’s self will to the cause that one loves’. From this definition, Royce constructs a moral framework based on loyalty and concentrates on devotion to a cause.

⁷⁰ William Shakespeare, ‘*Hamlet*’ (Act 1 sc. iii)

⁷¹ Josiah Royce, ‘*The Philosophy of Loyalty*’, (Macmillan Co 1908) 19

⁷² *ibid*, Royce’s definition of loyalty was: ‘The willing and practical and thoroughgoing devotion of a person to a cause. A man is loyal when first he has some *cause* to which he is loyal; when secondly, he *willingly* and *thoroughly* devotes himself to this cause; and when, thirdly, he expresses his devotion in some *sustained* and *practical* way, by acting steadily in the service of his cause.’ (my emphasis)

Other contemporary thinkers, such as Andrew Oldenquist⁷³ and Ladd,⁷⁴ differ from Royce as to the object of loyalty. Far from having as its objects impersonal causes, Ladd considers loyalty interpersonal. Historically, and in our ordinary moral language, loyalty is taken to refer to relationship between persons: for example, historically between a lord and his vassal, a parent and child, and between friends. Thus, the object of loyalty is ordinarily directed towards a person or group of persons. Ladd also states that loyalty is specific: 'A man is loyal to his Lord, his father, his comrade, his employer'.⁷⁵ These observations are extremely important because, in this author's opinion they emphasise that loyalty above all is relational in context; it does not exist in a vacuum.

In the context of fiduciary obligations loyalty is considered by many as the 'cement' that holds the fiduciary relationship together. This author adopts this view and considers it appropriate to consider the bond between the fiduciary and beneficiary a form of 'loyalty bond'. The fiduciary must show undivided loyalty towards his beneficiary; if he fails, he will be liable for breach of fiduciary duty. It is important to remember that fiduciary loyalty can be both proscriptive and prescriptive:⁷⁶ proscriptive in the sense that loyalty requires a fiduciary to refrain from actual or potential conflicts of interest, and prescriptive in the sense that the fiduciary must demonstrate loyalty through some affirmative conduct; prescriptive loyalty requires more than avoidance of conflicts or other sources of bias.

⁷³ Andrew Oldenquist, 'Loyalties' (1982) 79(4) *Journal of Philosophy* 173-93

⁷⁴ Ladd, 'Loyalty' in Paul Edwards (ed), *The Encyclopaedia of Philosophy* (Vol 5, McMillan & Free Press 1967) 97-98

⁷⁵ *ibid*

⁷⁶ Whilst theorists often emphasise either proscriptive or prescriptive standards of loyalty, they may be linked. See e.g. Peter Birks, 'The Content of Fiduciary Obligations' (2000) 34 *ISR L R* 3, 28. 'The obligation of disinterestedness cannot be severed from the obligation to promote and preserve.'

Conceptually, it is impossible to be loyal to people in general (to humanity) or to a general principle, such as justice or democracy. This creates a very real issue in the context of local authorities and their service users because, although a local authority may want to be loyal to an idea of, for example, ‘green’ environmental policies within their locality, considerations of other interests, local or national may impinge on their ability to be loyal to the ideology in implementing appropriate policies. Oldenquist joins Ladd in rejecting Royce’s view that ideals can be the object of loyalty. He makes it clear that the issue is a deep one, involving much more than the simple question of how we should use the term loyalty. Ladd’s view is that one must be loyal to a group of people. Royce considers that loyalty is displayed not to a person, or to a group or an organisation, but that it is loyalty to a particular call; yet the ‘cause’ with which he associates loyalty is ultimately articulated in terms of devotion to a community.

Miller and Gold emphasise the difference between loyalty to persons and loyalty to abstract purposes. They state:

In our view, loyalty to purpose differs from loyalty to persons in the specification of the object of the duty of loyalty. Whereas the object(s) of fiduciary loyalty under service-type mandates are beneficiaries, the objects of loyalty for governance type mandates are the abstract purposes for which a particular mandate has been established. Generally speaking, a fiduciary will demonstrate loyalty to the purpose(s) underlying her mandate by exercising discretionary powers exclusively with a mind to advancing those purposes. In our view, loyalty to purposes can be demonstrated more concretely in ways that parallel forms of loyalty to persons⁷⁷

They are supported by Royce, who emphasised that demands made by loyalty are for a single-minded pursuit of a goal. This approach contributes to this author’s argument that a preferred way to look at loyalty in a local government context is to regard notions of loyalty as compliance with the statutory purpose, rather than

⁷⁷ Paul B Miller and Andrew S Gold, ‘Fiduciary Governance’ (2015) 57(2) William & Mary Law Review 562-563

loyalty to any individual or group. This author terms this ‘directional loyalty of purpose.

Another feature of loyalty relates to partiality. Exercising partiality can result in a discriminatory approach: for example, acting on behalf of some particular person(s) or a group, can lead to the exclusion of other people or groups. Putting partiality on one side, we note another feature of acting loyally: acting on behalf of parties, not because the parties necessarily deserve it, but because they were promised it. Further, an approach of ‘blind loyalty’ may lead to irresponsible choices and behaviours on the part of a fiduciary without concern as to the possible consequences of such actions. The real danger is that loyalty may require us to set aside good judgment.⁷⁸ Moral philosophers are aware that factors, such as pride and self-interest, can seriously affect one’s conscience and cause an inability to discern good from bad.

The real issue is how does society construe notions of loyalty in such difficult and complex situations? This is the crux of applying fiduciary and trust like obligations to the relationship between local authorities and their service users. This issue will be addressed in chapter four when the problem of translating fiduciary concepts to local government will be explored, with specific reference to conceptualising loyalty and its application to ‘polycentric’ decision-making as and between a diverse class of beneficiaries. It may be as Evan Fox-Decent states: ‘In the

⁷⁸ Christina B Whitman, ‘Whose Loyalties’ (1993) 91 Mich L Rev 1266, 1277. ‘The great danger of partiality is that we will not be aware of how it limits our vision. We shall find our own affiliations worthy of respect and deference and despise the ties of others as too tenuous, idiosyncratic or divisive to merit similar protection.’

multiple beneficiary contexts typical of public law, loyalty manifests itself as fairness and reasonableness.⁷⁹ His view is supported by Professor Paul D Finn.⁸⁰

Loyalty is thus a strong word. It connotes ‘obligation’ and involves a strong sense of allegiance. It therefore slots nicely into the civil obligation of fiduciary duty, with its emphasis of negation of self-interest and total interest of the ‘beneficiary.’

This section has confirmed that legal and extra-legal conceptions of loyalty often diverge in fiduciary law, and as challenged in an article by Professor Andrew S Gold,⁸¹ our moralistic view of fiduciary loyalty may need to be reappraised.

3.4. Duty of Good Faith

The requirement to act in good faith has been judicially acknowledged to be a key requirement of fiduciary doctrine.⁸² Professors Mathew Conaglen and Richard Nolan⁸³ regard good faith as an independent fiduciary duty.⁸⁴ This approach is justified on

⁷⁹ Professor Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, (2005) 31 *Queen’s L.J.* pp.259-310, p.265

⁸⁰ *The Forgotten Trust: The People and the State*, in Malcolm Cope, ed, *Equity Issues and Trends* (Sydney: The Federation Press, 1995) 131 p.138, It is uncontroversial fiduciary law that where a fiduciary serves classes of beneficiaries as a whole, the fiduciary is nonetheless required to act fairly as between different classes of beneficiary in taking decisions which affect the rights and interests of the classes *inter se*.’

⁸¹ Andrew S Gold, *Accommodating Loyalty*, a chapter in *Contract, Status and Fiduciary Law*, Paul B Miller and Andrew S Gold (eds) (Oxford: Oxford University Press, forthcoming. This article is available at SSRN: <https://ssrn.com/abstract=2696675>.

⁸² *Bristol & West Building Society v Mothew* [1998] Ch 1,18 (Millett LJ)
Further see Professor L Ho, ‘Good Faith and Fiduciary Duty’ (Obligations IV Conference National University of Singapore July 2008)

In *Fassihi*, Arden LJ justified the director’s failure to confess on the ground that he had breached the ‘fiduciary principle’ to act in what he in good faith considered to be the best interests of his company

⁸³ Matthew Conaglen and Richard Nolan, ‘Good Faith: What Does it Mean for Fiduciaries, and what does it tell us about them?’ in Elsie Bant and Mathew Harding, *Exploring Private Law* (CUP 2010) 319-342

⁸⁴ See, Claire Moore Dickerson, ‘From Behind the Looking Glass: Good Faith, Fiduciary Duty & Permitted Harm’ (1995) 22 *Fla St U L Rev* 955, 993. ‘The current view is that fiduciary duty and good faith are wholly separate concepts.’
See also, Robert S Summers, ‘The General Duty of Good Faith - Its Recognition and Conceptualisation’ (1982) 67 *Cornell L Rev* 810, detailing the historical perspectives of good faith and the evolution of the current view of the general duty of good faith

the basis that good faith 'is a quality that must be shown in the performance of a fiduciary undertaking'.⁸⁵ They draw a distinction between ordinary good faith and fiduciary good faith. They illustrate this difference by a specific example of a sale by a mortgagee, involving a mortgagor taking possession of a borrower's property and selling it. Mortgagees have limited powers to the borrower's property of possession and sale of the mortgaged property to recover their debt. The mortgagee does not owe a fiduciary duty to the borrower with regard to the exercise of these powers, because they are never clothed with any fiduciary duty. However, whilst the mortgagee owes a duty of good faith to the borrower to exercise his power of sale fairly, he is entitled to regard his own interests. In this context, the mortgagee must not exhibit bad faith, but obtain the best price possible for the mortgaged property.⁸⁶ While this illustration is helpful, it should be mentioned that the relationship between a mortgagee and mortgagor is not fiduciary.⁸⁷

Conaglen and Nolan face the problem that while good faith is said to be central to fiduciary obligations, and a core duty of a fiduciary in the execution of their duties, it is equally true that duties of good faith apply to non-fiduciaries. They argue that good faith can apply to persons who are not fiduciaries, meaning that good faith must be something unique when applied in the context of a fiduciary relationship.⁸⁸

⁸⁵ Professors' Matthew Conaglen and Richard Nolan, 'Good Faith: What Does it Mean for Fiduciaries, and what does it tell us about them?' in Elsie Bant and Mathew Harding eds, *Exploring Private Law* (CUP 2010) 319-342

⁸⁶ See, *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] 1 Ch 949, 966 (Salmon LJ), this case concerned a sale by possession of a mortgaged development site. Planning permission had been granted for 35 houses or 100 flats. The land was marketed without reference to the planning permission for the flats. Evidence was produced to show that building the flats was more profitable. The mortgagor succeeded in obtaining damages for the difference between the sale price and one that would have been obtained for the flats.

⁸⁷ *Cholmondely (Marquis) v Clinton (Lord)* [1820] 2 Jac & W1, 178; 37 ER 527, 591

⁸⁸ Matthew Conaglen and Richard Nolan, 'Good Faith: What Does it Mean for Fiduciaries, and what does it tell us about them?' in Elsie Bant and Mathew Harding, *Exploring Private Law* (CUP 2010) 319-342, 331. See Chapter 1 'It is seen to operate in a unique way in the

The question immediately raised is what is the determinate for deciding levels of ordinary good faith and unique good faith for fiduciary purposes?

Parties in a contractual relationship, for example, may well try to show good faith to each other, but considerations of good faith are not central to their relationship. Fiduciaries, on the other hand, owe a specific duty of good faith to their principal that acts to regulate the fiduciary's actions or inactions. Conaglen and Nolan capture this important point stating 'it is about prohibiting any intended use of those powers that is not directed to the furtherance-the future development of the principal's interests. That is the key to distinguishing fiduciary good faith from other usages of that term.'⁸⁹

This author considers that unless 'good faith' has some other particular meaning for fiduciaries - a meaning that is separate and distinct from understandings of what good faith is in other spheres of law there appears to be no justification to attributing a special meaning that is only applicable to fiduciaries: good faith is simply a component (not an independent or distinct) part of the duty of loyalty. Further, it is incorrect to assume that good faith does not play an integral part in other legal relationships.⁹⁰ Identifying good faith as a component of a fiduciary duty does not, however, contribute much to the analysis of the relationship between local authorities and their service users: good faith is a public law principle that binds a local authority in their decision making.

fiduciary context, because it qualifies the fiduciary's unique undertaking to advance the interests of the principal.'

⁸⁹ *ibid*, 331

⁹⁰ For example, in the world of insurance the contractual nexus between insured and insurer places a burden on the insured under the *uberrima fides* doctrine to reveal all material facts in their proposal to the insurer, so that insurers have a true basis upon which to underwrite the risk or not, or upon which terms. No one suggests that insured and insurer are in anything other than a contractual relationship

In *Fassihi*, Lady Justice Arden acknowledged that ‘good faith’ was expressed in very general terms, but felt this was one of its strengths. She extolled the flexible and dynamic quality of equity and its capacity to apply in cases where it had not previously been applied. Professor Melvin Eisenberg⁹¹ considers that the duty of good faith provides a principled basis for courts to articulate new specific fiduciary obligations, which may be regarded as appropriate and responsive to changes in social and business norms and cannot be easily accommodated within the core fiduciary duty of loyalty. There is, therefore, a growing body of opinion that the fiduciary duty of loyalty is not limited to cases involving a financial or other recognisable fiduciary conflict of interest: it also encompasses cases where the fiduciary in some way fails to act in good faith. This author agrees with Conaglen and Nolan, who state that: ‘Good faith is too vague a concept to direct and judge action with any acceptable degree of predictability. It is impossible to say with any clarity what behaviour is mandated by good faith alone.’⁹²

Notwithstanding extensive literature on good faith, no consensus exists on precisely what a duty of good faith means.⁹³

The contractarian view discussed in chapter two is that good faith and fiduciary duties share the same function as contract gap fillers, but they lie at different

⁹¹ Melvin Eisenberg, ‘The Duty of Good Faith in Corporate Law’, (2006) 31 Del J Corp L 1, 75

⁹² Mathew Conaglen and Richard Nolan, ‘Good Faith: What Does it Mean for Fiduciaries, and what does it tell us about them?’ in Elise Bant and Mathew Harding (eds), *Exploring Private Law* (CUP 2010) 326

⁹³ See, Mareta Auer, ‘The Structure of Good Faith; A Comparative study of Good Faith arguments’ (unpublished manuscript, November 17th, 2006) <<http://ssrn.com/abstract=945594>> accessed 28 September 2016. ‘It has almost become a trademark of writings in the genre to begin by emphasising the unsatisfactory state of the debate, which mostly seems to be concerned with the insurmountable difficulty of defining a concept such as “good faith.”’

points of a continuum.⁹⁴ Mariana Pargendler also shares this view, drawing a gap-filling classification between fiduciary duties as untailed gap-fillers, whilst good faith' mandates the application of a tailored gap-filling method.⁹⁵ They are essentially frameworks to help solve contracting problems, rather than means to impose inflexible moral standards on business parties or to accommodate other public policy considerations.⁹⁶

This author concludes that the duty of loyalty is wider than an obligation of good faith, and that good faith is not a separate, free standing fiduciary duty, albeit a fundamental component of the core duty of loyalty.⁹⁷ Fiduciary duty is more than an untailed default gap-filling provision.⁹⁸ This author joins with Rebecca Lee when she states 'good faith' is not a proper consideration of English fiduciary law, however it is defined'⁹⁹ Lee goes on to state that 'introducing an element of 'good faith' into the fiduciary obligation may risk conflating fiduciary and non-fiduciary duties.'¹⁰⁰

⁹⁴ Frank H Easterbrook and Daniel R Fischel, 'Contract & Fiduciary Duty' (1993) 36 J L & Econ 425, p. 438

⁹⁵ Mariana Pargendler, 'Modes of Gap Filling: Good Faith and Fiduciary Duties Reconsidered' (2008) 82 Tulane Law Review 1315-1354, 1 (abstract).

See also, Oliver Hart, 'An Economists View of Fiduciary Duty' (1993) 43 U Toronto L J 299, 301. 'It is only possible to make sense of fiduciary duty in a world where the initial contract is incomplete for some reason.'

⁹⁶ Frank H Easterbrook and Daniel R Fischel, 'Contract & Fiduciary Duty' (1993) 36 J L & Econ 425, p. 427

⁹⁷ See, Rebecca Lee, 'Rethinking the content of the fiduciary obligation' [2009] Conv 3, 236, who states: 'This formulation of fiduciary obligation is gaining momentum and provides us with an excellent opportunity to examine the relationship between loyalty and other concepts.'

See, for example, *Fulham Football Club v Tigana* [2004] EWHC 2585 (QB), 17-18; *Hanco ATM Systems v Cashbox ATM Systems Limited* [2007] EWHC 1599 (Ch), 57

⁹⁸ See, Ian Ayres and Robert Gertner, 'Filling Gaps in Incomplete Contracts: an Economic Theory of default rules' (1989) 99 Yale L J 87, who find that good faith is an immutable rule rather than a gap-filling default rule

⁹⁹ See, Rebecca Lee, 'Rethinking the content of the fiduciary obligation' [2009] Conv 3, 236, 248-250. See sub-section headed 'Good faith and fiduciary duty'.

¹⁰⁰ *ibid*, 249

Kelvin Low states:

A duty of loyalty necessarily entails that the obligor act in good faith, but a duty of good faith does not necessarily entail loyalty on the part of the obligor. In a fiduciary relationship the fiduciary's loyalty is to consider the beneficiary's exclusive interests in carrying out his duties, whereas 'outside the fiduciary context, a duty of faith requires the obligor to balance his interests with those of the oblige....such a duty of good faith seems to be significantly less onerous than that owed by a fiduciary. Put more plainly, a duty to act in good faith is measurably different from a duty to act in good faith *in another's interest*'¹⁰¹(original emphasis)

3.5. Duty of Care

We have seen that proponents of the prescriptive nature of fiduciary obligations have advocated widening the traditional proscriptive role to include a positive duty of care. Duty of care has an affirmative content. In relation to the duties owed by a local authority, this author considers questions of duty of care are adequately covered by the existing law and that to include that duty as a component of fiduciary obligation would be to weaken fiduciary duty as a meaningful independent concept. It is stretching the traditional no conflict obligation too far. Fiduciaries commonly have a duty of care, but this is independent of, and separate to, their fiduciary duty of good faith. As Larry Ribstein states '...a fiduciary duty substitutes relinquishing gain for submitting to judicial evaluation of services rendered. The duty of care is generally an implied term concerning the manner of a contract's performance for professional services or agency relationships.'¹⁰² Professor Melanie B Leslie¹⁰³ lists the duty of

¹⁰¹ See, Kelvin F K Low, 'Fiduciary duties: the case for prescription' (2016) 30(1) *Tru L I* 3-25, 6. This article presents both the thesis of Professor Mathew Conaglen and Robert Flannigan with comments on the theory advanced by Rebecca Lee

A requirement of good faith was judicially stated in a number of cases as requiring open and fair dealing. See *Director General of Fair Trading v First National Bank plc* [2002] 1 AC 481; [2001] UKHL 52, [17] (Lord Bingham of Cornhill), [36] (Lord Steyn); *Interfoto Library Ltd v Stiletto Ltd* [1989] 1 QB 433, 439 (Lord Bingham)

¹⁰² Larry Ribstein, 'Fencing Fiduciary Duties' (2011) 91 *Boston University Law Review*, 899, 908. Section B entitled Non-fiduciary duties (this represents a contractarian approach).

¹⁰³ Melanie B Leslie, 'Trustee Trustees: Fiduciary Duties and the Limits of Default Rules' (2005) 94 *Geo L J* 67, 95

care and the duty of loyalty as ‘the two most basic duties of trust law.’ There is now a statutory duty of care imposed on trustees by the Trustee Act 2000. If local authorities are to be regarded as trustees then it follows that they would fall within these statutory provisions.¹⁰⁴

To what extent is a duty of care in a fiduciary relationship different to non-fiduciary duties of care? The predominant view across common law jurisdictions is that a duty of care is not a duty specific to fiduciaries;¹⁰⁵ the law in England and Wales has long recognised that trustees owe a duty of care. This duty, although it has its origins in equity is not a fiduciary duty.¹⁰⁶

¹⁰⁴ This new statutory duty of care applies to the activities listed in Schedule 1. The legislative aim was to produce a uniform duty that would apply across a spectrum of trustees’ duties. The listed activities include many administrative tasks, for example investing, land acquisition, and the employment of agents

¹⁰⁵ See Millett L J in *Mothew* (p17) where he endorses the comment of Ipp J in *Permanent Building Society (in liquidation) v Wheeler* (1994) 14 ACSR 109, 157 ‘it is essential to bear in mind that the existence of a fiduciary relationship does not mean that every duty owed by a fiduciary to a beneficiary is a fiduciary duty. In particular, a trustee’s duty to exercise reasonable care, though equitable is not specifically a fiduciary duty.’ *Girardet v Crease & Co* [1987] 11 BCLR (2nd) 361 (Southin J) ‘The word ‘fiduciary’ is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth ... to say that simple carelessness in giving advice is such a breach is a perversion of words.’

See further, Professor J C Shepherd, ‘*Law of fiduciaries*’ (Toronto: Carswell 1981) 49, where he argues that a duty of care is not necessarily fiduciary in nature

Mathew Conaglen, ‘The Nature and Function of Fiduciary Loyalty’, 121 L Q Rev 456. ‘The duty of care is not peculiar to fiduciaries ...’ and again ‘Fiduciary duties of care were recognised in the past, but such duties of care are now no longer considered fiduciary because they are not peculiar to fiduciaries. Matthew Conaglen, ‘*Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties*’ (Hart Publishing, 2010) 138

And *Lewin on Trusts* (18th ed 2012) para 34-01

Professor Larry E Ribstein, states ‘Fiduciaries commonly have a duty of care. However, this is not a fiduciary duty, which as described above is a duty of unselfishness.’ Larry E Ribstein, ‘Fencing Fiduciary Duties’ (2011) 91 Boston University Law Review, 899, 908.

¹⁰⁶ Law Commission, *Fiduciary Duty of Investment Intermediaries*, (Law Com No: 350, 2014) 53

See *Futter v Futter* [2011] EWCA Civ 197, [127], where the Court recognised that trustees’ duty to take relevant matters into account (in carrying out their responsibilities) is a fiduciary duty

See further Millett LJ in *Mothew*, [17], ‘The common law and equity each developed the duty of care but they did so independently of each other and the standard of care required is not always the same. But they informed each other and today the substance of the resulting obligations is more significant than their particular historic origin.’

A contrary view is expressed in the United States, where it is customary to include a duty of care as a fiduciary duty per se. Professor William A Gregory criticises this contrary view and considers that the problem of conflating the duty of care and the duty of loyalty is not merely semantic, but threatens to obfuscate legal reasoning.¹⁰⁷ This author agrees and considers that it is misleading to identify a duty of care as fiduciary per se, since it is not a fiduciary duty, but a tort concept and ‘quite unlike the duty of loyalty.’¹⁰⁸ As Peter Cane recognised, ‘fiduciary obligations are different from any obligation imposed by tort law. As a general rule, tort law does not require people to act for the benefit of others and to ignore their own interest, but only to avoid causing ‘dis-benefit’ to others.’¹⁰⁹

Supporters of this approach argue that the fiduciary standard of care is different from the duty of care imposed by ordinary tort law. It appears that the essence of difference is one of degree, rather than kind.¹¹⁰ In this author’s opinion, it is very difficult to suggest that the substance of the fiduciary duty of care relates to a higher standard of care, than in ordinary negligence cases, unless one relates that duty of care to the core notion of fiduciary loyalty, with its emphasis on strict moral compliance. If duty of care is to be a distinct and separate part of a fiduciary duty, a relevant question of calibrating the necessary level of care arises. This is particularly relevant in a local authority setting, where certain sections of the local ‘public’ are

¹⁰⁷ William A Gregory, ‘The Fiduciary Duty of Care: A Perversion of Words’ (2005) 38:1 Akron Law Review 181, 183. ‘Equating the duty of care with the duty of loyalty is bad law and worse semantics. Using legal terms, with fixed meanings that have developed over the centuries in different ways, leads only to confusion and chaos.’

¹⁰⁸ Rebecca Lee, ‘Rethinking the content of fiduciary obligation’ [2009] Conv 251 She states: ‘Duty of care and duty of loyalty are not similar concepts that vary only in degree of intensity on the same fiduciary continuum. Rather, they are distinct concepts addressing different concerns. Duty of care is concerned with the standard expected of the reasonable man.’

¹⁰⁹ Peter Cane, *The Anatomy of Tort Law* (Hart Publishing 1997), 189-90, Chapter ‘tort law in the law of obligations’

¹¹⁰ Mathew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-fiduciary duties* (Hart Publishing 2010) 36

more vulnerable than others—for example, children in care or elderly persons subject to care in their home or nursing homes. It is unclear, if local authorities are regarded as being in a fiduciary relationship with such persons, whether a higher duty of care is owed to such persons than to other service users—for example, to their ordinary liability in negligence to a child who trips and is injured from a badly fitted street paving stone.

Millett LJ in *Mothew* separated the prescriptive duties of due diligence and prudence in management from the proscriptive duties of loyalty, retaining the more stringent rules and equitable remedies for the latter. Yet ‘other voices doubt the appropriateness of severing the equitable duty of care from the category of fiduciary duties as propounded in *Mothew* and the proposed assimilation of the common law and equitable rules in breach of duty’.¹¹¹

This author re-affirms the view that whilst a duty of care is undoubtedly a vital part of a fiduciary obligation, it is not promoted to a stand-alone factor¹¹²; rather, it is related to and part of the dominant loyalty factor, which must be present before a fiduciary relationship is triggered and thus receives special judicial treatment. Evans LJ in *Swindle v Harrison*¹¹³ stated that duties imposed by equity on a fiduciary go far beyond the common law duties of skill and care. This author considers that this view better reflects the predominant view across common law jurisdictions, and is

¹¹¹ Jonathan Garton, Graham Moffat, Gerry Bean and Rebecca Probert, *Moffat’s ‘Trusts Law, Text & Materials’* (6th ed, CUP 2015) 577

See further, Chapter 14 entitled Trusts in Commerce-III ‘Fiduciary relationships, commerce and the trust.’

¹¹² See the arguments presented on behalf of both the appellant, Anthony Temple QC and for the respondents, Jonathan Boswood QC in *Henderson v Merrett Syndicates* [1995] 2 AC 145 on questions of a free standing duty of care imposed by equity. Temple QC stated: ‘The law draws a distinction between the concept of skill and care in tort and fiduciary duties of skill and care. They are not coterminous.’

¹¹³ [1997] 4 All ER 705, 716

supported by English courts and scholars.¹¹⁴ Professor Kelli A. Alces¹¹⁵ states: ‘An obligation to exercise care is not the same as undertaking a fiduciary obligation, because one does not give rise to the other, and because a party may owe a duty of care without having a fiduciary relationship’. Ribstein’s view was that the duty of care is not a fiduciary duty even though it is a duty to which all fiduciaries are bound.¹¹⁶ The debate reaffirms this author’s view that extending the proscriptive role of fiduciary obligations, not only causes fiduciary duty to lose potency by trespassing into other areas of tort and contract law, but unleashes an animal difficult to tame.

Advocating a prescriptive dimension to fiduciary obligation means that its social function occupies a prominent place on the platform of analysis, particularly regards a local authority’s service delivery function and care for children, the elderly and other vulnerable groupings in their locality. In order to protect such persons the scope of fiduciary duty must be moulded to the circumstances of each individual case and therefore challenges the exclusivity of contract and tort law as only being capable of dealing with non-economic interests. Professor David Hayton¹¹⁷ emphasises the ‘good man’ philosophy of equity which prevents a defendant subject to a fiduciary duty of loyalty claiming that he was a good man and did what he did in the interests of his beneficiaries.

¹¹⁴ For example, Mathew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-fiduciary duties* (Hart Publishing 2010) 38. ‘Fiduciary duties of care were recognised in the past, but such duties of care are now no longer considered fiduciary because they are not peculiar to fiduciaries’.

Henderson v Merrett syndicates [1995] 2 AC 145, 155 (Lord Browne-Wilkinson). ‘A contention for a free standing fiduciary duty of due skill and care involves a radical change in the law;’ and at 205, ‘The liability of a fiduciary for the negligent transaction of his duties is not a separate head of liability but the paradigm of the general duty to act with care imposed by law on those who take it upon themselves to act for or advise others.’

¹¹⁵ Larry Ribstein, ‘Fiduciary Duties’ (2014) Vol. University of Ill L Rev 1768

¹¹⁶ Ibid. Professor Alces., was a student of Professor Ribstein and her work, ‘Larry Ribstein’s Fiduciary Duties’, University of Ill L Rev, 2014, pp. 1765-1782 is a valuable contribution to understanding the late Professor Ribstein’s fiduciary theory

¹¹⁷ Professor David Hayton, ‘The Development of Equity and the ‘good person’ philosophy in common law systems’ (2012) 4 Conveyancer and Property Lawyer 263

This is, of course, a contractarian-economic based viewpoint, but nevertheless it does illustrate the value society places on such fiduciary relationships, as well as its social benefits. This leads to the conclusion by Rotman that ‘Relationships, not individuals, are the prime concern of fiduciary law’¹¹⁸. In this author’s view, this is a limited interpretation of the role and scope of fiduciary law in society, as it undoubtedly has wider application, for example, in the applications of protecting social and environmental benefits. The issue of whether fiduciary duty is confined only to economic interests is highly relevant to this thesis, since a local authority engages in delivery of services, where non-financial considerations may be paramount: the provision of child and vulnerable adult services where welfare considerations are greater than fiscal considerations. Such welfare considerations may be far higher on the scale of relevant ethical stewardship than cost considerations alone.

3.6. Trust and obedience

Virtues of loyalty, trust and obedience arise in any discussion on the content of fiduciary duties, whether conducted academically or in a courtroom. Loyalty, as both a concept and a duty, was considered above; it will be helpful to this thesis to also consider ‘trust’ and ‘obedience’ in order to emphasise the various strands of morality running through the fiduciary doctrine.

3.6.1 Trust

Trust features heavily in determining whether a fiduciary relationship is established. It is, of course, from the basic position of trust that strands of reliance and

¹¹⁸ Professor Leonard I Rotman, ‘Fiduciary Law’s ‘Holy Grail’: Reconciling Theory and Practice in Fiduciary Jurisprudence’ (2011) 91 B U L. Rev 921, 993

vulnerability emerge. Professor Tamar Frankel develops the notion of trust by identifying the close relationship between trust and reliance. Both qualities are socially valuable, especially where there is reliance in, and trust that, the other actor in the relationship will carry out what they promise to do. Professor Frankel defines trust as ‘a reasonable belief that the other party will tell the truth and perform its promises.’¹¹⁹ The essence of this definition will be particularly relevant in chapter 7 when a promise is made to service users by local authorities trigger legitimate expectations, from which later the local authority resiles.

Professor Austin Scott emphasised the element of trust in fiduciary relationships by referring to the parable of the unjust steward in St Luke’s Gospel 16: 1-8.¹²⁰ A steward was asked to give account of his stewardship to his employer, because there had been accusations that he had wasted his employer’s goods. As he was about to be dismissed he called in the employer’s debtors and reduced the purchase bill for 100 measures (8/9 gallons each) of oil from 100 to 50, and the other debtor’s purchase bill of 100 measures (twelve bushels each) of wheat from 100 to 80. This is a difficult parable to analyse, but its teaching is clear that we naturally expect that a servant entrusted with a master’s possessions and given critical tasks would be faithful in fulfilling the trust the master placed in the servant. The biblical truth is that we must give an account of our stewardship on earth. Drawing an analogy with local authorities and those in authority must also exercise governance on stewardship principles and not in their own interests. Some philosophers have suggested that to trust is to rely on the goodwill of a trustee to perform their task. As Professor

¹¹⁹ Professor Tamar Frankel, *Fiduciary Law*, (Oxford; Oxford University Press 2011) 12 Frankel recognises that the ‘degree of trust in a fiduciary relationship must be quite high.’ See further, Larry E Ribstein, ‘Law & Trust’, 81 B U L Rev 556, 557-8 where he distinguishes the various meanings of trust

¹²⁰ Professor Austin Scott, ‘The Fiduciary Principle’ (1949) 37(4) California Law Review, 539 The parable of the unfaithful servant relates to the biblical parable told by Jesus

Annette Baier, for example states ‘When I trust in another, I depend on her goodwill toward me.’¹²¹ Professor Karen Jones takes a similar approach,¹²² whilst others, such as Professor Richard Holton view the act of trusting as a reactive stance: treating a failure to honour entrustment is not just a disappointment, but is also a betrayal, and grounds for resentment.¹²³ We have normative expectations of trust with the people and organisations we interact with.¹²⁴ This author concurs with Richard Holton when he states ‘there may well be some truth in all of them: trust may be better seen as a cluster concept, not as a term with simple definition.’¹²⁵

Trust, along with notions of loyalty, may be seen as the foundation of the fiduciary doctrine. In this author’s opinion, however, the law concentrates more on protection of the beneficiary; the function of fiduciary duty is more proscriptive than prescriptive. The actions of the beneficiary are discounted; the sole concern of the court is whether the fiduciary has breached his or her fiduciary duties (in failing to act

¹²¹ Annette Baier, ‘Trust and Antitrust’ in *Moral Prejudices* (1986) 96 *Ethics* 231, 235

¹²² Karen Jones, ‘Trust as an Affective Attitude’ (1996) 107 *Ethics* 4, 4-5. ‘This way of seeing the other, with its constituent patterns of attention and tendencies of interpretation, explains the willingness of trusters to let those trusted get dangerously near the things they care about.’

¹²³ Professor Richard Holton, ‘Fiduciary Relations and the nature of Trust’, 91, *BUL Rev*, 991, (2011), ‘In cases where we trust and are let down, we do not just feel disappointed, as we would if a machine let us down, we feel betrayed’ p. 993

¹²⁴ See, Professor Sandford Goldberg, ‘The Philosophy of Trust: Key Features’ and ‘When expectations clash’, research conducted at the Trust Project, Northwestern University, <kellog.northwestern.edu/trust-project/contributions/sandford-goldberg.aspx. Professor Goldberg is a Professor of philosophy and this is a video link to three of his contributions to the Project-When Trust Expectations Clash; The Philosophy of Trust: Key Findings and The Nature of Trust: A philosopher’s Perspective.

¹²⁵ Richard Holton, ‘Fiduciary Relations and the nature of Trust,’ (2011), 91 *B U L Rev*, 991, 993. In this article Holton comments on reference to trust in Tamar Frankel’s book *Fiduciary Law*, at xvi (2011): ‘trust is reserved for other actors - mainly for people, and perhaps, by extension, for corporate or government bodies.’

See also Phillip Pettit, ‘The Cunning of Trust’ (1995) 24(3) *Philosophy and Public Affairs* 202, 202, where he states: ‘For a society where people are disposed to be trusting, and where trust is generally well placed, it is almost certain to work more harmoniously and fruitful than a society where trust fails to appear or spread. If we are not clear about the good reasons why people might trust one another, we are in danger of designing institutions that will reduce trust or even drive it out.’

in the sole interests of the beneficiary) rather than with the degree of trust placed in the fiduciary by the beneficiary.¹²⁶

3.6.2 Obedience-a trinitarian alternative

In order to do justice to the depth and diversity of academic literature on the foundation of fiduciary duty, reference must be made to the work of Professor Rob E. Atkinson. Jnr¹²⁷ Atkinson locates two forms of obedience in four kinds of relationships: profit making corporations, private trusts, charitable trusts and charitable corporations; he questions the twin pillars of duty of care and duty of loyalty. He argues that a third duty, obedience, is more basic and is the foundation on which the duties of care and loyalty ultimately rest. His aim, drawing analogy with physics is ‘to reduce all the relevant phenomena to a single, unifying principle.’¹²⁸ In place of the prevailing dualistic theory of fiduciary duty, Atkinson therefore offers a Trinitarian alternative; ‘As the Trinitarian metaphor implies, the claim here is that, properly understood, three identifiably different elements are functionally distinct yet essentially one.’¹²⁹ This author disagrees with inclusion of the duty of care and accorded separate status, as discussed above, but finds Professor Atkinson’s reference to the duty of obedience compelling. Atkinson distinguishes two forms of the duty of obedience, the strong and the weak. By the ‘strong’ form of the duty of obedience he means the principal’s control of trust assets is not just within a generation of beneficiaries, but also across generations. This is usually called ‘dead hand control.’

¹²⁶ Justice James J Edelman ‘When Do Fiduciary Duties Arise?’ (2010) Law Quarterly Review 13

¹²⁷ Rob E Atkinson Jnr, ‘Obedience as the Foundation of Fiduciary Duty’, (2008), 34 Journal of Corporation Law, 1

¹²⁸ *ibid*, 45

¹²⁹ Rob E Atkinson Jnr, ‘Obedience as the Foundation of Fiduciary Duty’, (2008), 34 Journal of Corporation Law, 1

The ‘weak’ form of the duty of obedience, on the other hand, is essentially nothing more than the ordinary law of contracts and agency.¹³⁰

Although Atkinson does not specifically consider the relationship between local authorities and their service users, his approach is nevertheless helpful, since he illustrates that the duty of obedience is more extensive than the duties of care and loyalty. He states ‘that the duty of obedience is, ‘deeper, broader and longer.’¹³¹ He constructs a triangle at the base of which is obedience. His premise is that the duty of obedience is often overlooked and is absorbed into other heads of fiduciary obligation. Seen from this perspective, duties of loyalty and care are derived from, and grounded upon, the more fundamental duty of obedience.¹³²

Using Professor Atkinson’s analysis it may, therefore, be more appropriate to identify the fiduciary duty of local authorities to their service users as involving obedience to the letter and intent of their statutory purposes, rather than attributing their duty of loyalty directly to service users.

3.7 Conceptualising Notions of Loyalty, Trust and Obedience in a Local Government Setting

3.7.1 Loyalty and Polycentric decision-making

It is necessary to consider loyalty in relation to the utility of fiduciary obligation in the local government setting. How comfortable is its application to the public law field? Loyalty is a requirement that governs the exercise of judgment and is integral to all fiduciary relationships; can we say that local authorities are clothed with duties

¹³⁰ Rob E Atkinson Jnr, ‘Obedience as the Foundation of Fiduciary Duty’, (2008), 34 *Journal of Corporation Law*, 1

¹³¹ Rob E Atkinson Jnr, ‘Obedience as the Foundation of Fiduciary Duty’ (2008) 34 *J Corp L* 43, 47-48

¹³² *ibid*, 49

of loyalty? Local authorities owe a duty to their council taxpayers and to their service users to conduct their affairs and decision-making carefully and with due diligence, but local authorities have a vast range of sectional and community interests to take into account, which may make it impossible to act with loyalty to all conflicting and conflicted interests.

Loyalty in this context is a difficult concept to apply and it may be that a proper conception is to view the loyalty of a local authority as being towards its statutory purposes, rather than towards a person or group of persons.¹³³

Fiduciary obligation, with its emphasis on the core element of loyalty, technically means that there would a breach of fiduciary duty to the person or group that ‘loses out’ in the final decision. The assumption is that, no matter how fair are the procedures in place for making decisions, loyalty can never be satisfied where the class of beneficiaries is wide, with conflicting and competing interests. Professor Seth Davis, an opponent of using fiduciary principles in the public sphere, concludes that undivided loyalty¹³⁴ in a local government context cannot be completely satisfied, even where a detailed set of fair procedures have been set in place. Fiduciary obligation, with its core duty of loyalty, means that it cannot have a place in the relationship between local authorities and their service users, unless the duty of loyalty is reduced to a ‘best interests’ duty. This author is, however, against a ‘watering down’ of the fiduciary duty in this way, as there are other legal conceptions

¹³³ The nature of polycentrism and polycentric decision making is discussed in chapter four

¹³⁴ Professor Seth Davis, ‘The False Promise of Fiduciary Government’ 89(3) *Notre Dame Law Review* 1204. He states: ‘The fiduciary duty of undivided loyalty is not part of the background conditions that underlie public laws combination of ideas.’ As the article title implies, Davis argues that the promise of fiduciary government is a false one. Some of his views will be addressed in chapter 4

Nelson Tebbe and Robert L Tsai, ‘Constitutional Borrowing’ (2010) 111 *Colum L Rev* 459, 463-64, describing doctrinal development through borrowing across different areas of black-letter law

that do not rely on duties of absolute loyalty and may better ‘fit’ the relationship between local authorities and their service users. Such conceptions include the community stewardship role of a local authority which is discussed in chapter four.

3.7.2 Loyalty as prioritising interests

Some philosophers emphasise that to be loyal to something is to have special concern with its interests. Professor Philip Pettit,¹³⁵ for example, states that ‘to be loyal is to be dedicated to a particular individual’s welfare’: R.E. Ewin continues this theme by suggesting that loyalty is, at least in part, ‘the bonding of oneself preferentially to the interests of a certain group or individual.’¹³⁶ and that loyalty is a willingness to ‘take the interests of others as one’s own.’¹³⁷ Professor Simon Keller¹³⁸ suggests that ‘there are ways of expressing loyalty that do not come down to prioritising the interests of loyalty’s object; there are expressions of loyalty other than loyalty in concern.’¹³⁹ Keller’s conception of loyalty supports the argument for attributing a fiduciary duty to local authorities in their relationship with service users, because it is possible to prioritise something or someone’s welfare without being loyal to it; conversely, you can be loyal to something or someone without prioritising their interests. Keller’s views stem from his belief that the notions of loyalty (as a concept, value or virtue), is not suited to any foundational theoretical role.¹⁴⁰

¹³⁵ Philip Pettit, ‘The Paradox of Loyalty’ (1988) 25(2) *American Philosophical Quarterly* 163-171, 163

¹³⁶ R E Ewin, ‘Loyalty and Virtues’ (1992) 42 *The Philosophical Quarterly* 403, 406

¹³⁷ *ibid*, 419

¹³⁸ Simon Keller, *The Limits of Loyalty* (Cambridge University Press, 2010) 9

¹³⁹ *ibid*, 9

¹⁴⁰ *ibid*, Preface p 10 - chapter 7 considers ‘Is loyalty a value? Is loyalty a virtue?’

3.7.3 'Sole' or 'Best Interests'

Some¹⁴¹ have argued that reference to 'sole' interests should be replaced by reference to 'best' interests so as to alleviate the strictness of the no conflict, no profit rules which applies, even where the fiduciary has caused no loss to his or her principal (and, indeed, has even made a profit for them.)¹⁴² Significant academic criticism has however, been levelled at the 'best interests' approach, describing it as 'unhistorical, simplistic, true in part only and misleading.'¹⁴³

With the 'sole interests' approach, protection is clearly aimed at preventing the fiduciary exploiting their position; it does, however, go further, illustrating a coercive legal approach by effectively saying to the fiduciary that if you are disloyal by direct misappropriation of trust funds or you place yourself in situations where your personal interest conflict with those of your beneficiary, then you are in breach of your fiduciary duty and the penalties are onerous. This 'sole interest' is widely regarded as a most fundamental rule of trust law. Equity's approach is that it is better to strike down all disloyal acts rather than trying to separate the harmless and the harmful by permitting the trustee to justify his representation of two interests.

¹⁴¹ John H Langbein, 'Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?' (2005) 114 Yale Law Journal, 929

See further, L Smith, 'The Motive, Not the Deed' in J Getzler (ed), '*Rationalising Property, Equity and Trusts, Essays in honour of Edward Burn*' (Lexis Nexis Butterworths 2003) 76

¹⁴² *Phipps v Boardman* [1967] 2 AC 46, Mr Boardman was a solicitor who with a beneficiary, Mr Tom Phipps purchased all the shares in Lester & Harris Ltd other than those held by the trust. They reorganised the business and improved the fortunes of the company. This clearly benefited, Boardman, Phipps and the trust itself, which had a large shareholding on the company. One of the testator's beneficiaries John Phipps sued Boardman for breach of fiduciary duty and succeeded by a 3-2 majority in the House of Lords.

See Michael Bryan, 'Boardman v Phipps' (1967)' chapter 20 in '*Landmarks Cases in Equity*' (eds Mitchell & Mitchell) Oxford: Hart, 2012)

¹⁴³ S E K Hulme, 'The Basic Duty of Trustees of Superannuation Funds - Fair to One Fair to All' (2000) Tru L I 130

Rebecca Lee, 'Rethinking the content of the fiduciary obligation' [2009] Conv 250, 250, states, 'To the extent that acting in the 'best interests' of the beneficiary sets a requisite standard for the fiduciary's behaviour, it is irrelevant to the content of the fiduciary obligation.'

It may be that conceiving loyalty as working in the ‘best interests’¹⁴⁴ of a beneficiary, as opposed to their ‘sole’ interest, may better fit the relationship between local authorities and their service users, whilst accepting that it is a lower standard. A ‘best interest’ approach is advocated by Professor John H Langbein, who argues that the duty of loyalty should be reformulated to prefer the best interest, rather than the sole interest of the beneficiary. His premise is that sometimes beneficiaries are better off when a transaction also benefits the trustees.

Professor Lionel L. Smith¹⁴⁵ is also supportive of a ‘best interests’ approach. He analyses fiduciary concepts of loyalty as prescribing how a fiduciary should exercise judgement: decision making should be made in an entirely subjective way, with an emphasis on what the fiduciary perceives to be the best interests of the beneficiary. This approach recognises that different decisions may be made by different fiduciaries in essentially the same circumstances. Professor Smith states:

the importance of the subjective nature of the duty of loyalty is that the duty evaluates, not whether the fiduciary has done their job well, but whether they have done it loyally, that is with an eye solely on what they perceive to be the best interests of the beneficiary¹⁴⁶

This author considers that such an approach may, however, create problems in adjudication, as enquiries into the subjective motives of a fiduciary may prove difficult evidentially and might also produce distorted decisions by the courts. Breach of the straightforward conflict of interest rule produces greater certainty,

¹⁴⁴ See, Professor John Langbein, ‘Questioning the Trust Law Duty of Loyalty: Sole interest or Best interest?’ 114 Yale L J, 929, where he argues that a present strict liability approach in fiduciary law can cause hardship to a fiduciary and needs to be modified

¹⁴⁵ Professor Lionel Smith, ‘Can We Be Obligated to Be Selfless? Chapter 13 (p.261) in *‘Philosophical Foundations of Fiduciary Law’* Andrew S. Gold and Paul. B. Miller (eds) (Oxford: Oxford University Press) 2014. pp.140-141

¹⁴⁶ *ibid*, 143

See also Professor Lionel L Smith, ‘Ensuring the Loyal Exercise of judgement on Behalf of Another’ (2014) 130 LQR 608

albeit accepting that in some circumstances it may penalise a well-intentioned fiduciary.

Translating a 'best interest' approach to the relationship between local authorities and their service users, presents problems, not least because the phrase is very imprecise; undoubtedly decisions made by a local authority on the basis of the best interests of a section of service users to the exclusion of others is a recipe for challenge. If 'best interest' is used as a guide, it must not be at the expense of strict compliance by the local authority in fulfilling its statutory purpose.

3.7.4 Loyalty-Trust and Expectations

There is a clear nexus between loyalty and expectations. In the context of fiduciary relationships expectations arise on both sides: it is a form of a double sided transaction. The analogy of the simple double entry accounting system is very apt. Fiduciary obligation is often seen as a one sided relationship, but this is totally incorrect. The fiduciary will be expected to look to the interests of the beneficiary at every turn; the fiduciary will expect trust from the principal such that he will be allowed to make choices within the scope of the discretionary power granted to him. These are both realistic expectations of loyalty towards one another.

Fiduciary relationships are typically marked by strong interpersonal trust between the beneficiary and the fiduciary. Indeed, some regard trust as the central characteristic of a fiduciary relationship. Trust, in and of itself, is not sufficient for finding a fiduciary relationship.¹⁴⁷ It is, however, useful to discuss trust in the context of the relationship between local authorities and their service users. This

¹⁴⁷ Professor J C Shepherd, 'Towards a Unified Concept of Fiduciary Relationships' (1981), 97 LQR 51, 59 'It is patent that people go around trusting others all the time, without necessarily creating a fiduciary relationship as a result.'

author agrees with Laing¹⁴⁸ that the existence of interpersonal trust between parties does not inevitably entail a fiduciary obligation of loyalty, but rather is a common characteristic of many relationships in private law. Shepherd argues that it is foolhardy to think we are capable of ‘neatly tagging and labelling the various facets’ of trust relevant to fiduciary liability.¹⁴⁹ This author concurs, and has difficulty in seeing how trust can function as a legal standard.¹⁵⁰

In the relationship between local authorities and their service users there are clear expectations of persons, groups and associations that the local authority will act in their best interests. This may not, however, be possible at all times and in all circumstances and the expectations of one group may come into conflict with those of another. If the conflict is resolved by giving preference to one group over another, it does not necessarily follow that there is disloyalty to the other. It is preferable to view the situation, not from an aspect of disloyalty, but rather from the perspective of the local authority acting in the public interest and for the general good and welfare of all its service users.

If expectation is brought into the equation, then it becomes necessary to draw lines of demarcation, in order to identify circumstances that should justify expectations of loyal conduct. This may be because past dealing between the parties demonstrates sufficient grounds of expectation, although if it is evident that loyalties owed by the actor are orientated elsewhere, an expectation of loyalty is unlikely to be justifiable. Expectation in the context of local government arises from trust placed in the administrative promise-maker that they will be loyal to their promises. Emphasis

¹⁴⁸ Stephen Charles Laing, ‘Two forms of the fiduciary relationship’ (Dissertation, University of Otago 2013)

¹⁴⁹ Professor J C Shepherd, *The Law of Fiduciaries* (Toronto: Carswell 1981) vi

¹⁵⁰ Professor Paul B Miller, ‘Justifying Fiduciary Duties’ (2013) 58 McGill L J, 969, 1010

on expectations, and realisation of these expectations, is central to the doctrine of legitimate expectation (procedural and substantive) which is analysed further in chapter seven.

Society, through the agency of the courts, clearly sees breach of loyalty as a part of the prophylactic nature of fiduciary duty and wishes to cleanse society from what it conceives as a form of unconscionable behaviour. A review of the case law relating to breach of fiduciary duty identifies loyalty as being present and central to the finding of a fiduciary relationship. This author agrees with Professor DeMott when she states: ‘Focusing on loyalty as fiduciary duty’s distinctive and animating force also lends some analytic structure to cases in which the question is whether an actor should be subject to a fiduciary duty outside the conventional or typical fiduciary categories.’¹⁵¹

Society obviously sees value in fiduciary law for both human and business relationships. Professor Paul. D. Finn captures this by stating ‘The true nature of the fiduciary principle...originates, self-evidently, in public policy. To maintain the integrity and utility of relationships in which the (or a) role of one party is perceived to be the service of the interests of the other, it insists upon a fine loyalty in that service’.¹⁵² Professor Finn did not explain what he meant by his adjectival use of the word ‘fine’ but one can draw infer that he was espousing loyalty of more than a vague, or emotional, or casual nature. ‘Fiduciary interactions rank amongst the most

¹⁵¹ Professor D De Mott, *Breach of Fiduciary Duty: on justifiable expectations of loyalty and their consequences* (2006) 48 *Arizona Law Review* 927

¹⁵² Paul D Finn, ‘Fiduciaries in Context: An Overview’ in Peter Birks (ed) ‘*Privacy and Loyalty*’ (Oxford: Clarendon Press 1997) 284

valuable in society by enhancing productivity and knowledge, facilitating specialisation, and creating fiscal and informational wealth.’¹⁵³

This is echoed in *Parks of Hamilton Holdings Ltd v Colin Campbell*, where Lady Dorian¹⁵⁴ said of a commercial fiduciary actor: ‘Society expects that fiduciary to answer to the highest ethical standards...without such a requirement, the restraints which could be placed on the fiduciary nature of the relationship would be diluted and uncertainty introduced into mercantile dealings.’

Fiduciary law subordinates the individual interests which are emphasised in areas of contract and tort to broader social and economic goals that are consistent with the construction and preservation of social and economic interdependency. This may be illustrative of the different emphasis held by equity as compared to the common law.

3.8 Conclusion

This chapter has demonstrated that there is much disagreement amongst judges and academics as to the correct duty or set of duties that arise when a fiduciary relationship is created. The difference of approach and emphasis between different schools of thought is clear. There are doctrinal differences, as well as specific consequences that flow from supporting one approach rather than another. As we have seen the proscriptive school is very traditional and negative concentrating on combating conflicted interests, whereas the prescriptive approach is wider and

¹⁵³ Paul D Finn, ‘The Fiduciary Principle’ in Timothy Youdan (ed), *Equity, Fiduciaries and Trusts* (Law Book Co 1992)

¹⁵⁴ *Parks of Hamilton Holdings Ltd v Colin Campbell* [2014] CSIH 36 (CA) 15/O8, [29], this case involved a director negotiating a company’s total shareholding, including his own personal shares, at a more favourable premium. It was held that he was in a fiduciary relationship with the remaining shareholders on whose behalf he was purporting to act and as such owed them a duty of care entitling them to damages for loss caused by them in reliance on his negligent representation

includes positive duties of good faith and care. It may be the case that the prescriptive approach better suits the relationship between local authorities and their service users, because it emphasises the positive active role of a local authority, as democratically elected public servants carrying out their service mandate.

This chapter has shown that the duties of care and good faith are not unrelated to the duty of loyalty; in fact duties of care and good faith can be viewed as part of an overall concept of fiduciary loyalty. What does such a conclusion mean in the context of local authorities and their service users? Professors David L Ponet and Ethan J Lieb¹⁵⁵ illustrate the merit of including duties of care and good faith within their conception of public fiduciaries by using deliberative democratic dialogue as an example. In this conception duty of care is understood ‘as an obligation to consult with, and deliberately engage, constituents as part of the process of rationally considering their preferences and assessing the full panoply of potential causes of action within the fiduciaries’ authorisation.¹⁵⁶ Ponet and Leib state that good faith requirement in fiduciary law ‘underscores the fact that preferences and interests are not fixed in time but can undergo revision and reformulation....the political relationship between ruler and ruled is ongoing and extends beyond bookend election days.’¹⁵⁷

This author is, however, concerned that going further down the path of prescriptivism will ultimately lead to the incorporation of duties unrelated to the original public policy purpose of catching conflicted conduct by a person who has accepted fiduciary office, whether expressly or impliedly; for example, by including a

¹⁵⁵ Professor Ethan J Leib, ‘Fiduciary Law’s Lessons for Deliberative Democracy’ (2011), 91 BULR, 1249

¹⁵⁶ *ibid*, 1259 Reference to ‘potential causes of action’ alludes, in this author’s opinion, to local authorities’ obligation to consider the polycentric nature of much of their decision making

¹⁵⁷ *ibid*, 1260

duty of candour, as a separate head of fiduciary liability, unless that duty is subsumed under the central fiduciary characteristic of loyalty. As a consequence, fiduciary duty will be watered down by accommodating obligations that are best suited to other areas of law, such as contract or tort law.

Identifying loyalty within a relationship will certainly help in legally classifying that relationship, and will also assist in viewing the obligations that arise. Loyalty, however, is not seen as a key factor by some, such as Professor Nolan,¹⁵⁸ who sees loyalty not as a positive obligation the breach of which can be enforced by equitable remedy, but as merely ‘a goal to which fiduciaries are encouraged to aspire.’ This author supports Professor Robert Flannigan when he states: ‘it is not always clear whether terms, such as trust, confidence, faithfulness, good faith, loyalty or fidelity are being used as synonyms for conventional fiduciary duty or as labels for distinct duties in novel and undeveloped taxonomies.’¹⁵⁹

In this author’s opinion, by focussing on the classification of fiduciary relationships we may have discarded, or at best given scant attention, to the very important personal element of the nature of a fiduciary obligation. This element is often found in fiduciary relationships, such as doctor and patient, trustee and beneficiary. There are of course notable exceptions, such as the relationship between a company and its shareholders, which may lack the intense personal element found in other relational contexts yet still fall within a recognised fiduciary relationship. Certainly common characteristics of loyalty and trust reinforce the personal relational nexus. In jurisdictions such as Canada, the fiduciary doctrine has been applied to

¹⁵⁸ Professor R C Nolan, ‘Conflicts of Interest, Unjust Enrichment and Wrongdoing’ in W R Cornish (ed) *Restitution: Past, Present and Future* (Hart 1998)

¹⁵⁹ Professor Robert Flannigan, ‘The Core Nature of Fiduciary Accountability’ (2009) *New Zealand Law Review*, 375

novel situations, where the personal element is clearly present, for example, between counsellor and client. It is this author's opinion that the potential dynamism of the fiduciary concept must not be stunted by the search for its structural characteristics. Fiduciary doctrine is not merely a set of loosely-fitting or entirely unrelated rules functioning in an ad hoc fashion. Rather, it is a blueprint for the protection and continued efficacy of interdependent societal relations,¹⁶⁰ not least the relations between local authorities and their service users.

Twenty one years ago Professor Rotman highlighted the exciting nature of fiduciary law 'whose potential is only beginning to be',¹⁶¹ yet fiduciary law in the context of the relationship between local authorities and their service users is an area that has not yet been explored. This thesis attempts to address this gap by exploring how fiduciary theories might be translated into local government. These issues are now discussed in chapter four.

¹⁶⁰ Professor L I Rotman, 'Fiduciary Doctrine: A Concept in Need of Understanding' (1995) 34(4) *Alta Law Review* 851

¹⁶¹ *ibid*, 852

CHAPTER FOUR

Concept translation: can concepts of equity be transferred into public law?

4.1 Introduction

In Chapter two we examined the way in which fiduciary relationships are formed and considered the relational indicators used by the courts to identify such relationships. Chapter three analysed the content and nature of the fiduciary duty and concluded that trust and loyalty were the key elements of the relationship, as identified by judges and scholars alike. This does, however, present real practical problems in translating private law fiduciary duties to public law which are explored in this chapter. The main reason for this, as noted in chapter three, is that a local authority's 'loyalty' to one section of a community invariably means that other persons and groups may feel 'left out'. A related problem is the multitude of discretionary decisions that a local authority must take in relation to a wide range of issues and interested parties. Such factors suggest that fiduciary duty seems to have limited application in a local government setting: if that is so, the private law trust model has a role to play in public law, but not in its present form.

*Commissioners for Local Authority Accounts in Scotland v Stirling D C*¹

illustrate that some jurisdictions find the concept of a local authority as a fiduciary

¹ *In Commissioners for Local Authority Accounts in Scotland v Stirling DC* [1984] SLT Reports, 442 (The Lord President (Lord Emslie), Lords Cameron and Avonside) A good example of the overlay of an implied fiduciary duty in central government activity is *R v Secretary of State for Foreign and Commonwealth Affairs ex parte The World Development Movement Ltd* [1995] 1 All E R 611. Douglas Hurd the Foreign Secretary in order to encourage Malaysia to buy British aircraft promised to give over 2 million pounds from the Overseas Development fund for the construction of the Pergau dam project that was plainly accepted as uneconomical. The Divisional Court declared the exercise of the

inappropriate on the facts. In this case the duty imposed on the council was one of reasonable regard for the interests of the ratepayer; it was not conceptualized as a fiduciary duty; indeed, Lord Avonside stated that he did not ‘find a close examination of the word ‘fiduciary’ at all helpful and felt that an ‘inordinate amount of time (had been) spent on questions of a fiduciary nature.’² Lord Cameron reserved giving any opinion on fiduciary duty, but was not dismissive.³ The Lord President, Lord Emslie, was more supportive of the fiduciary argument put to him by counsel, and stated: ‘I have no doubt that the council had a duty in the terms in which counsel for the controller expressed it.’⁴ The court’s conclusion was not because the court had failed to refer to the three cases of *Roberts v Hopwood*⁵, *Prescott v Birmingham Corporation*⁶ and *Bromley LBC v GLC*⁷ (discussed in the next chapter) because Lord Emslie did, but, that their review of those English cases did not lead them to conclude that a fiduciary relationship arose on the facts of the instant case.

This author’s sense is that the Scottish Court considered fiduciary duties as too narrow and insufficiently accommodating of wider public interests. This author adopts a similar approach and considers that, although the private trust model may provide a general framework, it does not lie easily in the public service sphere, where it is perhaps more appropriate to regard a local authority as a ‘steward’ of local community resources and interests, rather than as a trustee. In using a stewardship concept, there would be lesser emphasis on loyalty, which is so central to the

discretion unlawful. There is no reference to fiduciary duty in the judgement, but it is clear that there are overtones of fiduciary rationale in the use of public assets.

² *ibid*, *In Commissioners for Local Authority Accounts in Scotland v Stirling DC* [1984] SLT Reports 442, (Lord Avonside) [448]

³ *Ibid*. (Lord Cameron) [447]

⁴ *In Commissioners for Local Authority Accounts in Scotland v Stirling DC* [1984] SLT Reports 442 (Lord Emslie) [446]

⁵ [1925] A.C. 578

⁶ [1955] Ch 210

⁷ [1983] 1 A.C. 768

fiduciary model.⁸ A stewardship approach might be more accommodating of situations faced by local authorities who have to achieve a difficult balance in their decision making, especially in the present climate of austerity (see Table 4.1).

A great deal of work in understanding the fiduciary foundations of public authority has been carried out by Professor Theodore Rave. In *Politicians as Fiduciaries*⁹ he draws an analogy between private and public fiduciaries, and concludes that the analogy is appropriate. Rave primarily deals with election law, and draws on the corporate analogy where the principals are the shareholders who elect the company board of directors to manage the corporate entity; whereas, - in public law the principals are the citizens who elect the local councils to run their local government. Rave's reasoning is that these two superficially dissimilar bodies of law are thus unified by the same regulatory dilemma of diverse groups. Lieb, Ponet and Serota, however, claim that 'public law is not unitary in how it identifies relationships and imposes duties, a fact not made clear by Rave's too direct transplantation of private law concepts into the redistricting domain.'¹⁰ This author agrees, and feels that 'a straightforward importation of private law duties into the unique relationship between represented and representative is not appropriate.'¹¹ This chapter will consider why a simplistic transfer of the private fiduciary duty and trust mechanism does not fit easily in public law. Indeed Lieb, Ponet and Serota state: 'we need a deeper appreciation of the particularities of political relationships so that we can calibrate the fiduciary principle and related enforcement mechanisms to this sui generis public domain.' In discussing Rave's work they note 'Rave's analysis would

⁸ See *Bristol & West Building Society v Mothew* [1998] Ch 1, 18 (Millett LJ)

⁹ Theodore Rave, 'Politicians as fiduciaries' (2013) 126 Harvard Law Review 671

¹⁰ Lieb, Ponet and Serota, 'Translating fiduciary Principles into Public Law' (2012) 126 Harvard Law Review F91 this is a response to Theodore Rave's work, see n9

¹¹ *ibid*, 101

benefit from engaging hard questions about who is really best identified as the public fiduciary, who is the actual beneficiary, and what are the right ways to enforce the constraints of the sui generis fiduciary relationship in the political sphere.’¹² These are the issues to which this author will now turn.

4.2 Problems of ‘Fit’

Professor Seth Davis, for example states:

The problem of fit robs fiduciary government of the resolving power necessary for a creative reinstatement of public law. To make the fiduciary account of government fit, it is necessary to draw a thin comparison between private fiduciaries and public officials. Taken as a modest analogy between private fiduciaries and public officials—both, after all, are delegated powers by others— the theory of fiduciary government simply restates perennial problems in public law¹³

For purpose of this thesis, the focus will be on whether local authorities as institutions are public fiduciaries, and not the officials of local authorities. Davis seems to have no quarrel with the basic premise of fiduciary law that places emphasis on protection of the vulnerable (in this case of citizens), rather his concern relates to the substantive issues of fit, such as doctrinal issues, standing, taxonomic and remedial issues. He states: ‘The problems of fit, intent and function, highlight the difficulties of translating between public and private law.’¹⁴ Issues of standing are outside the remit of this thesis, although we may note that Davis argues that the modern doctrine of standing is also inconsistent with the fiduciary analogy.¹⁵

¹² Lieb, Ponet and Serota, ‘Translating Fiduciary Principles into Public Law’ (2012) 126 Harvard L Rev F 91

¹³ Professor Seth Davis, ‘The False Promise of Fiduciary Government’ (2014) 89(3) Notre Dame Law Review 1145, 1205

¹⁴ *ibid*, 1198

¹⁵ *ibid*, 1199-2000, Professor Davis views the standing of beneficiaries in public law has not straightforward, but for purposes of our exercise it is vital to note that he is referring to the US legal system and speaks of regulated parties and regulated beneficiaries. Notwithstanding, he does accept that ‘where a recognised beneficiary sues a trustee for breach of a fiduciary duty, the requisites for standing are usually satisfied.’

4.2.1 Doctrinal borrowing

Doctrinally, Davis raises the ‘old chestnut’ of there being no universally acceptable and comprehensive definition of what constitutes a fiduciary. He states ‘.....the possibilities of translating private fiduciary law into public law are limited,¹⁶ particularly, in the light of how, quoting Leib and others who state: ‘little headway has been made in delineating fiduciary-beneficiary relationships in the public context.’¹⁷ This author, however, supports (in part) the view expressed by Leib, Ponet and Serota, who argue strongly for a sui generis classification of the relationship between public institutions and their service users, on the basis of the morphological similarity between private and public agency problems.¹⁸ This chapter will, however illustrate that shared similarities may not be enough.

4.2.2 Remedial problems

Professor Davis also notes that the difficulty of transposing private law fiduciary remedies¹⁹ into public law ‘are a far cry from the prospective injunction that is part and parcel of modern public law litigation.’²⁰ Whilst Davis is talking about American law, his comment does find resonance with the use of injunctions in English administrative law, which are after all an equitable remedy. Davis further states ‘It requires also a theory for equilibrating jurisdictional and remedial doctrines in public law to the fiduciary model. That theory has not been forthcoming. When stripped of

¹⁶ The False Promise of Fiduciary Government (2014) 89(3) Notre Dame Law Review 1145, p.1170

¹⁷ *ibid*, 1170 quoting Ethan Lieb, Ponet and Serota, Mapping Fiduciary Relationships, chapter 9 in Andrew Gold & Paul Miller (eds), *The Philosophical Foundations of Fiduciary Law* (Oxford University Press 2014)

¹⁸ Leib, Ponet and Serota, ‘Translating Fiduciary Principles into Public Law’ (2013), 126 Harv L Rev F 91, 94

¹⁹ Account of profits, restitution, disgorgement of profits, and in some cases punitive damages

²⁰ Seth Davis, ‘The False Promise of Fiduciary Government’ (2014) 89(3) Notre Dame Law Review 1201

its characteristic remedies, it is unclear how fiduciary law would function as a source for public law doctrines.’²¹ His view is that remedial restrictions are necessary because of the interplay of balancing individual rights against competing public interests.²² In reply, it is true that public law litigants cannot typically obtain damages, much less disgorgement in successful challenges to alleged abuse of local government powers. However, there is no justifiable reason why public law adjudication cannot use and adapt such remedies as they see fit, a practice they have achieved successfully with other equitable remedies, such as injunctions and declaratory relief. This is a very contentious area and, while the use of monetary remedies in public law has been the subject of recent Law Commission reports²³ it is not discussed further in this chapter, as to do so would deflect from our discussion of exploring translating equitable principles into public law. Notwithstanding, it is prudent to note that remedies are certainly a relevant issue and their type and content would need further exploration, if fiduciary duty and trusts is translated to the public sphere. After all, transposing concepts from private law to public law will have no value as such, unless it leads to recourse to wider remedial relief.

Davis concludes that:

Fiduciary government cannot, however, fulfil the promise made in its name. Politicians and bureaucrats are not like private fiduciaries. They do not serve discrete classes of beneficiaries, and they are subject to demands that cannot be distilled into a discrete maximand. To translate private fiduciary law into public law results either in resort to general principles that provide no helpful guidance or fiduciary doctrines that are an ill fit for public law problems²⁴

²¹ *ibid.* 1201

²² Seth Davis, ‘The False Promise of Fiduciary Government’ (2014) 89(3) *Notre Dame Law Review* 1145, 1205

²³ Law Commission, *Monetary Remedies in Public Law*, Discussion Paper, 2004. www.lawcom.gov.uk

²⁴ Professor Seth Davis, ‘The False Promise of Fiduciary Government’ (2014) 89(3) *Notre Dame Law Review* 1206

Davis's objections need to be taken seriously, as do judicial remarks against pressing too far the analogy between what the law requires of trustees in their decision making and of decision-makers in the public sphere²⁵. The purpose of the next section is therefore to consider the issue of 'ill fit' specifically in relation to the nature of local authorities, identifying the beneficial objects²⁶ and the difficulties of dealing with polycentric decision-making.

4.2.3 Identifying the Nature and functional scope of local authorities as statutory corporations

A local authority is a statutory corporation owing its origin to an Act of Parliament or Royal Charter. The consequence of such a birthright means that a local authority can only do that which it is statutorily permitted to do; features of its corporate governance, such as a discretionary power, fall to be determined by interpretation of the enabling statute. The relationship of local authorities with their service users is that of a public authority governed by proper construction of the relevant statutes. Whether literal or purposive techniques of statutory construction or a combination of both are used, the central aim of the court is to elicit Parliament's intention. If we view a local authority as a trustee, it may be correct to consider the founding

²⁵ William Gummow AC, 'Equity in the modern administrative state' chapter 16 in P J Turner (ed), *Equity and Administration* (Cambridge University Press 2016) p.312 See further, statement by Lord Walker in *Pitt v Holt* [2013] AC 108; [2013] UKSC 26, [11] 'There are superficial similarities between what the law requires of trustees in their decision making and what it requires of decision makers in the field of public law. This was noted by the Court of Appeal in its judgment delivered by Chadwick L J in *Edge v Pension Ombudsman* [2000] Ch.602, 628-629. It was duly noted by Lord Woolf MR in *Equitable Life Assurance Society v Hyman* [2002] 1 A.C. 408, para 20. The analogy cannot however be pressed too far. Indeed it was expressly disapproved by the Court of Appeal in these appeals:- Lloyd L J, at para [77] and Mummery L J, at para [235]

See further statement by Lightman J in *Abacus Trust Co (Isle of Man) v Barr* [2003] Ch 409, [29], where he identified three important differences as the discretionary nature of relief in judicial review, a different approach to nullity, and strict time limits

²⁶ Professor Seth Davis, 'The False Promise of Fiduciary Government' (2014) 89(3) *Notre Dame Law Review* 1161. Seth Davis raises this same question, and states 'Moreover, it is far from clear, in any given case, who the beneficiaries of public fiduciaries are.'

legislation as some form of trust deed. The upshot is that, apart from any overlay of equity's fiduciary obligation, the powers of a local authority will always be defined by the empowering statute and common law principles.

Lord Templeman in *Hazell v Hammersmith and Fulham London Borough Council and Others*²⁷ stated: 'a local authority, although democratically elected and representative of the area, it is not a sovereign body and can only do such things as are expressly or impliedly authorised by Parliament.'²⁸ It made no difference that the local authority had been incorporated by Royal Charter;²⁹ they were also subject to any statutory limits imposed. *Hazell* involved the legality of speculative transactions totalling £390 million pounds conducted through a London capital market fund. This borrowing was to fund major capital development that had taken place in the borough. The council would benefit if interest rates fell, but lose if interest rates rose. The expenditure was challenged by the Auditor appointed by the Audit Commission.

The sole question for the court was whether the council was authorised expressly or impliedly to enter into what were termed 'swap contracts'. The court concluded that there was no authority to enter into such arrangements, as there was no express statutory authority under the local government legislation nor was there implied authority as an arrangement incidental to their borrowing function. The definition of 'functions' in the governing legislation at that time, Section 111 of Local Government Act 1972, was 'the sum total of the activity Parliament had entrusted to it'.³⁰ It was suggested³¹ that the court itself could sanction a transaction that resulted

²⁷ [1992] 2 A.C. 1 Lord Templeman delivered the main judgment

²⁸ *ibid*, [22]

²⁹ Royal Charter had been granted in accordance London Government Act 1963, s 1.

³⁰ [1992] A.C. 1 [29] Note the use again of the word '*entrustment*.'

³¹ Elizabeth Gloster QC counsel for some of the lending banks

in a breach of trust (through analogy to a breach of trust by a trustee)³² Lord Templeman rejected such an approach, stating ‘while the court has jurisdiction to sanction any transaction which the settlor could have authorised and with all beneficiaries being sui juris could sanction, the court had no jurisdiction to extend the powers on a corporation by Parliament or to approve an unlawful transaction by a corporation.’³³ The actions of the local authority were outside the totality of activity permitted by the statute.

4.2.4 Commercial Functions

This section addresses the extent (if any) commercial consideration should be a factor in their decision making of local authorities that affect their service users. In *Hazell*, Lord Templeman developed his analysis of the legal status of a local authority drawing a useful distinction between the status of a local authority and an ordinary trading company. He said a local authority ‘is not a trading or currency or commercial operator with no limit on the method or extent of its borrowing powers to speculate.’³⁴ He emphasised the position of a local authority, in this case *Hammersmith and Fulham*, as a public authority dealing with public monies. He considered that a local authority ‘which borrowed in reliance on future successful swap operations would be failing in its duty to act prudently in the interests of

³² A court has the statutory power to give relieve a trustee under section 61 of the Trustee Act 1925 for a breach of trust. There are, however, stringent requirements that need to be satisfied before the court will grant relief. These involve honesty, reasonableness and fairness. See *Re Stuart* [1897] 2 Ch 583, and Maugham, ‘Excusable Breaches of Trust’ [1898] LQR 159, stating that the wrongdoing trustee must prove that he or she deserves the ‘dubious prerogative of mercy’ vested in the court

³³ [1922] A.C. 1 para

³⁴ [1922] A.C. 1 [31] (Lord Templeman)

Peter Scott QC counsel for the local authority acknowledged that ‘the fundamental distinction between a local authority and banks is that the local authority does not exist for the purposes of trade but to provide local services as stipulated by Parliament.’

ratepayers.’³⁵ This is a clear judicial example of the principle of stewardship espoused by this author.³⁶ Lord Templeman recognised the source of a local authority’s funds and that a local authority had controlled powers of borrowing, both short-term and long-term; he considered that ,with the latter, fairness dictated that expenditure be spread over future generations of local council taxpayers, and not imposed entirely on those who pay when the expenditure is incurred. Lord Templeman concluded that the swap transactions involved were a speculative method of raising money in the hope of reducing the burden of interest accruing on money already borrowed. The swap activity could not be considered as an incidental function covered under section 111 of the Local Government Act 1972 to the statutory borrowing power, because it was a distinct and separate activity.³⁷ Michael Barnes QC argued that due regard for local tax payers’ interests was a ‘fiduciary duty’ of the local authority and was part of the requirement of public law duty to act reasonably. Fiduciary obligation was, in his view, a component of an existing ground of judicial review.

Hazell is particularly important because of its discussion of the functions of a local authority and its statutory nature. It continues the judicial stewardship approach displayed in *Attorney Gen v Belfast*,³⁸ a case referred to in chapter 5, where the Irish Chancellor said ‘Boroughs are now mere functionary institutions-trustees of public funds.’³⁹ In *Hazell*, Lord Templeman recited some of the key functions of a principal

³⁵ [1922] A.C. 1 (Lord Templeman)

³⁶ Stewardship principles were clearly broken as the auditor produced statistics showing that 77 local authorities out of 450 principal local authorities entered into 400 swap transactions between 1987 and 1989. 10 councils had entered into more than 10 transactions and 18 into more than five swap deals. Hammersmith & Fulham had entered into a staggering 592 swap transactions of a notional principal sum of £6,052m.

³⁷ [1922] A.C. 1, See paras 21G-22A, 29E-30A, 31F, 33H-34A, 37C, 44E, 46F-G, 47 E-F

³⁸ [1855] 4 IR Ch 119, 141-142

³⁹ *ibid*, 141-142

local authority⁴⁰, which have been ‘extended under many statutes to public health, housing, planning and highways and other environmental matters and to education, housing and social welfare services including the care and protection of children, the sick and the elderly.’⁴¹

Hazell conveys a clear message that a local authority does not exist for the purpose of trade, but to provide local services as stipulated by Parliament.⁴² On this approach, a local authority is foremost a service vehicle; that public service ethos may now be changing, from a provider of goods and services to one of an enabler. The defining characteristic of ‘enabling’ as argued by Leach & Davies,⁴³ is that the ‘enabling authority’ redefines the primary purpose of any local council: away from that of a provider of services to that of a purchaser of goods. The strategic function of an ‘enabling authority’ is to specify service requirements informed by local community needs, engaging with a market of external providers to deliver local services. This shift in junction provides further grounds for reappraising the classification of a local authority in law. As local authority service delivery methods have changed since *Hazell*, from a provider to an enabler, the designation of a local authority as a service entity may be questioned by some. What is not open to challenge, however, is that a local authority must carry out its statutory purposes, not

⁴⁰ Local Government Act 1972, s 270, defines a principal local authority as a County Council, District Council or London Borough Council

⁴¹ [1992] 2 A.C. 1, [22]

See case comments – ‘Tails you lose? The swaps case examined’ (1991) 12(5) Bus L R 145-146

‘Local authority swaps: lessons for all transactions’ (1991) 2(3) P L C 7-12

⁴² Peter Scott QC for the Council referred to *Attorney-General for Ceylon v Silva* [1953] AC 461, 479, where the fundamental distinction between local authorities and banks - the local authority does not exist for the purposes of trade but to provide local services as stipulated by Parliament

⁴³ S Leach., & H Davies., (1996) introduction in S Leach, H Davies and Associates ‘*Enabling or Disabling Local Government*,’ Buckingham Open University Press, p.3 See also, ‘*The ensuring Council: An alternative vision for the future of local government*’, APSE (Association for Public Service Excellence), Apse.org.uk May 2012 pp.10 & 11

with any particular person or group in mind, but for the well-being of the community it governs and serves.

4.2.5 The ‘fiduciary’ nature of local authority functions

In *Charles Terence Estates v Cornwall Council*,⁴⁴ Cranston J stated that *Bromley* contained an authoritative statement of the principle of a council’s fiduciary duties to its council tax payers. In *Bromley*, the GLC⁴⁵ owed a duty to the general transport users on the one hand (the public interest factor) and, on the other hand, a duty to its ratepayers; all of the interests had to be fairly balanced. Of *Bromley*, Cranston J said:

This binding authority means that relevant legislation conferring a power on a local authority must be read subject to the fiduciary duty owed to its ratepayers. A local authority cannot exercise a statutory power without regard to its fiduciary duty; if it purports to do so it is acting beyond its statutory powers⁴⁶

This is significant because, although Cranston J could have relied on the ultra vires doctrine, he instead explicitly referred to the importance of fiduciary obligation in a public context and did so in direct and unambiguous language. Cranston J further recognised that the fiduciary duty must be balanced with other duties⁴⁷: in the present case, this required balancing Cornwall Council’s statutory duty to the homeless and its fiduciary duty to local taxpayers through preservation of council funds⁴⁸.

These conflicting considerations, and the need to balance a local authority’s fiduciary duty to ratepayers with the provision of services to its locality, were also

⁴⁴ [2012] EWHC 1439

⁴⁵ [1982] 1 All E R 129 (CA & HL), this case is discussed in depth in chapter 5.

⁴⁶ *ibid.*, [75] specifically headed ‘fiduciary duties’.

⁴⁷ [2012] EWHC 1439 [75]

⁴⁸ *ibid.* Cranston J ‘Fundamental to a public body’s accountability is the care it exercises in handling public moneys. In the context of local authorities this takes legal shape in the principle of their fiduciary duty to local taxpayers.’ [64].

identified in *Pickwell*, where Forbes J. said ‘It is plain that a local authority owes a fiduciary duty to its ratepayers: it also owes a duty, laid on it by Parliament, to provide a wide range of services for its inhabitants, be they ratepayers, electors or neither. It must therefore be involved in *balancing fairly these interests which may frequently conflict*’⁴⁹ (Emphasis added). *Pickwell* represented progression from earlier cases,⁵⁰ where the courts preferred to take the more traditional approach of basing their decision on pure statutory construction and ignored any fiduciary obligation on the part of the council.

References in case law to the fiduciary duties of a local authority, and the trustee and beneficiary analogy, requires further analysis of the type of trust that might be adopted, if the private law trust model was transposed to the public law arena.

A PRIVATE TRUST MODEL

4.3 Identifying an appropriate private trust model

4.3.1 Fixed trusts

These may be a specific fixed trust, where there are only one or few beneficiaries, the objects of the trust. For example X holds property on behalf of Y. A variant of the fixed trust is a life interest trust, where property is held by X for Y for life and thereafter for Z and C in equal shares absolutely. Y will be entitled to the trust income

⁴⁹ *Pickwell v Camden LBC* [1983] QB 962; (1983) WLR 583, it was claimed that the wage settlement made by the council with their striking workers had not exceeded their powers or abused them, notwithstanding the settlement was greater than that reached by the strikers’ national union

⁵⁰ For example, *R v Manchester CC, ex parte King* [1992] A.C. 1, 37H - increased fees for market stall licence where the Court preferred to take the traditional approach of basing their decision on pure statutory construction and ignored any fiduciary obligation on the part of the council

(not capital) for life and Z and C termed are termed ‘remaindermen’ who have vested absolute interests after the life interest of Y ceases. In both these cases the beneficiaries are identifiable and it is easy to understand notions of fiduciary obligations between those trust actors; virtues of trust and loyalty easily fit into such an arrangement. The trustees in a fixed trust are required to distribute the property in accordance with the trust deed; they have no discretion as to who benefits or in what proportion (apart from powers of maintenance and advancement). A fixed trust is termed ‘fixed’ because of the terms stipulated by the settlor/testator who determines who is a beneficiary and their share. The objects of the trust are therefore fixed and every beneficiary must be identifiable or the trust is invalid. More significantly, beneficiaries under a fixed trust have equitable proprietary interests in the assets (albeit their interests not always vested). These factors make it an unsuitable vehicle for local authority funds because of the difficulty in pointing to a property interest of service users as a wide class.

4.3.2 Discretionary trusts

In a discretionary trust, trustees hold property on behalf of a class or group of people. The trustees have a discretionary power to appoint trust assets amongst the beneficiaries, who have no legal entitlement or proprietary interest in the fund: this is a key characteristic of the discretionary trust. Although it has been argued that equitable title to the property is vested in the class of beneficiaries as a whole, an approach confirmed in *Re Smith*,⁵¹ the ‘group interest’ approach was, rejected in *Gartside v IRC*,⁵² and subsequently.⁵³ A contrary view is, however, expressed by

⁵¹ [1928] Ch 915

⁵² [1968] A.C. 553. For purposes of death duties the Inland Revenue argued unsuccessfully that the deceased husband had a beneficial interest in the family discretionary trust and therefore liable to tax.

Pearce & Stevens who state that the equitable interest in property does not remain inchoate, or ‘in the air’, but vests in the class of potential beneficiaries as a whole.’⁵⁴ For our purposes, it is sufficient to state that if local authority assets were held on a discretionary trust, no single service users could realistically claim a proprietary equitable interest in council assets. This author adopts this traditional view.

If this argument is accepted, it is on the basis that there is a resemblance of a discretionary type trust relationship between local authorities and their service users, where objects of the trust have individual competing interests in the trust fund and have a mere expectation or hope that a distribution will be made to them.

4.3.3 Non-charitable purpose trusts

A local authority’s role is to carry out the purposes of its statutory duties and powers for its locality’s well-being. A purpose trust specifies a particular use for a trust fund: but, with the exception of a small group of anomalous cases⁵⁵, such trusts are void because of the lack of an identifiable beneficiary ‘in whose favour the court can decree performance.’⁵⁶ In *Re Astor’s Settlement Trusts*, a non-charitable purpose trust was held to be void, primarily because there were no identifiable beneficiaries, also because the stated purposes were considered too vague. In relation to the stated purposes Roxburgh J said ‘...the purposes must be stated in phrases which embody definite concepts and the means by which the trustees are to try and attain them must

⁵³ *Sainsbury v IRC* [1970] Ch 712, this case involved the rights of discretionary beneficiaries and whether or not the interests of the beneficiaries of a discretionary trust was an interest in possession for the purposes of assessment of estate duty purposes on the death of one of the beneficiaries

⁵⁴ Pearce and Stevens, ‘*Trusts and Equitable Obligations*’ (6th ed, Oxford: Oxford University Press 2015) 602

⁵⁵ Testamentary trusts of imperfect obligation; trusts for a particular animal, trusts to erect and maintain monuments and graves, trusts for the saying of private masses and trusts for the promotion of fox-hunting

⁵⁶ *Morice v The Bishop of Durham* [1803-13] All ER Rep 451, 454 (Sir William Grant MR)

also be prescribed with a sufficient degree of certainty.’⁵⁷ He went on to say that ‘the purposes must ...be so defined that if the trustees surrendered their discretion, the court could carry out the purposes declared not a selection of them arrived at by eliminating those which are too uncertain to be carried out.’⁵⁸ Despite reference to clarity of purpose, it must be remembered that, for a trust to be valid, it ‘must be for the benefit of individuals...or must be in that class of gifts for the benefit of the public which the courts in this country recognise as charitable in the legal as opposed to the popular sense of that term.’⁵⁹ This is because as Roxburgh J states:

if the purposes are not charitable, great difficulties arise both in theory and in practice. In theory, because having regard to the historical origins of equity it is difficult to visualise the growth of equitable obligations which nobody can enforce, and in practice, because it is not possible to contemplate with equanimity the creation of large funds devoted to non-charitable purposes which no court and no department of state can control, or in the case of maladministration, reform⁶⁰

4.3.4 ‘People trusts’ for a purpose

While a trust for abstract purposes cannot be valid, if ‘the trust, though expressed as a purpose, is directly or indirectly for the benefit of an individual or individuals...it is in general outside the mischief of the beneficiary principle.’⁶¹ In other words, if the purpose(s) can be regarded as directly or indirectly benefiting ascertained individuals,

⁵⁷ *Re Astor’s Settlement Trusts* [1952] Ch 534, 547, The owners of the Observer newspaper sought to create a purpose trust for i. the maintenance of good understanding between nations; ii. the maintenance of the independence and integrity of newspapers; and iii. The protection of newspapers from being absorbed and controlled by combines. The Astor’s did not however benefit individuals and was not charitable, nor were they suitable to build a purpose around being ‘void for uncertainty. The objectives were not conceptually clear.

⁵⁸ *Re Astor’s Settlement Trusts* [1952] Ch 534, [548] (Roxburgh J)

⁵⁹ *Bowman v Secular Society* [1917] A.C. 406, [441] (Lord Parker)

⁶⁰ *Re Astor’s Settlement Trusts* [1952] Ch 534, [541-2] (Roxburgh J)

⁶¹ *Re Denley* [1969] 1 Ch 373, [383-4] (Goff J)

See generally articles on purpose trusts-

P Lovell, *Non-Charitable Purpose Trusts-Further Reflection*’ (1970) 34 Conv p. 77

J Harris, *Trust, Power and Duty*, (1971) 87 LQR.31

the trust may be valid.⁶² *Re Denley* involved land held by trustees for the use and enjoyment of employees of a particular company⁶³. In this case Goff J held that, although the trust was expressed as a purpose (use and enjoyment) it was valid because it was directly or indirectly for the benefit of identifiable individuals and therefore did not fall within the mischief of the beneficiary principle. His decision is understandable where, as here, the beneficiaries were easily identifiable and therefore had locus standi to apply to the court for any breach of trust. *Re Denley* has been cited with approval⁶⁴ but not specifically relied upon to uphold a non-charitable purpose trust as valid. For our analysis the task is not so simple where the purpose is expressed in an abstract or impersonal way, for example, the well-being of a particular locality.⁶⁵

The decision in *Re Denley* has been justified on the basis that the beneficiary principle had not been offended because the land was held on trust for individuals who had a beneficial interest in the land. This was the interpretation of *Re Denley* by Vinelott J in *Re Grants Will Trusts*⁶⁶ holding that ‘the trust deed created a valid trust for the benefit of the employees, the benefit being the right to use the land subject to

⁶² See *Leahy v Attorney-General for New South Wales* [1959] A.C. 457, 459; 478 where Viscount Simmonds delivering the judgment of the Privy Council stated the general position on the validity of purpose trusts as follows: ‘A gift can be made to persons (including a corporation) but it cannot be made to a purpose or to an object: so also, - and these are important words - a trust may be created for the benefit of persons as cestuis que trust but for a purpose or object unless the purpose or object be charitable. For a purpose or object cannot sue, but, if it be charitable, the Attorney-General can sue to enforce it.’

⁶³ See Clauses 2c and 2.d of trust deed

⁶⁴ See *Lipinski’s Will Trust* [1976] Ch 235, 248 where Oliver J considered *Re Denley* to accord with ‘authority and common sense.’

⁶⁵ See later case of *R v District Auditor, ex parte West Yorkshire Metropolitan County Council* [1986] RVR 24

⁶⁶ *Re Grants Will Trusts*, [1979] 3 All E R 359. This case involved a gift to the Labour Party Property Committee for the benefit of Chertsey headquarters. The gift was void for breach of perpetuity rules, but also not construed as a gift to the members of the Chertsey branch as at the date of the testator’s death

and in accordance with the rules made by the trustees.’⁶⁷ Vinelott J did not see anything unorthodox about such a trust. A similar view of *Re Denley* was adopted by Collins J in *Re Horley Football Club*, holding that the land in *Re Denley* was ‘held on trust for the benefit of individuals.’⁶⁸

4.3.5 Charitable trusts

Charitable trusts are not the concern of this thesis, but it is worth noting that local authorities have made use of this type of trust vehicle in public service delivery, particularly with reference to recreational facilities. The Recreational Charities Act 1958⁶⁹ recognised the provision of facilities for recreational purposes as charitable. Use of charitable trusts as a vehicle for service delivery entails a separate charitable body that is exclusively charitable⁷⁰, independent of the local authority and which retains its discretion in how services are delivered.

4.4 Transposing trusts into the public sphere

As well as the difficulty of identifying an appropriate private trust model, there are further specific hurdles to transposing private trusts into the public sphere. If some form of public discretionary trust is adopted the class of beneficiaries must be identified, and the diversity of issues that a local authority has to deal with must be considered.

⁶⁷ Ibid Vinelott J [368]

⁶⁸ [2006] EWHC Ch 2386; W.T.L.R.1817 where land was settled on trust for the primary purpose of securing a permanent ground for Horley football club

⁶⁹ Now consolidated in the Charities Act 2011, s 5 That Act does not enlarge the definition of charity, but instead gives statutory confirmation of purpose already recognised as charitable. The provision of facilities for recreation or other leisure time occupation is charitable if the facilities are provided ‘*in the interests of social welfare.*’

See Charity Commission Policy Paper dated 1st August 2000 The Recreational Charities Act 1958.(RR4), which summarises the Charity Commission’s views on the scope of S.1 of the Act

⁷⁰ See, Mark Sandford, *Local government: an alternative model of service delivery* (House of Commons Briefing Paper No: 05950, 20th May 2016)

Certainty of objects:-

4.4.1 Identifying the class of beneficiaries

Identifying the class of beneficiaries is vital, because as we have seen, in order for a trust to be valid there must be ascertainable and identifiable beneficiaries, or a class of beneficiaries, in whose favour the trust can be enforced.

This need to identify the beneficiaries of a trust may cause problems in the context of a local authority. If the class was limited to the adult inhabitants of a district, a simple electoral voting register check would not suffice, because all adults may not have registered to vote, and with people moving in and out of a locality the register might take time to reflect these changes. If however, the class was to include service users more generally (for example, children and visitors to the locality) the task of identifying potential beneficiaries becomes more difficult. Further, for those local authorities located near ports or airports⁷¹, there has been much litigation on the issue of the duties owed in terms of service provision to asylum seekers. These stateless persons seeking asylum should, in this author's view, rightfully fall within the class of potential beneficiaries.⁷²

⁷¹ See statement by Bean J in *R (on the application of 'HA') v London Borough of Hillingdon* [2012] EWHC 291 (Admin) [23], involving Hillingdon's termination of services following an age assessment of a 'child' asylum seeker. 'I have a good deal of sympathy, for Hillingdon: as the local authority for Heathrow airport and Harmondsworth Immigration detention centre they have to bear more than their fair share of the burden of providing services to asylum seekers.'

⁷² See Safeguarding Vulnerable Groups Act 2006 which reflects a commitment to protect vulnerable adults and children from harm. Consideration should be given to the inclusion of asylum seekers and refugees within relevant policies cf Professor Timothy Endicott, 'A good public agency will not set out to further interests of strangers. It certainly does not have general fiduciary duties to foreign individuals or states ... in fact, when a public authority rightly gives asylum to an asylum seeker ... it will be acting in the discharge of its people's duties.' Professor Timothy Endicott, 'Administrative

Professor Feldman, quoting Arden, Baker and Manning, has suggested that the class might be extended to national taxpayers, although the relationship is arguably too remote, but not to central government, notwithstanding that it provides most of the funding for local government.⁷³

Discretionary trusts and the need for certainty of objects (beneficiaries) was considered by the House of Lords in *McPhail and others v Doulton*.⁷⁴ The Court held that a discretionary trust was valid if it could be said with certainty that any given individual is or is not a member of the class. Lord Upjohn agreed with Lord Wilberforce that there were two types of ‘uncertainty’ bearing upon the objects of a discretionary trust: first, conceptual (linguistic or semantic) uncertainty⁷⁵ and, secondly, evidential uncertainty.⁷⁶ Lord Wilberforce identified a third form of ‘uncertainty’, that of administrative unworkability, which is particularly relevant in the context of local authorities and their service users.

behaviour: commentary’ chapter 19 in P G Turner (ed), *Equity and Administration* (Cambridge University Press 2016) 376

⁷³ Professor David Feldman, *English Public Law* (Oxford: Oxford University Press 2004), para 2.4.80.

⁷⁴ (1971) AC 424

⁷⁵ Conceptual uncertainty: for example, funds placed on discretionary trust for ‘my nephews’ would be valid, but not for ‘my friends.’

See, *Re Barlow’s Will Trust* [1979] 1.W.L.R. 278. Browne-Wilkinson J had to decide the validity of a trust which was intended to benefit ‘old friends’. He concluded that such an expression was conceptually uncertain. The descriptive words, ‘old’ and ‘friends’ had so many potential meanings that it was impossible to say, with certainty, who were the intended beneficiaries

See prior case *Spafax v Dommett*, *The Times*, July 14th, 1972 where a trust established in favour of ‘customers’ was invalid. The Court held that it was unclear what was meant by ‘customers’. It may encompass all individuals who purchase items or simply browse (and never buy a thing) or it may be limited to those who purchase items.

See further, P Fudakowska, ‘No Beneficiaries, No Trust (2012) J. G. L. R., 14(3), pp 331-336

⁷⁶ Reference to the practical difficulty of ascertaining the existence or whereabouts of beneficiaries

4.4.1.1 Conceptual Certainty

Professor Emery defines 'conceptual certainty' in the following terms:

We may say that a class of potential beneficiaries is conceptually certain to the extent that the terms used by the settlor to define the class have precise boundaries of meaning: in so far as it is possible to state the criteria which it is necessary and sufficient for a person to fulfil in order to be a member of a class.⁷⁷

A trustee's duty is therefore to select within the class. For the purposes of this thesis, provided a service user falls within the statutory service criteria or as stated by a local authority within its permitted discretionary authority, then such persons or entities are entitled to receive service. There are a number of academics for and against the certainty doctrine. For example, Dr Yuri Grbich⁷⁸ argues that a complete list of beneficiaries is inappropriate, whilst Emery⁷⁹ argues that 'the cardinal principle is that the object of the trust must be defined with sufficient certainty to enable the trusts existence.'

Significantly, in *McPhail* Lord Wilberforce also spoke of a trustee's duty to make enquiries about the range of objects, stating 'as to the duty of enquiry or ascertainment in each case the trustees ought to make such a survey of the range of

⁷⁷ C T Emery, 'The Most Hallowed Principle - Certainty of Beneficiaries of Trusts and Powers of Appointment' (1982) 98 LQR 551, 555-56

⁷⁸ Dr Yuri Grbich, 'Baden: Awakening the conceptually Moribund Trust' (1974) 37 MLR 643, 657.

'In making an order to allocate there is no need for the court to know, as in the case of an ordinary fixed trust, who all the beneficiaries are and the exact shares in which they take. The settlor has merely laid down an obligation that all the discretionary funds be distributed by a fixed date. It is enough to know with certainty that a candidate is clearly one of the defined class of objects.'

⁷⁹ C T Emery, 'The Most Hallowed Principle - Certainty of Beneficiaries of Trusts and Powers of Appointment' (1982) 98 LQR 551

objects of possible beneficiaries *as will enable them to carry out their fiduciary duty.*⁸⁰ (Emphasis added)

4.4.1.2 Administrative unworkability⁸¹

In *McPhail*, Lord Wilberforce gave a very important statement that is particularly relevant to questions of translation of trust principles in respect of a potentially wide class of beneficiaries. Although his Lordship expressed his reluctance to give examples which might prejudicially effect future litigation, he did state: ‘but perhaps ‘all the residents of Greater London’ will serve as an example of an unworkable class’.⁸² In a similar vein, *R v District Auditor No 3 Audit District of West Yorkshire Metropolitan County Council, ex parte West Yorkshire Metropolitan County Council*⁸³ is extremely important for the purposes of this thesis, since Taylor J held that a discretionary trust of £400,000, created by a local authority for a list of purposes for the benefit of any or all or some of the inhabitants of the county of West Yorkshire (some 2.5 million inhabitants) was invalid, because it would be administratively unworkable to distribute such small amounts to all people, and too difficult and costly for the court to administer. Indeed Taylor J stated: ‘the class is far too large.....it seems to me that the present trust comes within the third case to which Lord Wilberforce refers.’⁸⁴ I hope I am not guilty of being prejudiced by the example he gave (referred to above). But it could hardly be more apt, or fit the facts of the present case more precisely.⁸⁵

⁸⁰ *McPhail v Doulton* [1971] AC 424 (Lord Wilberforce)

⁸¹ See, I M Hardcastle, ‘Administrative unworkability - a reassessment of an abiding problem’ [1990] (Jan/Feb) *Conveyancer and Property Lawyer* 24

⁸² *McPhail v Doulton* [1971] A.C. 424, 457

⁸³ [1986] RVR 24

⁸⁴ Taylor J was making reference to *McPhail v Doulton* [1971] A.C. 424

⁸⁵ *ibid*, Taylor J

In summary, the paramount principle of English trust law is that, unlike charitable trusts,⁸⁶ non-charitable purpose trusts are not valid with certain exceptions, as a trustee must hold property on behalf of ascertainable individuals. Historically speaking in the pre- *Baden (No 2)*⁸⁷ era a complete list of all beneficiaries was required to validate all types of trusts, including fixed and discretionary trusts. Lord Wilberforce in *McPhail v Doulton* adopting the approach of Lord Upjohn in *Re Gulbenkian's Settlements*⁸⁸ decided that the better test for certainty was the 'is or is not' test to validate a discretionary trust.

There is however judicial disagreement of the correct test to apply. *In Re Baden's Deed Trusts (No 2)*⁸⁹ represents three different judicial views. The wider view of Sachs LJ based on conceptual certainty conforms to precedent and the House of Lords decision in *McPhail v Doulton* that 'the court is never defeated by evidential uncertainty, and it is in my judgment clear that it is conceptual certainty to which reference was made when the 'is or is not a member of the class'⁹⁰ test was enunciated. Stamp LJ was completely the opposite and required the old approach and wanted de facto to create a complete list of beneficiaries, whereas a middle approach was taken by Megaw LJ suggesting that a discretionary trust could be validated, if a substantial number of people can be successfully classed as beneficiaries. This test is flawed, since how do we determine what constitutes a 'substantial number.?'⁹¹

See further, *Re Manistry's Settlement* [1973] ALL.E.R.1203, where it was held that an attempt to benefit the residents of Greater London would be capricious.

⁸⁶ Charitable trusts can be enforced by the Attorney General

⁸⁷ *Re Baden's Deed Trusts (No 2)* [1972] EWCA Civ 10

See, '*Re Baden and the Third Class of Uncertainty*' (1974) 38 Conv 269

⁸⁸ *In re Gulbenkian's Settlements* [1970] A.C. 508 [71]

See, R P Austin, 'Discretionary Trusts: Conceptual Uncertainty and Practical Sense' (1980) SydLawRw 3; (1980) 9(1) Sydney Law Review 58

⁸⁹ *Re Baden's Deed Trusts (No 2)* [1972] EWCA Civ 10

⁹⁰ [1971] A.C. 424, 20

⁹¹ [1971] A.C. 424, 'To my mind, the test is satisfied if, as regards at least a substantial number of objects, it can be said with certainty that they fall within the trust what is a

Professor M Ramjohn comments that ‘the significant number test seems to be a variant of the outdated approach.’⁹² Additionally Lord Upjohn in *Re Gulbenkian* said that the class must be definite and that ‘the court cannot guess as it.’⁹³ As Thomas and Hudson⁹⁴ and Harris,⁹⁵ argue, there is now no valid reason for a complete list of beneficiaries to validate a discretionary list. This modern practical approach is preferred and may, of course, assist with problems of certainty of beneficiary class in the public context concerning disparate local authority public users coming in and out of an area.

4.4.2 The shifting nature of the beneficiary user class in a local government context

Identifying the local authority service user class is a difficult one. Local authorities at the start of the twentieth century were considered as being more concerned with the infrastructure and welfare of their locality, rather than with their ‘public.’ The development of the changing local authority ‘public’ will be considered in chapter five and the service users in Poplar compared with those in the *Bromley* case.

John Stewart observes that ‘discussion of the relationship with the recipients of services is conspicuous by its absence.’⁹⁶ To support his view, he refers to

‘significant number’ may well be a question of common sense and of a degree in relation to the particular trust.’ (Megaw LJ)

⁹² Mohammed Ramjohn, *Cases & Materials on Trusts*, London: Cavendish, 2004) 130. He further states ‘in addition, this diluted approach to the given postulant test creates a class within a class. The class is laid down by the settlor as varied to include only a significant number of objects. It is questionable whether such an approach accords with the intention of the settlor.’

⁹³ *In re Gulbenkian’s Settlements* [1970] A.C. 508 [71]. (Lord Upjohn). [524A]

⁹⁴ Thomas, W Geraint and Alistair Hudson, *The Law of Trusts* (2nd ed, Oxford University Press 2004)

⁹⁵ W J Harris, ‘Trust Power and Duty’ (1971), 87 LQR 31

See also J A Hopkins, ‘Certain Uncertainties of Trusts and Powers’ (1971) 29 CLJ 68

⁹⁶ John Stewart, *The Nature of British Local Government* (McMillan Press Ltd 2000) 258

Professor Harold Laski's series of essays in praise of local government,⁹⁷ in which there is no discussion of the service user, or the 'customer'. A shift in focus in the 1980's led to a conception of the public as 'customer', but this change to customer-orientation did, and does not inform what is meant by the beneficiary user. The beneficiary class in relation to local authority service users is wide, diverse and shifting. The make-up of the class is constantly changing and persons and groups may occupy more than one position in the class, which in itself is made up of inter relationships. For example, a small family who are council tenants with children at the local school may have a rent dispute with their landlord: at one and the same time they are tenants, pupils, possible litigants, pedestrians, travel users and community social amenity users of parks, swimming baths or libraries. There are other important interest groups, such as business users (perhaps members of the local chamber of commerce, trade unions, and/or voluntary support groups), all with their own particular pressures and demands on a local authority. As Stewart observes: 'the variety and intensity of the relationship with a defined locality distinguish a local authority from most other organisations, whether public or private, and means that a local authority shapes, and is shaped by its public and through the public by the locality.'⁹⁸ This author argues that a local authority, because of its unique constitutional position, is more than a local service provider: it is an autonomous political institution with emphasis on local citizenry and constituted through representative democracy.

It is apparent that a modern local authority has a very wide service user class. Local authorities not restricted only to looking after the interests of their ratepayers. Individuals and groups within the user class participate in many different capacities

⁹⁷ H Laski and W Ivor Jennings, *'A Century of Municipal Progress 1835-1935'* (Praeger 1978)

⁹⁸ John Stewart, *'The Nature of British Local Government'* (McMillan Press Ltd 2000) 262

and, inevitably those capacities will conflict with each other. Sometimes statutory obligations will define the beneficiary class, by reference to who should benefit. For example, local authorities have a mandatory statutory duty under public library legislation ‘to provide a comprehensive and efficient library service for all persons’ desiring to make use thereof’⁹⁹, taking into account local needs and available resources. The ‘user class’ is identifiable, as the Act states that ¹⁰⁰local authorities are not by virtue of the subsection ‘under a duty to make such facilities available to persons other than those ‘whose *residence* or *place of work* is within the library area of the authority or who are undergoing *full-time education within that area.*’ (Emphasis added)

If we conclude that local authorities have a fiduciary duty then this may extend to neighbouring authority ratepayers.¹⁰¹ This author’s definition of the service user class may therefore need revision to include a neighbouring local authority, where there is some form of joint collaboration agreement. This is certainly an evolving area as local authorities continue to extend their shared services.

The beneficiary class must also include recognition of the public interest in any local administrative decision making. This follows from recognition of a local authority as a corporation designed around the public interest. For example, planning decisions for a major road construction may have national implications and repercussions beyond the locality itself, a factor recognised by Diplock LJ in *Bushell v Secretary of State for the Environment*.¹⁰² In this author’s opinion, the diversity of

⁹⁹ Public Libraries and Museums Act 1964, c.75, s 1

¹⁰⁰ Public Libraries and Museums Act 1964, c.75, the user class is specified in s 7 (1)

¹⁰¹ *R v London Borough of Newham, ex p London Borough of Tower Hamlets* (1990) 22 HLR 298, where the court clearly saw obligations arising between authorities under the ‘local connection’ provisions of the Housing Act 1996. ‘It was incumbent upon Newham to have regard to the rights of Tower Hamlets under s. 60(4) of the Housing Act 1985’.

¹⁰² [1981] A.C. 75, 7 (Viscount Dilhorne, Lord Edmund-Davies, Lord Fraser, Lord Lane and Lord Diplock)

potential beneficiaries makes it highly unlikely that a private law trust model could fit the relationship between local authorities and their community of voices. In addition, it can be argued as, Timothy Endicott states that: ‘the legal and moral duties of public authorities are very diverse and are not in general fiduciary duties.’¹⁰³

The task of a local authority, as an elected local representative, is to reconcile and balance the many voices- values and interests of its citizenry and locality before a proposed course of action is taken-they must be ‘cognisant of different interests and their intensity.’¹⁰⁴ This leads us onto the next major hurdle of fit: diversity of interests and the polycentric nature of many local authority decisions.

Polycentricism:-

4.4.3 Polycentric issues

This section examines the concept of polycentricism, and its relevance to the role of a local authority and its relationship to service users. In any area of life - be it business, political or social - individuals and communities interact, creating potential both for co-operation and for conflict. Striking a balance is complex, and the existence of multiple interests makes contextualising the relationship between local authorities and their service users extremely difficult. Issues of polycentrism and the problems it creates in administrative English public law must be considered.

4.4.3.1 Definitions of bi-polar and polycentric decision making

Case held that objectors not being able to challenge expert traffic flow statistics at inspector’s local planning enquiry concerning new motorway link of approx. 15 mile stretch through rural farm areas to the South and South East of Birmingham

¹⁰³ Professor Timothy Endicott, ‘Equity and Administrative behaviour: commentary’ chapter 19 in P G Turner (ed) ‘*Equity and Administration*’ (Cambridge University Press 2016) 372

¹⁰⁴ Professor Jeffrey Jowell, *The Legal Control of Administrative Discretion* (1973) PL 178, p.216

A great number of administrative decisions in local government will be those involving a single issue such as refusal or grant of a market licence or planning permission, extension of a commercial shop lease or refusal of housing benefit. The likelihood is that only a few people will be affected, often only the applicant or their immediate family network. This type of issue is termed 'bipolar', because they have very little impact beyond this limited range. Some decisions, however, may affect a greater range of parties and encompass a wider range of issues. For example, the sale of part of a school playing field for a sheltered housing project will affect many people and groups in different ways. Decisions that involve such 'polycentric' issues are, by definition, much harder to make than narrower bipolar decisions. In the context of local authorities they lack a single principal, but instead have multiple agency relationships, involving moral, legal or political obligations.

For the purposes of discussion, Kevin T Jackson's ¹⁰⁵ definition of the nature of a polycentric issue is adopted:

that polycentric issues involve a number of distinct centres each of which define rights and obligations of a multiplicity of affected parties and resolving matters around one centre typically creates unpredictable repercussions around one or more of the other centres

Lon Fuller¹⁰⁶, M Polyani¹⁰⁷ and Jeff King are prominent in discussions on polycentric issues and polycentrism. According to Fuller, a polycentric problem arises where there are a number of interlocking relationships that impact on each other. Fuller used the graphic metaphor of a spider's web to illustrate interacting

¹⁰⁵ Kevin T Jackson, 'The Polycentric character of business ethics decision making in international context', (2000) 23(1), *Journal of Business Ethics* 123

¹⁰⁶ Lon Fuller, 'The Forms and Limits of Adjudication' (1978-1979) 92, *Harvard Law Review* 353

¹⁰⁷ M Polyani, 'The Logic of Liberty: Reflections and Rejoinders' (Routledge and Kegan Paul 1951)

centres of diverse interests and, as noted by King, the spider's web can be used to convey the idea of tensions between various parties, each pulling in different directions according to their own interests such that 'pulling on one strand would distribute new and complicated tensions throughout all of the other strands of the web.'¹⁰⁸

Enid Campbell and Mathew Groves¹⁰⁹ state that 'bipolar' and 'polycentric' disputes do not form a dichotomy, but rather ends of a continuum. The degree or level of polycentric elements will, in some measure, depend on the person making the decision, as different decision-makers may be prepared to recognise a greater or lesser range of interests.

Fuller did not consider a polycentric issue susceptible to solution by adjudication; although the subject of polycentricism was prominent in much of his thought, he never directly defined the term. In addition to his spider's web metaphor, Fuller also gave an additional example of a testamentary bequest of an art collection to be divided equally between two beneficiaries, and the problems that could arise if one legatee did not want a picture by a particular artist, because they already had some of that artist's work. In this scenario the Personal Representative of the deceased would have to face making a decision involving not only the legatee who

¹⁰⁸ Professor Jeff King, *Judging Social Rights* (Cambridge University Press 2012) ch 7; Jeff King, 'The Pervasiveness of Polycentricity' [2008] Public Law 101 See further J W F Allison, 'Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication' (1994) 53 Cambridge Law Journal 367

¹⁰⁹ Enid Campbell and Mathew Groves, 'Polycentricity in Administrative Decision-Making' chapter 10 in *Law and Government in Australia*, The Federation Press, See, Michael D McGinnis, 'Polycentric Governance in Theory and Practice: Dimensions of aspiration and Practical Limitations' (Working paper, 29 February 2016), states 'In an ideal system of **polycentric governance** a diverse array of communities and public and private authorities with overlapping domains of responsibility interact in complex and ever-changing ways, and out of these seemingly uncoordinated processes of mutual adjustment emerges a persistent system of social ordering that can support and sustain capacities for individual liberty, group autonomy, and community self-governance.' (original emphasis) Depts.washington.edu/envirpol/wp-content/uploads/2016/02/mcginnis_paper.pdf.

made the particular request, but would also need to consider how honouring such a request would affect the other legatee.

Other scholars have defined polycentrism in a variety of ways, Jeffrey Jowell, for example, states it is,¹¹⁰ ‘a complex network of relationships, with interacting points of influence. Each decision communicates itself to other centres of the decision, changing the conditions such that a new basis must be found for the next decision.’ Professor Paul Craig employs an easily identifiable sporting metaphor: the decision of a team captain to switch his centre-back to half-back may necessitate alterations to the whole team.¹¹¹ The consequences are more sweeping than the initial decision (of moving player A to a different field position) might have first suggested: not only would the team formation be affected, but no doubt tactics to accommodate the new line up would need to be formulated.

No matter what definition of polycentricism we prefer, it may be that on a pluralist view local politics is like a market place; in that market, a proliferation of competing interests push, pull, grapple and horse trade their way to influence the local authority decision making process. Significantly, Davis observes that:

with the pluralists, fiduciary theorists describe contemporary life as characterised by the tug and pull of competing interest groups. But, unlike the pluralists, fiduciary theorists aspire to public governance that transcends normal politics and see an ambitious role for the courts to hold politicians and bureaucrats, no less than partners or agents, to something more than market morality¹¹²

¹¹⁰ Professor Jeffrey Jowell, ‘The Legal Control of Administrative Discretions’ (1973) PL 178

¹¹¹ Professor Paul Craig, ‘*Administrative Law*’ (5th ed, Sweet & Maxwell 2003) 454

¹¹² Seth Davis, ‘The False Promise of Fiduciary Government’ (2014) 89(3) *Notre Dame Law Review*, pp. 1145-1207, p.1153

It appears that ‘no single body can hope to represent the full range of interests in a neighbourhood, so you can’t devolve to one single group. We need other forms of representation for powerless groups.’¹¹³

4.5 Summary-Private trust model

To summarise, it seems clear that the private law trust model does not fit the relationship between local authorities and their service users. The technical aspects of private law trusts, particularly in relation to the beneficiary principle and to certainty of objects, present serious obstacles to transposing private law trusts into the public sphere. Delineating membership of the beneficiary class to an amorphous group of service users causes great difficulty. Further, this author considers that imposing fiduciary obligations on a local authority is also problematic: the core obligation of a fiduciary is loyalty and it is difficult to accord loyalty to all service users given the polycentric issues faced by local authorities.

This author strongly argues that the role of local authorities has fundamentally changed since the early twentieth century; they have emerged as representative bodies, not confined to representing the interests of the taxpayers. Local authorities provide public services for the benefit of local inhabitants as well as for persons coming in and out of their locality. Their service function is not restricted to those who pay council tax, nor is it limited to current users. There is an undoubted obligation of stewardship, not just for present service users, but for those generations who follow.

This author argues that, in the context of local authorities, the trust analogy should not be abandoned completely, but if a trust concept is applicable, it may lie in

¹¹³ Reference to a contributor in L Richardson, *Working in neighbourhoods, active citizenship, and localism* (York JRF 2012)

the nature of a public law trust, rather than a private law trust. Public trusts have been used in the realm of protection of natural resources and the rights of indigenous peoples, and are underpinned by the notion of stewardship. This author further argues that the notion of ethical stewardship could be transferred to the relationship of local authorities and their service users.

Moving from a private trust analyses to one focussed on trusts in the public sphere will be advantageous for several reasons. First, it enables fiduciary duties to remain as proscriptive duties, while new relational public trust classifications between local authorities and their service users are explored and debated. Secondly, it invites wider debate on the use of trusts in public law. This author considers the community stewardship model more appropriate than an ad hoc sui generis fiduciary relational label, where sole loyalty by the fiduciary to the principal is replaced by ‘best community’ interest, and whose core characteristic is an ethic of care, a public service conception. Ethics of care have several advantages over fiduciary duties. Conceptually, it is wider in scope, and can take into account more than interests of the principal.

Ethics can help develop the technique and processes required to take into account these diverse interests. More fundamentally, an ethic of care leads to a shift in emphasis from what Mike Feintuck calls ‘commodification’ to a care morality. The work of Professor Mike Feintuck¹¹⁴ finds affinity with this author’s overall approach, and is of particular relevance to the notion of stewardship. Feintuck emphasises the democratic significance of public services, and offers an alternative to viewing services through a commodity lens. He states:

¹¹⁴ Mike Feintuck, ‘Protecting Non-Commodity Values in the Public Interest’ (University of Bristol CMPO Law, Economic Incentives and Public Service Culture Working Paper 05/129)

The agenda requires a rather different mode of thinking to that which currently dominates political and regulatory debate. It requires an unashamedly holistic vision which includes and recognises non-commodity values, which extend beyond economic interests¹¹⁵

Professor Donald C Langevoort, referring to fiduciary obligations identified: ‘the difficulties that face a legal ethic of service to others...in a culture that celebrates personal wealth, achievement and consumption.’¹¹⁶

This author agrees with Professor Finn who called the public trust a forgotten trust and stated that ‘the most fundamental of fiduciary relations in our society is that which exists between the community...and the state and its agencies that serve the community.’¹¹⁷ Some commentators have treated public trusts as no more than a political metaphor, stating that it is simply a ‘moral or political obligation’ and cannot be enforced by the courts. It therefore behoves English law and particularly its branch of equitable jurisprudence to be progressive once again, as it has demonstrated in the past; its flexible quality of being able to fashion and adapt its principles and concept to meet the challenges of a new age of consumerism. The author’s preferred view is that a better path to understanding the public trust concept in administrative law is not to restrict it to known formulas of the public doctrine, as applied to natural resources or indigenous peoples, as these are property based, but understand that public law deals with administrative power of public bodies in a variety of different areas, often involving a complex network of interacting actors and interests, including that of the general public. It is controlling abuse of that power in a conceptual framework which is the prime challenge.

¹¹⁵ *ibid*, 1 (abstract)

¹¹⁶ Donald C Langevoort, ‘Psychological Perspectives on the Fiduciary Business’ (2011) 91 BULR 995, 995

¹¹⁷ Paul Finn, ‘The Public Trust and Fiduciary Relations’ chapter 3 in Coghill, Sampford and Smith (eds), *Fiduciary Duty and The Atmospheric Trust* (Ashgate Publishing Ltd, 2012) 31, referring to his argument in ‘The Forgotten Trust: The people and The State’ in Malcolm Code (ed), *Integrity Issues & Trusts* (Federation Press 1995)

4.6 A PUBLIC TRUST MODEL

4.6. Introduction

A public trust was described several centuries ago as a trust concerning the public.¹¹⁸

Fundamental to the public trust principle is the recognition and enforcement of social responsibilities that promote the stewardship ethic. As Professor Haochen Sun¹¹⁹ states, ‘Both rights and responsibilities form the foundation of the public trust principle. Moreover, these rights and responsibilities are independent of each other.’

The public trust doctrine is a long standing principle and relates back to the origins of democratic government and its seminal idea that within the public resides the true power and future of a society. As Professor Evan J Criddle states:

....from Cicero’s Discourses¹²⁰ On Moral Obligations to Locke’s Two Treatises of Government¹²¹ American legal rhetoric has internalised the metaphor of government officials and institutions as ‘agents and trustees’.....Legal historians trace the fiduciary concept’s genesis to the Roman *fiducia* or *fidei-commissia*¹²²

¹¹⁸ *R v Bembridge* [1783] 3 Doug 332 (KB); Eng R 170, this case, whilst about an individual’s misconduct in public office (a common law offence) and not an institution itself, does nevertheless emphasise that a public trust philosophy was adopted. The judge in that case, the eminent Lord Mansfield QC, when speaking of an accountant in the office of the Receiver and Paymaster General of the Forces, used the word trustee: ‘he was a trustee of the public and the Paymaster.’ The rationale behind the offence was, like the public trust concept the ‘public good’. Colin Nicholls QC points out in his book *Corruption and Misuse of Public Office* (Oxford University Press 2006) 66, that ‘even before *Bembridge*, the common law sought to criminalise the public officer who had failed to discharge his duties competently and for the public good.’ He refers to two earlier cases: *Makally’s Case* [1611] and *Crouther’s Case* [1600] Cro Eliz 654; 78 ER 839

¹¹⁹ Haochen Sun, ‘Toward A New Social-Political Theory of the Public Trust Doctrine’ (2011) 35 Vermont Law Review, 563, 600

¹²⁰ Cicero, ‘*On Moral Obligations*’ (Book 1, John Higginbotham (tr), Faber & Faber 1976) 69

¹²¹ John Locke, ‘*Two Treatises of Government*’ (first published 1698, Book II, Legal Classics Library 1994) 77-79, 107-109, 119-22, 136, 229-30

Fiduciary government was part of Locke’s conception of the social contract: ‘the community put the legislative power into such hands as they think fit with *trust*, that they shall be governed by declared laws ...’ (emphasis added)

¹²² Ethan Criddle, ‘Fiduciary Foundations of Administrative Law’ (2006) 54 UCLA Law Review 117, 124

Can we learn lessons from an ancient concept? As a basic definition of a public trust the author envisages a trust created for the promotion and delivery of public welfare and not for the benefit of one or a few individuals.

In recent years, there has been much academic interest in the subject of a fiduciary rendering of democratic representation.¹²³ Relevant literature is mostly from America and Commonwealth countries and is informative, albeit related in some instances to specific jurisdictional issues.¹²⁴ This body of influential work does not, however, deal specifically with the institution of local government and the relationship between local authorities and their service users in England and Wales, which is the subject of this thesis.

For the purposes of this chapter, this author adopts a conception of public power that can be better understood in terms of a public trust. The public trust doctrine is a legal tool that embodies both rights-conferring and responsibilities-imposing functions. Local authorities have wide discretionary powers conferred upon them by Parliament, so that they can be used in the interests of the locality and its

¹²³ Robert G Natelson, 'The Constitution and the Public Trust' (2004) 52 *Buff L Rev* 1077; Evan J Criddle, 'Fiduciary Foundations of Administrative Law' (2005) 54 *UCLA L Rev* 117; Evan Fox-Decent, 'The Fiduciary Nature of State Legal Authority' (2005) 31 *Queen's L J* 259; Robert G Natelson, 'Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders' (2007) 11 *Tex L Rev & Pol* 239, 245; Evan J Criddle, 'Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking' (2010) 88 *Tex L Rev* 441; Ethan J Lieb, David L Ponet and Michael Serota, 'Fiduciary Laws Lessons for Deliberative Democracy' (2011) 91 *BUL Rev* 1249; Evan Fox-Decent, 'Sovereignty's Promise: The State as Fiduciary' (Oxford University Press 2012); Ethan J Lieb, David L Ponet and Michael Serota, 'Fiduciary Representation and Deliberative Engagement with Children' (2012) 20 *J Pol Phil* 178; Ethan J Lieb, David L Ponet and Michael Serota, 'Translating Fiduciary Principles into Public Law' (2013) 126 *Harv Law Rev* F.91, 91 (Fn 2); Ethan J Lieb, David L Ponet and Michael Serota, 'A Fiduciary Theory of Judging' (2013) 101(3), *Calif L Rev* 669; D Theodore Rave, 'Politicians as Fiduciaries' 126 (2013) *Harv L Rev* 671

Leib states 'much of this work was foreshadowed in Paul Finn, 'The Forgotten Trust, The People and the State' in Malcom Cope (ed), *Equity: issues and trends*, (Federation Press 1995) 131 and Paul Finn, 'Public Trust and Public Accountability' (1994) 3 *Griffith L Rev* 224

¹²⁴ For example, Theodore Rave relates fiduciary application to the field of American election law

inhabitants. Public bodies, whether national or local, are in much the same position as they would be if they had fiduciary powers conferred upon them. Powers are entrusted to them so they can exercise them on behalf of the public or a section of the public. The public places its trust in the public bodies to exercise their powers for the purposes for which they were conferred.¹²⁵

In chapter two we saw that fiduciary relationships may arise in a varied set of circumstances:

in which one party (the fiduciary) holds discretionary power of an administrative nature over the legal or practical interests of another party (the beneficiary), and the beneficiary is vulnerable to the fiduciary's power, in that he is unable, either as a matter of fact or law to exercise the entrusted power¹²⁶

Indicia of entrustment, discretion and power balance were very evident, albeit in different degrees in most of the major theories put forward for determining the existence of fiduciary relationships. The fiduciary ethos is sensitive and alive to abuse of power and is protective of citizens who are particularly vulnerable to a local authority's powers, notwithstanding their ability to exercise democratic voting rights. It may be argued that the state's assumption of sovereign powers - public powers that private parties are not entitled to exercise - places it in a fiduciary relationship with its people.¹²⁷

This chapter does not deal with public trusts of the inter-generational equitable principle,¹²⁸ concerned with the subject matter of protection of ecological

¹²⁵ Lord Woolf MR in Court of Appeal case *Equitable Life Assurance Society v Hyman* (2002) 2 All ER 331 [20] referred to by Lorne Sossin, 'Public fiduciary Obligations, Political trusts, and the Equitable Duty of Reasonableness in Administrative Law' 66 Sask L Rev 129, Fn 105

¹²⁶ Evan Fox-Decent and Evan J Criddle, 'Interest-Balancing vs fiduciary Duty: Two Models for National Security Law' (2012) 13(5) German Law Journal 556

¹²⁷ *ibid*, 556

¹²⁸ This author records that intergenerational considerations are highly important, especially public bodies, such as local authorities who often engage in substantial capital regeneration

values, natural resources, conservation and environmental protection, as discussed by Professor Joseph L. Sax¹²⁹ or with applications of fiduciary duty to indigenous peoples,¹³⁰ important as they are.¹³¹

To evidence that the public trust has been known in history reference will be made to turnpike trusts, their legal structure and considerable usage in the 18th and 19th century for works of road repair and maintenance. The then inability of common law in practice to call local authorities and their officials to account concerning stewardship of non-charitable funds will be examined and the importance of the *Dublin Corporation* judgement¹³² which changed the course of judicial thinking regarding use of public funds by assimilating accountability of public bodies for non-charitable as well as charitable funds noted. Reasons for the apparent decline of

projects which involve stewardship not only for present service users, but future generations. A stewardship ethic of care therefore dictates that costs are spread across current and future users

¹²⁹ Joseph L. Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1970) 68 Mich L Rev 471

¹³⁰ See, P. Batley (solicitor), 'The State's Fiduciary Duty to the Stolen Children' (1996) 2(2) Australian Journal of Human Rights 177. These trusts share the same philosophy of accountability by stewardship one of public natural resources and the other of wastage of local public assets, whether for the current generation or those generations unborn.

Mark R. Gillen et al, *The Law of Trusts: A Contextual Approach* (3rd ed, Edward Montgomery Publications 2015) ch16 'Fiduciary Obligations and Aboriginal peoples'. The doctrine of a fiduciary or trust relationship toward native Americans has grown out of a number of court cases, including the *Cherokee Nation v Georgia* 30 US 5 Pet 11 (1831), where Chief Justice John Marshall of the US Supreme Court held that the Indian tribes stood in US law as wards to their Federal guardians

From a Canadian perspective see reference to Assistant Professor Gordon Christie, *'Government in Conflict in Fiduciary Obligation'* vol. 19, issue 4, 2001, who argues that even though the courts have decided the Crown's actions have created fiduciary or trust-like obligations in certain cases, fiduciary law as it would apply to two private parties must be applied differently when the government is one of the parties involved

¹³¹ In one sense, however, an inter generation property interest is involved, when discussing duties of local authorities, not least in relation to major capital infrastructure projects, for example road networks that have long service lives. It may forcefully be argued that current ratepayers and service users should not be expected to fund benefits of future users, and therefore the local authority in their stewardship role must ensure that there is a fair spread of costs across current and future users. An equally persuasive counter argument is that the current generation has responsibility to maintain stewardship of assets for future generations and that public bodies are key to its doing so

¹³² *AG v Dublin Corporation* [1827] 1 Bligh NI 312

equity in areas of governmental accountability is made by reference briefly to two important factors: firstly, the introduction of the public audit system and secondly, the effect of fusion of the procedural aspects (not substance) of common law and equity, resulting in the greater availability and use of equitable remedies in courts of common law jurisdiction.

To test the validity of the proposal that a public trust doctrine can apply in a local authority context three seminal cases, primarily dealing with fiscal issues will be analysed. It will be argued that the fiduciary role of local authorities extend to issues beyond those of merely financial stewardship. By an analysis of these judgments this thesis develops an argument that the trust principle is only used sparingly by the courts in the public law forum, and where it is mentioned, it is not so much as a reaffirmation of the trust concept, but some legal creature like it. It is part of the core of this thesis that judges have underestimated the value of the trust device, in the context of local government and applied its principles in too limited away by focusing on the tax payer class, to the exclusion of other service users. This underestimation may be due in part to the overuse of analogous language which can be identified as it creeps into the judicial vocabulary, as a mode of explaining a fiduciary relationship that may not fit perfectly with a private trust model. This thesis does not propose to deal with analogical reasoning in depth, but will provide a summary of the pros and cons of such judicial use and literature reference in a footnote section.

4.6.1. Historical context of Public trusts

The idea of public office holders and their institutions being regarded as fiduciaries is not new. It has an ancient historical pedigree going back to Plato, Aristotle, and John Locke. In this respect, the notion that government exercises its powers in trust has an impressive lineage. State authority is quintessentially seen as fiduciary in nature, a

view subscribed to by this author. The thoughts of Cicero on the subject are particularly instructive. He States:

Those who propose to take charge of the affairs of government should not fail to remember two of Plato's rules: first, to keep the *good of the people* so clearly in view that *regardless of their own interests* they will make their every action conform to that; second, to care for the *welfare* of the whole body politic and not in serving the interests of some party to betray the rest. For the administration of the government, *like the office of a trustee* must be conducted for the benefit of those *entrusted* to one's care, not of those to whom it is entrusted ¹³³ (Emphasis added)

This is altruism illustrated in a public communitarian context and resonates with how the author presents the relationship between local authorities and their council tax payers and service users, as a sui generis form of fiduciary relationship. Cicero also mentions 'entrustment', again an important element in fiduciary obligation, and as we saw in chapter two a central feature of the authoritative works of Professor Tamar Frankel who regards entrustment of discretionary power as a core indicia in any determination of a fiduciary relationship. ¹³⁴ Similarly, John Locke saw government in terms of the people entrusting the State to certain powers on their behalf, ¹³⁵so too did Disraeli. ¹³⁶ Statutory language also emphasised a public trust notion of public office. ¹³⁷ The possibility of fiduciary government is argued by Robert Natelson ¹³⁸ from the government of the Roman Emperor Trajan, and asks why

¹³³ Marcus Tullius Cicero, '*De Officiis*', (85) XXV; 1

¹³⁴ Tamar Frankel, '*Fiduciary Law*' (Oxford University Press 2011), see Chapter 1 A, 'The Recurrent Elements of Fiduciary Relationships.'

See also, Professor Tamar Frankel, 'Fiduciary Law' (1983) 71 Cal L Rev 795.

¹³⁵ John Locke, 'Second Treatise on Government.'

¹³⁶ The Earl of Beaconsfield Benjamin Disraeli, '*Vivian Grey*' (book VI, ch VII) 'all power is a trust; that we are accountable for its exercise; that from the people and for the people all springs and all must exist.' This work by former Prime Minister Disraeli is a fictional account of his own political hopes and longings. Vivian Grey is the alto ego of Disraeli.

¹³⁷ Oaths Act 1672, s.1 states that 'Persons that bear and Offices or Places of Trust under His Majesty, &c to take the Oaths of Supremacy and Allegiance', Statutes of the Realm, Vol. 5. 1628-80, ed John Raithly, pp. 782-785

¹³⁸ Professor Robert Natelson, 'The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan' (2001) 35 University of Richmond Law Review 191, 100.

Professor Natelson states: 'As Professor Bennett points out, Trajan's reign was permeated by an ideology of service.'

if it was possible in a narrowly based regime governing a multicultural empire, why it is not feasible today. F W Maitland over a century ago believed that the assimilation of the trust concept into public law was natural.¹³⁹

4.6.2 Turnpike trusts

This thesis now moves from general theoretical discussions of government seen through the lens of fiduciary perspective to its practical application, of which the turnpike trust is a good example. The Turnpike trust was a specific purpose trust, illustrative of an early use of the trust mechanism and acceptance of the public trust principle in legislation. The Turnpike trust was an operable legal device used in the 17th and 18th centuries. Their principal purpose was repair and maintenance of public highways in a specified local area. The trust had statutory authority, created by private Acts of Parliament, with powers granted to the controlling trustees to collect tolls from road users. At their peak in the 1830's, turnpike trusts administered around 30,000 miles of road, involving 1000 separate local trusts and taking tolls at 8,000 toll-gates and side bars.¹⁴⁰

The turnpike trust exhibited all of the characteristics of a private trust. It had trustees, trust assets and beneficiaries, but it was novel, since it operated as a non-charitable trust in the public sphere. The basic operating principle was that the trustees would manage resources from the several Parishes through which the highway passed, augmented with tolls from users outside the parishes. The whole

For detailed information see Professor Julian Bennet, '*Trajan Optimus Princeps*' Indiana University Press, (2001): DIO at 68.15.6.

For further relevant argument, see Kathleen Clark, 'Do We Have Enough Ethics in Government Yet? An Answer from Fiduciary Theory' [1996] U Ill L Rev 57; David M Lawrence, 'Local Government Officials as Fiduciaries: the Appropriate Standard' (1993) 71 U Det Mercy L Rev 1

¹³⁹ F W Maitland, '*The Collected Papers*' (Vol 3 9 CUP 1911) 402

¹⁴⁰ Mark Searle, '*Turnpikes and Toll-Bars*', (Hutchinsons 1930), p. 798

income was applied to the maintenance of the main highway, thus illustrative of an early form of localism in action. According to historians, such as Sidney & Beatrice Webb¹⁴¹ turnpike trusts increased the flow of commerce; some trusts extended their entrepreneurial spirit by building bridges in their locality, for example at Shillingford over the Thames. This form of local public purpose trust was useful – it encouraged community action, resulting in commercial benefit to the locality.¹⁴² One historian, Sir George Montgomery Metham, later to be Member of Parliament for Hull considered all turnpikes to be for the ‘public good’.¹⁴³

The trustees appointed to a turnpike trust were usually prominent local gentlemen-clergy and merchants-who had been nominated as trustees.¹⁴⁴ The powers of the trust were usually granted for a period of 21 years, after which it was assumed that road responsibility would pass back to the parishes: this seldom happened as the leases were often renewed. Despite the impressive trustee numbers,¹⁴⁵ trusts often failed to raise a necessary quorum for their meetings. This lack of interest was characteristic of the turnpike trust as a whole. The feeling was that too much executive power had devolved to a powerful few. The accountability of the local turnpike trustees to their beneficiaries left a lot to be desired, as there was no remedial

¹⁴¹ S and B Webb, ‘*English Local Government*’ The Story of the King’s Highway, Longmans, Green & Co, 1913, Vol 5, pp.157-159. Also published in paperback By Nabu Press,2012

¹⁴² The formation of a turnpike trust provided respectable and appropriate facilities for financial investment (interest rates were 5%) and the necessary supervisory control to enable intensive road repair and betterment to be carried out, in a way that was scarcely possible under existing conditions. These improvements along with enclosure, canal and drainage schemes had mutually vitalising social and economic effects on town and countryside.¹⁴²

¹⁴³ See, K A Macmahon, ‘*Roads and Turnpike Trusts in Eastern Yorkshire*’ (East Yorkshire Local History Society 16). This booklet provides useful detailed information and maps/statistics on turnpike trusts in East Yorkshire

¹⁴⁴ The first scheme that had trustees who were not Justices of the Peace was established through a Turnpike Act in 1707 for a section of the London-Chester road between Fornhill and Stony Stratford. Trustees were not paid any fee, but did have power to employ a clerk, treasurer and a surveyor to actually administer and maintain the highway

¹⁴⁵ The White Cross-Beverley Turnpike Act 1761 lists 113 trustees. Each individual Turnpike Act itself referred to the names of the trustees

judicial mechanism to deal with an incompetent or dishonest Turnpike trustee.¹⁴⁶

There was no cause of action, whereby local funds that had been misapplied could be compulsorily made good.¹⁴⁷ It caused Knight-Bruce VC to comment:

These sums were part of a *public fund* in the hands of certain *public officials*, devoted to certain *public purposes* within a certain district to which purposes it was the duty of those officers to apply them. They were in a sense *trustees* for that *purpose*; and if it were held that upon a misapplication of monies so circumstanced, it was not competent for a Court of Equity to interfere. I am not aware of what civil remedy there would be in such a case¹⁴⁸ (Emphasis added)

The emphasis is the author's, as fiduciary loyalty by a local authority is conceptualised in a public law setting correctly as loyalty to statutory purposes. Notwithstanding legal enforcement problems, this use of the public trust concept and its structural model to manage roads was adopted throughout the British Empire.

Turnpike trusts further resembled modern private trusts because the trustees, in administering the trust, had power to mortgage not only the trust assets, but also future contingent expected toll receipts. This power was regrettably a contributing factor to the eventual downfall of the turnpike system, as many turnpike trusts over borrowed and owed considerable sums of money.

The toll trustees had wide discretionary power and could levy fixed charges as well as discriminate price levels against their various users.¹⁴⁹ Statutory discrimination against users from outside the area for the benefit of local inhabitants was, therefore, permitted. It may well be the case that those involved in the turnpike

¹⁴⁶ *R v Netherthong (Inhabitants)* (1818) 2 B & Ald 179, 10, Abbott CJ observed that no turnpike trustee had ever been indicted for failure to repair

¹⁴⁷ *AG v Compton* (1842) 1 Y & C Ch 417, 426; 62 ER 951 [427], a case against a Parish's poor law Guardians for misapplication of poor funds to pay for legal costs of two board members. 'The right to the fund is not vested in any single individual, or in any number of individuals. The beneficial right to the fund is the public generally of that district.' (Sir J L Knight-Bruce VC)

¹⁴⁸ *ibid*, Knight-Bruce VC [426]

¹⁴⁹ For example, if your wagon wheels were wider than other vehicles you would pay a lower toll fee on the basis that your carriage wheels did less permanent damage to the road surface.

trust movement would not have understood the concept of community purpose trusts as a species of public trusts, but may have adopted the principles of such. On balance, turnpike trusts appear a good thing, but the 'community' involvement was relatively small and ultimately serving their own sectional interests, although there is an example of genuine community philanthropy where the local estate owner at Letcombe used his own resources to fund improvements where the toll income was not enough to pay for them.¹⁵⁰ The application for a trust was usually organised by a local group of landed and business interests or town elders who perceived the need for improvement to a particular route, so it is not unreasonable to conclude that ultimately self-interest, rather than philanthropy was a major driver.

It is possible to trace fiduciary principles in the working of these trusts, since no benefit could be obtained by the trustees; they were directly barred from benefiting financially from the trust. There was, however, an indirect benefit from the fact that as landowners they saw lands serviced by turnpikes as increasing in rental income. By the end of the Victorian age, tolls were seen as an impediment to trade and inefficient in their use of resources; moreover some suffered from petty corruption. The final nail in the turnpike trust coffin was however the advent of the railways. By the 1870's, Parliament had begun to close down the trusts, so that an unacceptable financial burden was not left on local communities. Eventually the Local Government Act of 1888 gave responsibility for maintaining main roads to county councils and to borough councils.

¹⁵⁰ K A Macmahon, '*Roads and Turnpike Trusts in Eastern Yorkshire* ', (East Yorkshire Local History Society 16)

Prior to 1827, public monies of a non-charitable nature,¹⁵¹ were not protected by the courts. This is confirmed by two cases in which the eminent Lord Chancellor Eldon was involved. In *AG v Carmarthen Corporation*,¹⁵² his lordship declined to intervene in the council's non-charitable affairs and again stated very emphatically in *Colchester Corporation v Lowten*¹⁵³

In the course of my experience in this court, of my present Researches, and of my Examination of Authorities,...nothing has occurred, shewing, that there was ever a Case, in which the court attached the Doctrine of Trust, as applied under the words 'Corporate Purposes' to the Alienation of a Civil Corporation

To a large extent, the landed classes controlled local affairs; this, coupled with the secret nature of local parish proceedings, meant that legal restraints or the will to exercise control or even advance ideas to protect non charitable assets was not prominent.

A corner was turned in the seminal case of *AG V Dublin Corporation*¹⁵⁴. In this case the distinction between charitable and non-charitable forms of trust was removed. In *Dublin Corporation* the court recognised that bodies controlling public monies were just as accountable to the public as they would be in administering a trust which had charitable objects. Henceforth, accountability at law would not turn on the legal classification of the trust. There was full argument in this case of a trustee's role in the public sphere and the extent to which the court had jurisdiction in such matters.

The Irish Attorney General filed an information in the Irish Chancery on behalf of relators arguing that the Corporation 'might be declared trustees of the

¹⁵¹ Corporations fixed the local bye-laws and taxes and it was impossible for the majority of the ratepayers to remove unpopular councils because they could not be voted out. Most of the corporations used their privileges for personal or party advantage

¹⁵² [1805] G Coop Rep 30

¹⁵³ [1813] 1 V & B 226; 35 ER 89, £32000 was raised on mortgage over council property for the specific purpose of indemnifying senior officers in defending actions relation to election results

¹⁵⁴ [1827] 1 Bligh N S 312, this case involved misapplication of water income

rates....for the statutory uses...and that the trusts thereof might be carried into execution'. They were met with the reply that they were not trustees and in any event had done all they could and had filed, as required, appropriate accounts with the Lord Lieutenant. The case was lost in the lower courts on a jurisdictional point, but the Attorney General succeeded on appeal to the House of Lords, where the eminent Lord Redesdale commented on the inadequacy of remedies available in cases of misapplication of public finances. He concluded that equity had jurisdiction over trusts of a public nature, whether charitable or non-charitable. The fundamental principle was that Courts of Equity had an inherent jurisdiction to right a wrong; Lord Redesdale said that: 'it is expedient, in such cases, that there should be a remedy, and highly important that persons in the receipt of public money should know, that they are liable to account, in a Court of Equity, as well for the misapplication of, as for withholding, the funds.'¹⁵⁵

Accountability was a very evident central theme in his delivered judgment. The court ordered members of the Dublin Corporation to refund the misappropriated income from their own pockets. Equity had now firmly established its jurisdiction in the field of public administration with particular reference to guardianship and use of 'public monies'. That is not to say that since 1827 there was no further confusion of charitable and non-charitable issues as succinctly referred to in John Barratt's article entitled '*Public Trusts*'.¹⁵⁶ Judicial precedent began to develop in the matter of public funds and their misapplication. In *Attorney Gen v Carlisle Corporation*,¹⁵⁷ the Dublin ratio was applied. In *Carlisle*, Sir L Shadwell V C confirmed that; '....a Court of Equity had, by its original jurisdiction, a right to see to the application of the fund,

¹⁵⁵ *ibid*, 340-341

¹⁵⁶ John Barratt, 'Public Trusts' (2006) 69(4) MLR 514-542

¹⁵⁷ [1842] 2 SIM 437 at 449; 57 ER 851

although the application of it might not happen to be one of the purposes mentioned in the Statute of Charitable Uses’.

Despite these judicial inroads, local authorities still insisted on a division of their assets: those they acknowledged as being held in trust, others that could be used and applied as they wished, just like an ordinary person. An example given by S and B Webb is the use of borough funds for political affiliations. This resulted in legislation¹⁵⁸ which made it a criminal offence for public officers, including borough officers to use corporate property to gain electoral advantage in Parliamentary elections. Corporate property was to be used for the welfare of local citizens, and not for the furtherance of a local authority’s political aims. The remedies for breach were severe, involving the repayment of abused funds, a criminal record and being disqualified from holding future office.

The fundamental idea of a trust of municipal assets by a local authority was established, with local citizens as beneficiaries. This was a highly significant development from the class size limitation in private trusts. In addition Acts of Parliament, regarding local authorities (for example, the Municipal Corporations Regulation Act 1882) specifically referred to trustees and their role using terms such as ‘public duty’: For example in the MCRA Act the interpretation clause read: ‘the word Trustee shall be construed to mean Trustees, Commissioners or Directors or the Persons charged with the Execution of a Trust or public duty, by whatever Name they are designated....’

¹⁵⁸ Sections 5-7 (2 & 3 W IV c 4)

4.6.2.1 The Municipal Corporations Act 1835

The importance of the Municipal Corporations Act 1835 cannot be over emphasised.¹⁵⁹ The municipal corporation had become a personification of the local community. It formed the essential foundation of our modern local government structure, by providing for councils to be elected by local ratepayers, their meetings to be held in public and accounts audited annually¹⁶⁰.

Importantly for this thesis, the Act imposed on the corporation the duty to use their revenue ‘for the public benefit and improvement of the borough.’¹⁶¹ A public trust doctrine with an ethos of accountability and based on a trusteeship paradigm was emerging. This was further emphasised by section 71 of the MCA 1835, which compelled local authorities to keep charitable funds and other funds in separate designated accounts with separate trustees. Such accounting mechanisms meant greater protection, and made it easier to police potential abuse of public funds. Because public trusts now provided a means of confining public expenditure to that which was lawful, statutes were increasingly promoted to act as a form of trust instrument. As with trust deeds in private trust law statutes were consulted to ascertain intention and clarify areas of doubt.

¹⁵⁹ See further, J Redlich and F W Hirst, ‘*Local Government in England*’ (London 1903) vol 1.111-33

¹⁶⁰ The Royal Commission appointed a radical lawyer Joseph Parkes as Commission secretary. He investigated 285 towns, most of which were found to be unsatisfactory. The Commission found ‘Corporation funds are frequently expended on feasting and in paying salaries of unimportant officers. In some cases, in which funds are expended on public works, an expense has been incurred beyond what would be necessary if due care had been taken.’ Parliamentary Papers (1835) XX111 Royal Commission on Municipal Corporations

¹⁶¹ Municipal Corporations Act 1835 (5 & 6 Wm 1V c 76), s 92, sometimes known as the Municipal Reform Act

The House of Lords decision in *Parr v Attorney General*¹⁶² is extremely important, since it declared in plain and precise language that the Municipal Corporations Regulations Act 1835 created a trust of the property of municipal corporations. Lord Lyndhurst said: ‘...we are of opinion that this is a public trust, that these funds are held by the Corporation subject to a trust, so as to give a Court of Equity jurisdiction over the subject matter.’¹⁶³ Lord Cottenham¹⁶⁴ concurred, stating: ‘This statute creates a trust in the corporation of the Borough fund, I have had in other cases to decide, particularly in the case of the *AG v Aspinall*¹⁶⁵ and seeing no reason to alter that opinion, I shall for present purposes, consider this as a settled point.’

Parr involved a compensation payment of £4500 by the borough of Poole, Dorset, to their town Clerk Robert Parr on his voluntary resignation. The compensation was secured by a bond that covered not only the office of town clerk, but other offices carried on by him outside of the Council, such as coroner, from which he had not resigned. A number of ratepayers, including Mr William Ponsonby, complained of rates being levied to meet the bond payment, but they were refused an Order of Mandamus in the Court of Queen’s Bench; they enlisted the help of the Attorney General, who filed an information in the Chancery Division. The payment was declared unlawful as being a breach of trust. Their Lordships were unanimous in their judgments that there was a public trust in existence, and the payment of the bond

¹⁶² *Parr v Att G* [1842] 8 Cl & Fin 409

¹⁶³ *ibid*, [431] (Lord Lyndhurst)

¹⁶⁴ *ibid*, [433] (Lord Cottenham)

¹⁶⁵ 2 My & Cr, 623, 1 Keen 539

Also see *A-G v Liverpool Corporation* [1835] 1 Mylne & Craig 171; 40 ER 343 where it is stated: ‘the Court has authority, under its general jurisdiction, to interfere for the protection of property vested in the corporation of a borough named in 6.W.4,C.76 on the ground of breach of trust.’

by the local authority was an unlawful application of borough funds that were clearly subject to a trust. Control over ultra vires spending had started.

Lord Campbell identified the beneficiaries of the trust as the town itself; thus identifying a public trust concept with characteristics of that of a private trust. His lordship summed up the effect of the Municipal Corporation Regulations Act by saying ‘

I see no ground for any difficulty upon the subject.’ Before the Municipal Corporation Regulations Act passed, certainly the corporation property was not subject to any trust: the corporation might do with it whatever they chose; and, generally speaking no relief could be obtained either at law or in equity for any misapplication of that property. The Municipal Corporations Act creates a trust for corporation purposes

Lord Cottenham identified the borough fund as held for public purposes and constituting a trust fund.¹⁶⁶ The Court unanimously held that chancery jurisdiction extended to such matters as preventing breaches of trust and ‘abuses of that sort of confidence’ (per Lord Cottenham).¹⁶⁷ Similar statements are found in *Att Gen v Belfast Corporation*¹⁶⁸ where the Irish Chancellor made the important statement that: ‘Boroughs are now mere *functionary institutions-trustees of public funds*, constituted by Act of Parliament.’ (Emphasis added). He also thought the case ‘to be about as free of legal difficulties as almost any case I have had to consider.’¹⁶⁹

¹⁶⁶ *Parr v Att Gen* [1842] 8 Cl & Fin, 409,[433] ‘it having been established in the case of *Att-General v Aspinall* –which I believe has not been brought here by appeal, and which has been followed on other cases in the Court of Chancery - that a borough fund is constituted a trust fund by this Act ... the question then is, whether the information states a case of breach of trust, of improper dealing with that which is held by the Corporation for public purposes, and therefore in that senses to be considered a trust fund...’

¹⁶⁷ *ibid* [433]

¹⁶⁸ [1855] 4 IR Ch 119, 141-142

¹⁶⁹ *ibid*, 141-142 (Lord Cottenham)

4.6.3 The Public Trust Doctrine halted

Progress was altered by two factors, identified by John Barrett.¹⁷⁰ One factor was the increase in statutory audit systems; the other was the fusion of equity and the common law by the Judicature Act of 1873 which allowed the Queen's Bench Division of the High Court to apply the same equitable remedies to prevent unlawful actions by public authorities.

A more robust centralised audit system led to decline in the use of the public trust doctrine. Audit was not a new mechanism used to control local authority spending, because it had been used in the Poor Law legislation, but it now took on a more robust and authoritative approach. District auditors could disallow any unlawful expenditure, and could recover from those who defaulted and caused losses resulting from illegality, negligence or misconduct.¹⁷¹ Under the Municipal Corporations Act 1882,¹⁷² all grant-aided borough expenditures became subject to district audit. The audit system was understandably more attractive than relying on courts and the courts process which was discretionary and was certainly cheaper. As local governance expanded to wider service provision, such as housing and public health, it was necessary for central government to keep some restraint on the use of public funds by local authorities.¹⁷³ In addition to public audits, there was the internal audit system instituted by each council. This, coupled with the district auditors' statutory powers meant that there was a double system of check on items of

¹⁷⁰ John Barrett, 'Public Trusts' (2006) 69(4) MLR 514

¹⁷¹ Poor Law Amendment Act 1844 (7 & 8 V c 101)

¹⁷² Sections 25-27

¹⁷³ Local Government Act 1972, s 154, Sch 29(7)

public expenditure, of amounts involved, and for what purpose(s) the money had been allocated or spent.

The operation of these audit schemes greatly reduced the need for development of public trusts concepts, and its benefits were neatly summed up by Wickens VC ¹⁷⁴ who said: ‘as a publicly funded service, statutory audit disallowances and surcharges deliberately and successfully provided for those involved a less costly process than litigation for identifying unlawful payments and making good any loss.’

Thus the importance of the public trust metaphor diminished with the rise of specific mechanisms enabling oversight and accountability; mechanisms that included greater parliamentary scrutiny of official action and statutory regulation of the public service, for example, the increase in the auditor’s powers.

Alongside this increase in statutory audit systems, the fusion of equity and the common law under Judicature Act 1873-5 undoubtedly had an effect on the frequency of use of equitable principles in public law. After fusion by the Judicature Acts 1873-1875¹⁷⁵ the monopoly of courts of Equity in dispensing equitable remedies ceased and the Queen’s Bench Division assumed a greater role.

¹⁷⁴ *A-G v Tottenham Local Board* [1872] 27 LT (NS) 440-441

¹⁷⁵ See, Patricia I McMahon, ‘Field, Fusion and the 1850’s’ chapter 22 in P G Turner (ed), ‘*Equity and Administration*’ (Cambridge University Press 2016) p.461, where the changes brought in by the Judicature Acts 1873-75, such as abolition of forms of action, simplifying proceedings and pre-trial discovery previously the domain of Chancery are detailed. See further, the work of Professor Michael Lobban, ‘Field, Fusion and the 1850’s’: A Commentary’ chapter 23 in P G Turner ‘*Equity and Administration*’ (Cambridge University Press 2016) at 468-469, where with reference to the Common Law Procedure Act 1854, s 83 states, ‘While the common law courts were able to provide complete justice by entertaining equitable pleas in cases where it was self-evident what the Chancery would do. (Footnote reference is made to *Luce v Izod* [1856] 1 H&N 245; 156 ER 1194, where the court allowed the defendant to plead that a deed had inaccurately described the geographical area in which he had covenanted not to practise, and held that the issue should be decided by the judge alone, and not by a jury), in cases where the issue was more complex, courts of common law were reluctant to interfere and so parties continued to have to go to the Chancery for redress.’ *Hunter v Gibbons* [1856] 1 H&N 459; 156 ER 1281 where the plaintiff in a trespass action

Fusion of Equity and the Common law did not extinguish equity's light completely, as is shown by a number of early 20th century guardianship cases.¹⁷⁶ In addition, the concept of fiduciary duty was extended to employees of local authorities who had a significant public role- such as the Council's borough treasurer in *Attorney-General v De Winton*.¹⁷⁷ *De Winton* is important because in this case, the court emphasised that the defendant was not merely a servant of the council (albeit a statutory officer with statutory duties) but, as he dealt with public funds, he was a custodian of those monies. He therefore stood in a fiduciary position to the burgesses as a body, and could not plead the orders of the council for his unlawful act. Farwell J referred to the borough funds as 'a trust fund.'¹⁷⁸ Significantly, the court said that the remedy for the ratepayers for improper payments was against the council and not against the treasurer, 'who owes no duty to the ratepayers'.¹⁷⁹ Accountability was squarely on the shoulders of the local authority.

In a similar vein the Government Officers Security Act 1810¹⁸⁰ (now repealed)¹⁸¹ required government officers to provide an indemnity bond for the due performance of the trust reposed in them and for the due accounting of 'all public monies entrusted to (them) or placed under (their) control.' This was an interesting

was told it was not an appropriate issue for a jury to determine, and his remedy was to go to Chancery for an account, in which money due would be calculated on a different (and less generous) basis from what would be received in trespass.

See further, P Polden, 'The Chancery Division' in W Cornish, S Anderson, R Cocks, M Lobban, P Polden and K Smith (eds), *Oxford History of the Laws of England* (Volume X1 1820-1914 English Legal System, Oxford University Press 2010)

¹⁷⁶ *A-G v Merthyr Tydfil Guardians of the poor union* [1900] 1 Ch 516; *A-G v Bermondsey Guardians* [1924] 40 TLR 512; *A-G v Poplar Guardians* [1925] 40 TLR 752

¹⁷⁷ [1906] 2 Ch 106, Tenby's borough treasurer debited the borough and credited himself with interest charges levied by their bankers in respect of a fluctuating overdraft

¹⁷⁸ *ibid*, 112

¹⁷⁹ *ibid*, 113

¹⁸⁰ 1810 50 GIII c 85

¹⁸¹ Statute Law (Repeals) Act 1974, s 1

external non judicial mechanism by the use of insurance fidelity bonds. Use of the word 'entrusted' in this context is particularly noteworthy.

The success of the audit mechanism led to it being extended to include power to surcharge an offending local authority and/ or the public officer concerned.¹⁸² This remedy clearly recognised the seriousness of a breach of public duty in the form of a trust and resembled, in some ways, disgorgement of profits by an errant trustee for breach of fiduciary duty in private law proceedings.

Revival of an almost forgotten equitable jurisdiction¹⁸³ came about due to statutory surcharge powers that came under specific review in *Porter v Magill*, where a public trust notion of public service was resurrected. This case illustrates the potential for the application of principles derived by analogy from equitable doctrines relating to private trust arrangements. *Porter v Magill*¹⁸⁴ concerned 'homes for votes', where 'trust' and its concept in a public context was very much the central theme. Before the abolition of audit surcharge¹⁸⁵ the external auditor had certified that there had been unlawful application of council powers by three councillors and

¹⁸² Auditors appointed by the Audit Commission under section 13 of the Local government Act 1982 could take action against errant councillors

¹⁸³ See, John Barratt, 'The 'Public Trust' Revived' (2004) 63(3) Cambridge Law Journal 540

¹⁸⁴ [2001] UKHL 67; [2002] 2 AC 357 (CA), 447 (HL)

Lord Hope held that whilst the Local Government Finance Act 1982 did enable the auditor to act both as investigator and judge in the cause, there was however an appeal procedure to the courts under section 20(3). Convention rights were thus fully protected. The issue of bias by a highly public press release by the auditor prior to his decision was rejected by Lord Hope - it was an 'error of judgment' and 'an exercise in self-promotion in which he should not have indulged'.

See case comment by Rebecca Williams, 'Wilful Misconduct - The House of Lords decision in *Porter v Magill*' (2002) 61(2) Cambridge Law Journal 239, 249-252 and John Barratt's case comment, 'The Public Trust Revived' (2004) 63(3) Cambridge Law Journal 540

See also Michael Supperstone, 'Local Authorities and Audits; challenges to auditors; new frontiers' (2003) Journal of Local Government, which provides a useful commentary on fiscal aspects of the case from a senior local government officer.

This case is also significant in the way it dealt with issues of bias in a political setting; thus involving the operation of notions of loyalty in a local government framework. Bias is outside the terms of reference of this thesis, save it is mentioned because of its relationship with a core indicia of a fiduciary relationship, namely loyalty

¹⁸⁵ Local Government Act 2000, s 90, abolished surcharge provisions

two senior officers of Westminster City Council to promote their own electoral success (to the tune of approximately £31m).

The council had introduced a policy in 1972 whereby 300 council dwellings were designated. When these properties became vacant, they were to be offered for sale to an approved applicant. The reasoning was that home owners were more likely to vote Conservative, and therefore increase the party's votes in key marginal wards. The overriding interest of Dame Shirley Porter and Mr Weeks was achieving electoral success. Westminster Council pursued Lady Porter in the Chancery division for its monetary loss on the grounds of breach of trust.

The House of Lords confirmed the Divisional Court's finding of liability against the former Council Leader Dame Shirley Porter and Deputy Leader Mr Weeks. The decision of the Court of Appeal was reversed (Kennedy and Schiemann LJJ., Robert Walker L.J. dissenting). The lawfulness of such charges was upheld, both in the House of Lords and in the European Court of Human Rights. Our concern here is with the concept of a public trust and not human rights as such, save to state that the House of Lords found no breach of procedural fairness and no breach of Article 6(1) ECHR.

The judgment of Lord Bingham is of particular importance to the theme of this thesis because his lordship endorsed a public trust approach - the bedrock of his decision. He stated: 'Statutory power conferred for public purposes is conferred *as it were upon trust*, not absolutely.'¹⁸⁶ (Emphasis added). The use of 'as it were' was not expanded upon, but he continued this trust analogy by stating that: 'those who exercise powers in a manner inconsistent with the public purpose for which the

¹⁸⁶ *Porter v McGill* [2002] 2 AC.357, 436-464, at p

powers were conferred *betray the trust and so misconduct themselves*. (Emphasis added)¹⁸⁷

These words are highlighted by this author because they emphasize the core characteristics of a fiduciary relationship of loyalty. Political power over the use of public assets, seen through such a fiduciary prism, means that such powers must be used for the public good and not for motives of self-interest. Lord Bingham was consistent in his review of the ratio decidendi of old precedents such as *Attorney General v Belfast Corporation*¹⁸⁸ and *Attorney General v Wilson*,¹⁸⁹ where councillors were described respectively as trustees and agents. As Chief Justice French states: ‘The concept of the public trust and more particularly the notion of a fiduciary obligation, although metaphorical and analogical rather than an application of trust law, did foreshadow more contemporary ideas of administrative justice.’¹⁹⁰

The next chapter continues the discussion of public trusts and asks the specific question whether under this trust notion of accountability there can be a continuing influence in public law by reference to the so called ‘local authority fiduciary duty to ratepayers’ approach? Do local authorities owe a fiduciary duty to their ratepayers? The comment of Barratt is acknowledged where he states that current textbooks take matters only so far ‘... specified in a different way whether this fiduciary duty enabled wider judicial evaluation of local authority financial decisions than would otherwise be the case.’ This author agrees with this statement, save that the comment

¹⁸⁷ This was a quote used by Lord Bingham from H Wade and C Forsyth, *Administrative Law* (8th ed, Oxford University Press 2000) 356-357

¹⁸⁸ [1855] IR Ch 119, Lord Cottenham also developed this trust approach by reference to the ordinary trust law whereby, ‘If any other agent or trustee had so dealt with property over which the owner had given him control, can there be any doubt that such agent or trustee would, in this Court be made responsible for so much of the alienated property as could not be recovered in specie.’

¹⁸⁹ [1840] Cr & Ph 1

¹⁹⁰ Chief Justice Robert French AC, ‘Public office and public Trust’ (Seventh Annual Sir Thomas More Forum Lecture, 22 June 2011)

appears to restrict the scope of fiduciary obligation only to fiscal areas; the natural response is to ask why cannot it be used to span all local authority discretionary decisions, whether involving financial considerations or not?

4.7 Summary-Public Trusts

The concept of a public trust is that there are some societal interests that impose a more rigorous trust like obligation on government, whether central or local. Perhaps the most specific examples are when the requirement of a public trust imposes restrictions on the use of certain land, such as parkland. These restrictions are often that the public use must be maintained and not sold, even for a fair price. This is a controversial approach, since it means that the public right goes further than any restraining right seen before in English law. This is a common objection and is based on the notion of property ownership. In the context of this thesis, it would mean that each and every local citizen would have a property right in local authority assets. In respect of a trust it would mean that legal title is held by the local authority and the beneficial interests of local citizens would operate 'behind the curtain.' This author considers this to be a false approach, since the assets of a local authority are not, in the main derived from ratepayer sources, but from an amalgam of monies supplemented by central government grants and subsidies. In some instances grants are conditional and monies have to be returned to central government if there is a breach by the local authority of the terms on which the monies were sent (in practice express undertakings have to be given to central government). The trust fund is therefore a mixture of ownership, making a strict conceptualisation of a division of title (legal and equitable) very difficult. This exercise whilst necessary in private trust law would not seem to benefit any discussion on public trusts in the twenty first century and in particular local government activity. The works of such authors as

Professors Paul Finn,¹⁹¹ Lorne L Sossin¹⁹², Evan J Criddle¹⁹³ Ethan J Leib, David Ponet and Michael Serota¹⁹⁴ provide ways of understanding the concept of public authority, as a form of political trust and administrative entrustment. There is no need to abandon the trust concept, particularly the public trust model. However, what is needed is to fashion a conceptual tool that is practical and easily understood. This author espouses a stewardship approach.

A STEWARDSHIP MODEL

4.8 A Stewardship perspective-a better ‘fit’

The concept of stewardship is not new. It was a common feature in feudal times. It involved the management of property for other people and there were many situations in which a relationship of stewardship might arise. For example, the day to day running of a manor was entrusted to a reeve, and a common feature of stewardship was liability to account to their principal. This author considers that stewardship is as relevant today as in our past history.

This author considers that there are four aspects of stewardship which need to be considered in greater depth: stewardship of property, place and person, and an overarching stewardship of purpose. Each will be discussed separately.

¹⁹¹ Paul Finn, ‘The Forgotten Trust: The People and the State’, in Malcolm Cope (ed) ‘*Equity, Issues and Trends*’ (NSW Federation Press 1995)

¹⁹² Lorne L Sossin, ‘Public Fiduciary Obligations, Political trusts and the Evolving Duty of Reasonableness in Administrative Law’ (2003), *Sask L Review* 101

¹⁹³ Evan J Criddle, ‘Fiduciary Foundations of Administrative Law’ (2006) 54 *UCLA Law Review* 117

¹⁹⁴ Michael Serota, ‘Translating fiduciary Principles into Public Law’ (2013) 126 *Harv L Rev* F91, 94

4.8.1 Stewardship of property

We have already seen that local authorities have immense responsibility over a diverse asset range, including land, buildings and investments. Stewardship of property entails not only looking after the interests of the present service users, but also looking after the interests of future generations. On proposals to dispose of or keep, assets, or in the context of property maintenance, stewardship of property is paramount. Stewardship of assets was very much in the news a few years ago when a number of Icelandic banks went under, a bank in which many local authorities had invested due to the high interest rates the bank was offering.¹⁹⁵ Budgetary stewardship can lead to significant benefit to the whole local community, as well as for persons who are vulnerable. For example, a dilapidated council building can be brought back to life by a lease granted to a voluntary organisation that cares for those suffering drug or alcohol addiction, or for use as a women's refuge. The terms of the lease can be structured to include a rent free period during which time the lessee can use the rent that would otherwise have been paid to the council to repair the structure of the building and bring it back into a fit state of repair for occupational use. An additional community benefit is that, from a safety aspect, a dangerous building, where children and other persons could have sustained serious injury is repaired at minimal cost to the local authority.

¹⁹⁵ See, *Risk and Return, English local authorities and the Icelandic banks* (Audit Commission National report March 2009) Appendix C, 27-28. Large sums of money were deposited in Icelandic banks ... the total amount of funds at risk when the banks collapsed in October 2008, was £954 million. Most deposits were held in Landsbank, or its UK subsidiary. Some local authorities continued to place deposits despite the change in credit ratings. See Table 3 which provides a list of those local authorities who missed all the warning signs. nb. The Audit Commission was an independent public corporation that existed between 1.04.1983 and 31.03.2015. Following its closure a new local audit framework became effective from 01.04.2015

4.8.2 Stewardship of place

Local authorities exist to deal with the welfare of their local communities and stewardship of place is very important in this context. The environment in respect of parks and open spaces, as well as environmental issues, should be part of a stewardship vision of a local authority. For example, some local authorities recycle the garden waste they collect into compost, which is offered for sale to the general public. This not only generates a small amount of income but also contributes to a 'green' environmental approach.

The importance of stewardship of place was recognised by Sir Michael Lyons in his evidence to the ODPM Committee¹⁹⁶ prior to the release of his report on local government. Stewardship of place is of course not a new concept¹⁹⁷. In fact the Lyons inquiry in 2006 also endorsed such a place-shaping role for local government.¹⁹⁸ He recognised that, although much of the debate had centred on local government as a provider of services, there was another dimension: that when

you get down to the level of the individual council and the community it represents there is a whole set of things that local government does that are not summarised in the provision of services

Sir Michael uses the term 'place-shaping', the responsibility for stewardship of place, the people who are living in it today and the people who will be living in it in the future. He gave as an example of place shaping the activity of Gateshead & Tyneside Council who, following the decline of the ship building industry in the

¹⁹⁶ Evidence EV.95-19th June 2006. Memorandum submitted by Sir Michael Lyons, The Lyons Inquiry into Local Government, Select Committee on Transport minutes of Evidence, www.parliament.uk, publication and records.

¹⁹⁷ Sharpe LJ, 'Theories and Values of Local Government Political Studies' (1970), Vol. 18, Issue 2 Political Studies, 153

¹⁹⁸ Sir Michael Lyons, Lyons Inquiry into Local Government: Place-shaping: a shared ambition for the future of local government (Final report, The Stationery Office 21 March 2007)

North East and anxieties about the economic future of Tyneside, shaped the local economy by working with local people, businesses and building a coalition of interests in the interest of Gateshead itself. As Sir Michael states: ‘This is a way of trying to decide that role of stewardship and leadership in the community that goes beyond, but includes, the provision of local services.’

Stewardship was seen as important whatever the size of the local authority involved; the same approach was adopted for the big city council, as for the small parish council.

Local governments are the closest administration to citizens and to land issues within their administrative boundaries. Taking care of the land should be one of their top priorities. Local authorities can play an active stewardship role, acting as public landowners that reach agreement with the users of the land, as well as conservation organisations. They are also able to create conditions for land stewardship agreements.

4.8.3 Stewardship of person

The service user is of paramount concern and should be a key focus of a local authority’s activities, and should be engaged at all levels of decision making. In this respect a local authority needs to have in place adequate communication tools so that it has detailed feedback on its service levels or any projected spending or changes in infrastructure. The communication dialogue will, of course, be aided by true transparency.

4.8.4 Stewardship of Purpose

As stated previously a local authority is a creature of statute. It does no harm to remind ourselves that a local authority can only do that which is permitted by statute. Statutes have a purpose which is often stated in the enabling statute. This means that a local authority must maintain the boundaries of that statutory purpose, or ‘mandate’ if preferred, for to stray outside these boundaries would be ultra vires. Where a discretionary purpose is in doubt, it is the function of the court to interpret the spirit and intent of the relevant legislation.

In recent years there has been much debate on various approaches of local authority service delivery.¹⁹⁹ There has been a move from service delivery by a local authority, to a trend of outsourcing services, with the correlative move to emphasising marketization of such services. The term used is ‘enabling’, and it has become associated with outsourcing. This Maelstrom of competing institutional designs has triggered yet another round of enquiries and self-examinations into the future role of local government.

With the infusion of new ideas has come a danger that the service ethos, historically the core identity of a local authority, is becoming subsumed in a culture of commercial management. This leads to practical ethical concerns. In recent times, local authorities have been under increasing pressure to run along commercial lines, the rationale being that they are now multi-million pound organisations. Stewardship is an important criterion, not only for assessing the performance of a local authority,

¹⁹⁹ Models of service delivery - examples are provided in a report by Grant Thornton LLP, *Responding to the challenge: alternative delivery models in local government* (Grant Thornton January 2014). Reference is made to -
Common shared arrangements and services - management teams, IT, payroll, legal services
New shared arrangements and services - highways, housing management, children services
Common joint commissioning- adult social care, economic regeneration, joint transport structures

but also because it introduces an ethical dimension. Principles of stewardship are recognised by governments as good governance.²⁰⁰

To re-iterate, the concern of this author is to identify the legal relationship between local authorities and their service users. In proposing the adoption of ‘stewardship’ this author seeks to make an important and distinctive contribution to institutional design from a legal standpoint. It is argued that adopting the concept of a local authority as a steward of local resources better reflects the activity of a local authority within its regulatory space, than trusteeship or any other fiduciary relationship. The notion of stewardship is linked to the concept of local authorities as ‘ensuring’ bodies. An ‘Ensuring Council’ is one in which stewardship and values are paramount, involving application of a ‘logic of care’ in local authority decision-making. Professor Helen Sullivan sets out the importance of a ‘logic of care’ in the structuring of relations in the public sector.²⁰¹ She states ‘A ‘logic of care’ starts from the assumption that individuals are nearly always situated in communities or networks, which demand collaborative, interdependent relationships between public authorities and local authorities.’ An ethic of care changes the dynamics from a local authority resting upon market involvement alone in public services. Borrowing from the language of Anthony Giddens²⁰², a report by The Association for Public Service Excellence (‘APSE’) states:

the vision of an ‘Ensuring Council’ builds upon the responsibility of local authorities as stewards of their local authorities (operationalising in part Sullivan’s logic of

²⁰⁰ See, *Managing Public Money* (HM Treasury 2013) p.9, 1.1.3
<<https://www.gov.uk/government/publications/managing-public-money>> accessed 28 September 2016. ‘Public services should carry on their businesses and account for their *stewardship of public resources* in ways appropriate to their duties and conducive to efficiency.’ (my emphasis)

²⁰¹ Helen Sullivan, ‘Governing the Mix How Local Government Still Matters’ in J Richardson (ed) *From Recession to Renewal :The Impact of the Financial Crisis on Public Services and Local Government* (Bristol Policy Press 2010) 191-192

²⁰² Anthony Giddens, *The Politics of Climate Change* (Cambridge University Press 2002).

care), whilst bringing to the fore its leading role in local representative democracy over that of the market economy²⁰³

The APSE report²⁰⁴ on the role and value of local authority assets in town centres states that ‘the Ensuring Council’ privileges an active strategic role for local government in the stewardship of local social, economic and environmental well-being and enhances social justice.’ The report emphasises the stewardship role, stating: Local authorities are stewards of their localities.²⁰⁵

4.9 A definition of Stewardship

Stewardship can be described as ‘exercising the duties of a steward’ or ‘as a person employed to manage another’s property.’²⁰⁶ It is argued that this emphasis on management as opposed to ownership is key: the relationship between local authorities and their service users fits well with the ethos of stewardship, with its emphasis on community service, locality wellbeing and the management of community assets for current and future generations.

This thesis is not suggesting that the use of the private and social voluntary sectors in service delivery is a bad thing. In fact, there are examples²⁰⁷ of the

²⁰³ The Ensuring Council: an Alternative Vision for the future of local government (Association for Public Service Excellence May 2012) p.9

²⁰⁴ The Ensuring Council: an Alternative Vision for the future of local government (Association for Public Service Excellence May 2012)

²⁰⁵ *ibid*, 7. ‘Stewardship; Ensuring the social, economic and environmental wellbeing of the local area. This is the core principle of the ‘Ensuring council.’

²⁰⁶ See dictionary references to stewardship as a noun -

Oxford - ‘the act of taking care of or managing something, for example, property, an organisation, money or valuable objects.’

Cambridge - ‘someone’s stewardship of something is the way that person controls or organises it.’

²⁰⁷ See, Phillipa Roe and Alistair Craig, *Reforming the Private Finance Initiative* (Centre for Policy Studies 2004) 21, on successful PFI’s. Chapter 4 entitled ‘Some PFI Success Stories’. ‘The prison sector is also recognised as a good example of how PFI by bundling the construction and service elements together into a single package, can provide real efficiency savings through integration. One of the clearest examples of a successful prison project is HMP Rye Hill, where the project was delivered on time and to budget, and was built in 16

successful blend of private and public service provision. A plurality of service can be a good thing, but not at the expense of loss of sovereignty, in the sense of control and risk management and the ability to maintain direct democratic accountability over the quality of services provided. Professor Neil McInroy states: ‘Stewardship is about the qualities and values of public service. It is the ability to ensure a sense of fairness, and equality of access to services.’²⁰⁸

Local authorities are democratically accountable stewards of their local populations’ wellbeing and understand the crucial importance of ‘place’ in promoting wellbeing. Economic, social and environmental space is important for local jobs, parks and green spaces for leisure and good local housing to live in. Local authorities are responsible for a diverse range of assets-including theatres, cinemas, airports and sports stadia as well as civic centres, schools, parks, care homes and leisure centres.²⁰⁹. A local authority must manage its resources, regulate and monitor budgets, revenue, expenses and reserves, but they cannot and should not focus only on financial assets.

The notion of stewardship offers a useful window into a broader understanding of local authority governance. Stewardship depends on a willingness to be accountable for results without using control as a means to reach them. Stewardship is different from trusteeship since it does not depend upon property ownership; neither does it require identification or quantification of interest(s) held by service users. Instead, it has a wider remit, which enables local authorities to factor a

months, compared to the average construction time for a prison of three years under more traditional public sector procurement methods.’ The authors go on to refer to roads and state ‘Transport, in particular road building and operation is also seen as a major PFI success story.’

²⁰⁸ Neil McInroy, *Local Government must ensure they retain a place of stewardship role* (Local Government Chronicle 15 March 2011). McInroy argues that outsourcing on a grand scale weakens the stewardship and strategic role of local government

²⁰⁹ Local authority assets in England worth £250 billion

broader public (communitarian) interest into their decision making. Stewardship involves balancing competing influences and demands, and includes establishing effective mechanisms for accountability. Stewardship as a broader concept of governance better reflects the notions of trust versus control and service versus power in a local authority setting.

Whilst the scope for exercising stewardship functions is greatest at the national level, the concept can also encompass the steering and ethical service delivery role of local authorities in ensuring the social, economic and environmental well-being of a local area. Each local authority is different in size, composition, economic, social and cultural make-up and a stewardship theory of place in a local government context could accommodate differing needs and aspirations in a way that central government cannot. A local authority is best positioned to tailor services to its local space and to the service users who live in visit their locality. Adopting the concept of stewardship has advantages over concepts of 'trusteeship' or 'fiduciary' in relation to the relationship between local authorities and their service users. The 'fit' is better, and is far more descriptive of the true role of a local authority with its service using public and public-facing context. In fact, some local authorities themselves are already adopting the use of a stewardship label.²¹⁰

²¹⁰ Allerdale Borough Council in their *Local Code of Corporate Governance* state that there are four key dimensions to service delivery - 'DIMENSION 3. To perform a stewardship role that protects the interests of local people and makes best use of resources' Introduction 1.4, <<http://www.allerdale.gov.uk/council-and-democracy/councillors-democracy-election/policies-and-plans/local-code-of-corporate-govern.aspx>> accessed 28 September 2016

4.10 CONCLUSION

This chapter has explored the various models advanced as identifying the legal status between local authorities and their service users. It has, however, proved that whatever model is adopted there are serious obstacles to overcome.

CHAPTER FIVE

APPLICATION OF FIDUCIARY PRINCIPLES BY REFERENCE TO A JUDICIAL CASE TRILOGY

This thesis now proceeds to an examination of three seminal public law cases involving local authorities. The aim is to discover seeds of judicial thinking of the nature of the public trust doctrine that was evident in *Porter*. There is a need to understand and evaluate what is exactly meant by the public trust doctrine for it to have practical application to local authorities. An examination of the following case trilogy will help us do so.

5.1 Introduction

As we have seen in chapter four the fiduciary principle became prominent from the middle of the nineteenth century, but as Paul Finn observed in his seminal work ‘Yet much more so than in the private sector, it was - and is - in the realms of government that fiduciary power is the most persuasive, the most intense.’¹

It is argued that public trust doctrine found expression and development in obligations of a fiduciary nature and valuable therefore to look at three leading English cases where fiduciary duties arose in a public context. The aim is not to simply provide a descriptive account of the cases, but provide an analysis and evaluation of how judges understand fiduciary duties in the local authority context and, how this understanding has changed (if at all) over time. The analysis also enables us to identify more clearly the limitations of the fiduciary duty in the public law context.

¹ Paul Finn, *Public Trust and Public Accountability*, 3 Griffith L.Rev.224 (1994)
132

The three cases selected are significant for a number of reasons. First, they show the relevance of the fiduciary obligation to local authorities over a fifty year span. Second, and perhaps more significantly for the purpose of this thesis they illustrate very graphically that some judges continued to adopt an extremely tentative approach to understanding the obligations of local authorities in terms of fiduciary duties. In the author's view there are valid reasons for this approach as discussed in chapter 4 dealing with concept transferability and whether fiduciary government is a real possibility or a false promise. Third, and self-evidently the cases illustrate that local authorities must act in the public interest, which may be different from the specific interests of a beneficiary of a public service. Fiduciaries must act in what they determine to be the best interests of the 'beneficiary class' as a whole. Professor David Feldman states 'In the public sphere, the public good is a far weightier matter than in relation to private trusts or companies. If we forget this, we fall into serious error'.² He refers to the *Poplar* and *Bromley* cases as falling within an error category by treating public officers simply as if they were private fiduciaries.³ Fourthly, these three cases can of course be confined to their own facts, but in the author's opinion they are each examples of broader judicial approaches in relation to the imposition of obligations of a fiduciary nature upon local authorities. They centre on the ratepayers as the 'beneficiary' class, as opposed to a wider service user class.

² Professor David Feldman, 'Equity in the Administrative state: a commentary' in P G Turner (ed), *Equity and Administration* (Cambridge University Press 2016) 319

³ *ibid*

5.2 CASE TRILOGY

5.2.1 Roberts v Hopwood ('Poplar')

The seminal case of *Roberts v Hopwood*⁴ involved the extent of the discretionary power conferred on local authorities by s 62 of the Metropolis Management Act 1855, whereby a metropolitan borough council, as the successor of the Board of works was able to – ‘...employ.. such.. servants as may be necessary, and may allow to such...servants...such wages as (the council) may think fit.’

Issues

The Council in the year ending 31st March 1922 paid its lowest grade of workers, whether men or women a minimum wage of 80 shillings per week, notwithstanding that the cost of living had fallen during that year from 176% to 82% above the pre First World War level. The council considered that acting as a ‘model’ employer the 80 shillings each week was a correct figure to pay for adult labour, and passed a resolution which meant an increase of 16 shillings per week for men and 30s.3 pence for women. The District Auditor, Mr Carson Roberts⁵ had power⁶ to disallow any items of account contrary to law and surcharge the body or person(s) responsible. He found that payments made to various classes of workers by Poplar Borough Council to be excessive and therefore unlawful.

⁴ [1925] A.C. 578, 138; [1925] All ER 24

⁵ Referred to as ‘the doyen of district auditors during the first quarter of the twentieth century’ by Hugh Coombs and J R Edwards, in *Accounting Innovation: Municipal Corporations, 1835-1935* (1996) 50

⁶ Public Health Act 1875, s 247(7)

Brief history of the litigation-divergence of judicial data

The Divisional Court's decision was that section 62 of the Metropolis Act 1855 did not confer on Poplar council an absolute discretion to pay their employees any salaries and wages they thought fit. Borough Councils are in a fiduciary relation towards the whole body of ratepayers, and must confine the exercise of their discretion in regard to such payments within the law. This decision was reversed by the Court of Appeal, but reinstated by the House of Lords. The House of Lords unanimously held that the wages were fixed arbitrarily without regard to existing labour conditions and therefore the council had not lawfully exercised its discretion. They further held that expenditure on a lawful object might be so excessive as to result in it being declared unlawful. A great deal of academic literature was spawned by this case.⁷

The Court therefore agreed that the disallowance and surcharge of £5000 upon the Poplar Councillors and Aldermen was lawful, as the use of public funds by the council was contrary to law. Prior to the House of Lords decision the Council had lost at first instance before the Divisional Court of the Kings Bench Division (Lord Hewart C.J., Sankey and Salter J.J)⁸ who discharged the rule nisi for a writ of Certiorari, but had won in the Court of Appeal by a majority decision, of Scrutton and

⁷ The political climate of this case and the branch of politics it spawned as 'Poplarism' – see generally Noreen Branson, *'Poplarism 1919-1925; George Lansbury and the Councillor's Revolt'* (Lawrence & Wishart 1979) and for a background of the case, B Keith-Lucas, 'Poplarism' [1962] Pub L 52. For a discussion whether this decision marks a limitation in a local authority's discretionary decision-making see Phil Fennel, 'Roberts v Hopwood; the Rule against socialism' (1986) 13(3) *Journal of Law and Society* 401; Harold J Laski, 'Judicial Review of Social Policy in England: A Study of Roberts v Hopwood' (1925-26) 39 *Harv L Rev* 832, 842-843. He states: 'The Poplar Council is a body of persons chosen to carry out certain functions delegated to them by Parliament. There are various ways of carrying out those functions, and each way, ultimately, expresses a philosophy of life. Those who are chosen by the electorate are chosen, presumably, because the electorate prefers their view of those functions to that of their opponents.'

⁸ *The King v Roberts, Ex parte Scurr and Others* [1924] 1 514, Sankey J read the judgment of the Court

Atkin L.JJ. (Bankes L.J dissenting) and the rule was made absolute. The judgements of the Court of Appeal and the House of Lords are now examined more closely in the context of fiduciary duty and a public trust concept of the powers of a local authority.

The Court of Appeal's reasoning⁹

The Court of Appeal had focussed on the 'power' element of both the auditor and the council itself. Atkin LJ said 'The auditor's power appears to me to be strictly limited to surcharging such payments as are beyond the powers of the council to make.'¹⁰ He therefore relied on pure statutory construction and gave the term 'wages' a plain and unrestricted meaning. They were not to be 'as dole or as a bribe or with any other object than that of fairly remunerating the servant.'¹¹ Scrutton L J¹² took a similar power view, but related to the statutory power given by Parliament and stated 'It is for the Poplar Borough Council to fix these wages.' He considered that they should have a wide margin of discretion that was only to be interfered with if the council used its discretionary power excessively, which on the facts, whilst the figures were near the line he could not find had been reached.¹³

Interestingly for the theme of this thesis Atkin L J dismissed the proposition that there were any equitable rights in the ratepayers as such and did not consider the

⁹ *The King v Roberts Ex parte Scurr and Others* [1924] 2 KB 695, (CA)

¹⁰ *ibid* p. 722 'the auditor's power in the part of the section...appears to me to be strictly limited to surcharging such payments as are beyond the powers of the council to make.' (Lord Atkin) p. [722]

¹¹ *ibid* 725 (Lord Atkin)

¹² *The King v Roberts, ex parte Scurr and Others* [1924]2 695, Scrutton LJ judgment found on pp.716-721

¹³ *The King v Roberts, ex parte Scurr and Others* [1924] 2 KB 721 'it is for the Poplar borough council to fix these wages, which are not to be interfered with unless they are so excessive as to pass the reasonable limits of discretion in a representative body.' [Scrutton L J]

'I think that it is not made out that the wages are paid are so unreasonable as to be ultra vires the council.' [Lord Atkin]

trust analogy appropriate and stated: 'If it is sought to impose upon the councillors the liability of trustees to their cestuis que trust, the analogy fails.'¹⁴

The dissenting judgment of Bankes L J¹⁵ is also a useful reference, and whilst not mentioning directly fiduciary duty Bankes L J concentrated on what is involved in public stewardship of public monies. He did this by showing how considerations on the level of payment of wages are different from the perspective of a private employer compared to a public employer and stated:

a private employer can of course, disregard all standard rates of wages in the sense that he can pay his employees as much above the standard rate as he pleases. *His money is his own. He can employ it as he likes, and no one has any authority, statutory or otherwise, to complain if what he is in substance doing is making gifts to those he employs in addition to their wages. Not so, however, the public authority entrusted with the duty of the expenditure of public money*¹⁶ (Emphasis added).

His Lordship considered that disregarding what other employers were paying for similar services was unlawful; the council had therefore ignored a valid extraneous consideration. Stewardship was also a relevant factor in the judgement of Lord Sumner in the House of Lords

They have settled with their employees, but they are accountable employers still, for they administer public funds, which have been raised by levying rates, and they must give *an account of their stewardship*¹⁷ (Emphasis added).

A stewardship concept of local authorities will be examined further in chapter six of this thesis as a means of alternative accountability where public trusteeship and fiduciary duty may not exactly fit.

¹⁴ *ibid*, 726 (Atkin J) prior Justice Atkin had stated: 'I venture to doubt the legal value of the proposition of the Court below that 'the council are in a fiduciary position not merely towards a majority who have elected them but towards the whole of the ratepayers.'

¹⁵ *The King v Roberts Ex parte Scurr and Others* [1924] 2 695, Bankes L J judgment is found at pp.706-716

¹⁶ *R v Roberts ex parte Scurr and Others* [1924] 2 KB 695 (CA) at 712 (Bankes LJ)- Note use again of 'entrustment'

¹⁷ *Roberts v Hopwood* [1925] ALL E R 24 (HL) (Lord Sumner) [37D]

The reasoning of the House of Lords¹⁸

There is little by way of specific reference to public trusts and fiduciary duties in the five opinions delivered in the House of Lords. In fact there is none in the short opinion of Lord Carson or Lord Buckmaster. Lord Atkinson does not specifically use the word fiduciary, but he does say that the council ‘...stands somewhat in the position of trustees or managers of the property of others’: a clear judicial acknowledgement of the public trust concept as applied to local politicians who have stewardship over public assets. He regarded that relationship to be based on both a legal duty, as well as a moral one. Interestingly, he commented that the duty was owed towards the electors, and not towards the large ratepayer group who lived outside the district. This author considers this a very confined view of what constitutes the composition of the ‘beneficiary’ class.¹⁹

Lord Sumner also made no direct reference to fiduciary obligations, simply saying that ‘persons who hold public office have a legal responsibility towards those they represent and not merely towards those who vote for them’.²⁰ He concentrated more on dealing with the statutory provision of a duty coupled with a discretionary power and the scope of the words, such as ‘they may think fit.’ Lord Sumner gave little credence to the effect that equitable concepts, such as, trusts and fiduciary obligations could have. He made general reference to a local authority’s responsibilities by saying ‘It has great responsibilities, but the limits of its powers and of its independence are such as the law, mostly statutory, may have laid down., and

¹⁸ Composition of House of Lords: Lord Buckmaster, Lord Carson, Lord Atkinson, Lord Sumner and Lord Wrenbury.

House of Lords references- [1925] AC 578; [1925] ALL E R.24

¹⁹ See Chapter four where the composition of the beneficiary class in a local government context is discussed

²⁰ [1925] AC (Lord Sumner) [603] His Lordships judgment is found on pp.600-610

there is no presumption against the accountability of the authority',²¹ Importantly for the theme of this thesis he did, as we have seen apply an overlay of stewardship principles regarding council assets.²² Lord Wrenbury²³ also concentrated on what were the limits of the Council's statutory discretion and also made no reference to a trust or fiduciary status on the part of Poplar Borough Council or its councillors.

Barratt ²⁴ significantly considers that 'there was nothing in any judgment creating a distinctive, prioritising, special ratepayers trust.' This is a narrow interpretation of the case, and whilst a correct interpretation of the majority approach, it is wrong to say there is 'nothing in any of the judgments'. For example, it is possible to discover a public trust ethos in the judgments, particularly in Lord Atkinson's, albeit not specifically categorised as confined to ratepayers only, which in the author's view is a good thing and leaves open further development of the public trust doctrine on an incremental basis. ²⁵ There is also the stewardship reference by Lord Sumner referred to above which clearly directs the enquiry to a public trust concept, where stewardship is the core element. In addition the Divisional Court's judgment does have public trust doctrine and fiduciary references, but as some Victorian cases had previously done, restricted it to fit the factual circumstances of the case. His Lordship stated: 'The Council are in a fiduciary position, not merely towards a majority who have elected them, but towards the whole of the ratepayers.'

²¹ [1925] ALL E R (Lord Sumner) [para 39E]

²² [1925] A.C. 578 (Lord Sumner) [603] '...for they administer public funds, which have been raised by levying rates, and they must *give anccount of their stewardship*' (my emphasis)

²³ [1925] A.C. 578 (Lord Wrenbury) [613] 'A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so-he must in the exercise of his discretion do not what he likes but what he ought.' Lord Wenbury's judgment is found on pp.611-616.

²⁴ John Barrett, 'The public trust revived' [2004] Cambridge Law Journal 531

²⁵ Applying judicial incrementalism is supported by the author and is a main theme advocated by Jeff King, '*Judging Social Rights*' (CUP 2012). See Part III, Chapter 10, 287

²⁶ Atkin L.J. in the Court of Appeal qualified the Divisional Court's reference to a fiduciary duty to ratepayers by concluding it was of wider ambit 'to protect all the inhabitants of his borough'²⁷, thus implying that all local citizens were protected, not just the body who voted for the political shade of council concerned.

Sir David Williams QC ²⁸ deals with the Poplar case from the perspective of discretion, but does have some useful points to make concerning fiduciary issues. He felt that 'it may have been a lurking awareness of their political leanings that led some of the majority judges in *Roberts v Hopwood* to seek an additional factor to shore up or re-inforce their ruling on abuse of discretion'. Williams goes on to identify that additional factor as 'the so called fiduciary duty'.²⁹ He clearly saw the fiduciary doctrine as a 'security blanket' for courts uneasy and uncertain in the control of administrative discretion at the local level'.³⁰ Interestingly, Williams went on to state an alternative dislike of using fiduciary obligations

It is at best an ill-considered and inappropriate doctrine, as one of the minority judges in *Roberts v Hopwood* recognised (*the King v Roberts, ex parte Scurr* (1924) 2 K.B. 695, 726), not least because of its effect in exemplifying misuse of discretion in the expenditure of money rather than recognising that there can also be misuse through what counsel described as 'cheeseparings or undue economy'.³¹

This author agrees with the later part of this statement, since both positive action and inaction is caught within the net of fiduciary obligation, if one applies both

²⁶ *The King v Roberts, Ex parte Scurr and Others* [1924] 1 KB 514, [522] Sankey J
Compare the interpretation of 'wages' by Lord Goddard in *Re Decision of Walker* [1944] KB 644, where the Court of Appeal considered that the payment of a children's allowance of 2s 6d for each child of a non-manual worker as lawful

²⁷ *The King v Roberts* [1924] 2 K.B. 695 at 726 [Atkin L J] 'The duty of the Council is to the local community as a whole. It must be inadvertence which suggested any special fiduciary relation to the majority which elects them.'

²⁸ Sir David Williams QC, 'Law and Discretion' 1994 Vol.2: Iss1, Article 13 *Indiana Journal of Global Legal Studies*, 191-212, at pp. 198-9

²⁹ *ibid*, 199 'For many years it provided a security blanket for courts uneasy and uncertain in the control of administrative discretion at the local level.'

³⁰ *ibid*, p199

³¹ Sir David Williams QC, 'Law and Discretion' 1994 Vol.2: Iss1, Article 13 *Indiana Journal of Global Legal Studies*, 191-21 p.199

a proscriptive and prescriptive fiduciary duty, which was discussed in chapter three. The reality is the cases that reach court, often not only involve allegations of misuse of spending powers, but challenges to withdrawal of services in order to save money in a difficult economic climate. Principles of stewardship can be argued in both contexts. The key is striking the right balance for community well-being, between over spending and undue economy.

This author concludes this analysis of *Poplar* by commenting on the regretted fact that their Lordships did not specifically refer to the public trust principles, as neither *Aspinall*³² nor *Wilson*³³ referred to in chapter four were cited. Notwithstanding *Poplar* some 58 years later was approved both by the Court of Appeal and the House of Lords in the case of *Bromley v GLC*, to be discussed shortly. Despite criticism³⁴ it still remains sound law.

³² *Att General v Aspinall* [1837] 2 My & Cr 613

³³ *Att General v Wilson* [1840] Cr & Ph 1

³⁴ Ian Loveland, 'Constitutional Law, Administrative Law, and Human Rights: A critical Introduction' (7th ed, Oxford University Press 2015)

See, Professor David Feldman, 'the idea that local authorities had a fiduciary obligation to ratepayers was used to justify elevating individual over collective goods, ignoring the fact that public bodies exist for the collective good rather than individual good.' David Feldman, 'Equity in the Administrative state: a commentary' in P G Turner, *Equity and Administration* (Cambridge University Press 2016) 319. Professor Feldman considered both *Poplar* and the *Bromley* cases as serious errors, because 'they remind us what can go wrong if we treat public officers, simply as if they were private fiduciaries

Professor Timothy Endicott refers to the *Poplar* decision as a mistake, stating 'The mistake reflects the unhelpfulness of fiduciary law as a general model for administrative law.' Timothy Endicott, 'Equity and Administrative behaviour' chapter 19 in P G Turner, *Equity and Administration* (Cambridge University Press 2016) 373. He goes on to state at p.374, referring to the *Poplar* case, 'The decision vividly illustrates the dangers of what Professor Henry E Smith calls a general fix-it equity: the judges imposed on local governance their fix for an ill that they saw, and the reason for counting it as an ill did not lie in the law, but in the judges own model of local governance ... *the result was to require local governments to act in the private interests of the ratepayers rather than in the public interest of their localities.*' (Emphasis added)

5.2.2 *Prescott v Birmingham Corporation* ('Prescott')³⁵

This case is important for the theme being developed in this thesis, because some twenty five years on from *Poplar* we see fiduciary duty being developed as a notion of quasi-trust status of a local authority. In *Prescott*, Jenkins LJ did consider that fiduciary duty was a factor.

Issue

Birmingham Corporation obtained consent from the licensing authority under the Road Traffic Act 1930 and passed a resolution to introduce a concessionary bus scheme, whereby a certain class of elderly persons could travel on certain specified days at set times on their buses free of charge. Funding for the scheme was from the general rate fund. Thus all ratepayers contributed. An aggrieved ratepayer of Birmingham Corporation, Gregory Vincent Prescott, asked the court for a declaration that the scheme was illegal and ultra vires the powers of the council. He succeeded in the Court of Appeal (Evershed M.R., Jenkins and Birkett L.JJ) who affirmed the first instance decision of Vaisey J. whose decision was founded on the fact that the council owed a fiduciary duty, analogous to that of a trustee, to their ratepayers.

First instance

Like their Lordships in *Poplar* Vaisey J considered that the concessionary fares amounted in effect to a gift to a certain section of the locality, at the expense of the general body of ratepayers. This approach conformed to precedent as illustrated by

³⁵ [1955] 1 Ch 210 (CA) 227 (note report contains both first instance and Court of appeal judgment). Concessionary conditions - women over 65 and men over 70 in receipt of old age pension able to use the transport between 10 a.m. and 4 p.m. on every day except Saturdays

Lord Greene MR's reasoning in *Hurle – Hobbs Decision, Re* ³⁶ The Court of Appeal did so on the basis that local authorities owed a fiduciary duty, analogous to that of a trustee, to their ratepayers and that the scheme represented a gift 'in money's worth to a particular section of the community at the expense of the general body of the ratepayers' and 'that the scheme of free travel was wholly beyond the powers of the corporation'. It was considered that 'welfare' schemes or subsidising of particular classes of society is 'I think a matter for Parliament... and for Parliament alone'. Policies were not the province of the courts; they are a no go area. In a later case ³⁷ Lord Hoffman continued on the same lines.

Vaisey J explored the power source of the corporation, but saw no distinction between a corporation incorporated by Royal Charter (as here) and therefore *prima facie* having more powers bestowed on it, than one created by statute. He preferred, however to base his judgment on the fact that the fares scheme was a matter for Parliament. He stated: 'the corporation seems to me to be attempting to usurp the functions of the legislature, and to redress what they consider to be a nationwide grievance by local administrative methods.' ³⁸

³⁶ [1944] 2 All ER 261, where Lord Greene M R considered that a local authority must direct its decision making to the interests of the ratepayers, and on the facts of that case not the contractor who was paid over the contractual rate. Lord Greene used the term fiduciary when he stated 'they would not be acting in a proper way having regard to the fiduciary position they occupy.'³⁶ The Borough of Lambeth had made a bad bargain and the district auditor had correctly disallowed their expenditure and affirmed the King's Bench Division-[1944] 1 ALL.E.R. 249

³⁷ *R (on the application of Pro-Life Alliance) v BBC* [2003] UKHL 23; [2004] 1 AC 185, Lord Hoffman followed the traditional approach that courts are the forum for principle and that policy is to be decided by democratically elected accountable bodies. This distinction is very formalist, because it advocates a rigid distinction between the legislature and the courts. Courts are only concerned with issues of legality and not the merits or otherwise of local authority policy decisions, such as whether fare subsidies to one group are merited. See, Jeff King, '*Judging Social Rights*' (CUP 2012) 125, for a discussion under formalist approaches of the principle/policy distinction

³⁸ [1955] Ch 210, Vaisey J's judgment can be found on pp.222-230.

'The subsidising of particular classes of society, is, I think a matter for Parliament, and for Parliament alone'(Vaisey J) [225]

He did however, concede that travel schemes for the blind and disabled were distinguishable from the general pensioners' schemes, by the former category's special need for travel and obtaining it'.³⁹

Court of Appeal ⁴⁰

Birmingham Corporation appealed against the decision of Vaisey J that their scheme was illegal and ultra vires the corporation to put into operation free travel for certain classes of old persons, but the decision of Vaisey J was upheld. On the exempted category point the Court of Appeal stated 'the practice of allowing free travel to blind and disabled persons, may or may not be strictly justifiable, but may perhaps be classed as a minor act of elementary charity to which no reasonable ratepayer would be likely to object.'⁴¹ There was however no continuing analysis of this important exempted category and what 'beneficiaries' it would be comprised of and the author concludes with Loughlin who states; 'A local authority is not, in law, an eleemosynary institution; and the appeal to ordinary business principles provides little guidance on the legitimate limits to acts of philanthropy.'⁴²

In *Prescott* it was estimated that the beneficiaries would be around 65,925 in the city itself to which should be added approx. 5500 persons who qualified by reason of being in receipt of national assistance payable by order book. The scheme would cost £90,000 and be dealt with by an internal book keeping transfer from the general rate fund. Counsel for the ratepayer, Mr. Blennerhassett argued that the Council were 'trustees for the public.'

³⁹ [1955] Ch 210, 216 'the granting of special facilities to children, cripples, invalids, wounded servicemen and others seems to me to be permissible by reason of the special need for transport and the special difficulties of obtaining it which such travellers can plead owing to their tender years or physical difficulties.'

⁴⁰ Comprised of Evershed MR, and Jenkins and Birkett LJJ.

⁴¹ *ibid.* [CA citation] (CA) (Jenkins LJ) [236]

⁴² Martin Loughlin, '*Legality & Locality*' (Oxford: Oxford University Press 1996) 216

Jenkins. L.J. read the judgment of the Court of Appeal.⁴³ Significantly he said that local authorities are not trustees for their ratepayers, but ‘they do we think owe an *analogous fiduciary duty to their ratepayers in relation to the application of funds contributed by the latter.*’⁴⁴ (Emphasis added).

In his Lordship’s view the Council’s obligation notably arose from some monetary connection (i.e. the rate monies contributed) and not by some equitable relationship, whether fiduciary or otherwise. Regrettably he did not expand on his reasoning, which seemed based more on a subsidy for a particular group taken from the pockets of the total body of the ratepayers. The relationship between the Corporation and their wider service users was not explored. The emphasis was on the discriminatory nature of focusing on one group of citizens to the disadvantage of another. Martin Loughlin refers to this discriminatory principle and states ‘In so far as it may be assumed to exist, it is best understood as an aspect of fiduciary duty and is analogous to a trustee unduly favouring one beneficiary at the expense of the general group of beneficiaries.’⁴⁵ This author agrees with Loughlin’s view that some form of discriminatory aspect is triggered when a local authority seeks to benefit a small group disproportionately and at the expense of the general body. Lord Loreburn considered these issues in *Board of Education v Rice*⁴⁶ where the right of a local authority to differentiate between schools regarding the scale of salaries or the standard of efficiency, in the absence of special circumstances appropriate to the

⁴³ *Prescott v Birmingham Corporation* [1955] Ch 210, Judgment by Jenkins L J.pp.230-237

⁴⁴ *ibid.* 235-6

⁴⁵ Martin Loughlin, ‘*Legality & Locality*’ (Oxford: Oxford University Press 1996) 203-263. Chapter 4 Fiduciary duty in Public Law

⁴⁶ [1955] 1 Ch 210 (Lord Loreburn LC, Earl of Halsbury, Lord Atkinson, Lord Shaw of Dumfermline and Lord Mersey)

differentiation was discussed.⁴⁷ Impartiality in decision making was confirmed, the Earl of Halsbury stated: ‘it is clear that the local education authority ought to be as impartial as the rate collector who demands the rate without reference to the peculiar views of the ratepayer’.⁴⁸

Whilst of course other funding provision and provider/stakeholder interests were not in issue in this case it is interesting to speculate whether his lordship would have restricted the beneficiary class to that of the ratepayer only, if subsidies and government grants were involved. This feature is relevant in the *Bromley* case the last of the trilogy to be discussed. No other trust or fiduciary references were made, nor was the nature of the fiduciary obligation being proposed explored or explained, and how it related in the context of local government administrative powers and decision making. Regrettably there had been a lost opportunity. The corporation had recognised their public law duties, in that discretionary decision making meant not acting arbitrary or capriciously, but argued that they had not done so, nor was their scheme *mala fides*.⁴⁹ Their further argument (which was to no avail) that if concessionary fare schemes were declared unlawful then so would similar schemes for children, or blind or disabled persons who were allowed to travel free on local transport. Vaisey J identified that problem, but was concerned at implications of the

⁴⁷ The case involved a protracted dispute between the Swansea Local Education Authority and the managers of the Oxford Street voluntary schools, termed ‘non-provided’ schools. Teachers in the ‘provided’ schools were paid higher salaries. The Managers claimed that by this inequality of salary levels between the type of school they had failed to discharge its statutory duty of maintaining and keeping the Oxford Street Schools efficient. The decision of the Court of Appeal was affirmed and was a proper case for orders of certiorari and mandamus

⁴⁸ [1955] 1 Ch 210 (Earl of Halsbury) 5

⁴⁹ Counsel for the Corporation, Michael Rowe QC and Harold Lightman argued unsuccessfully that there was ample authority to support the proposition that a person or body levying tolls or rates is not obliged to treat all persons alike, and that therefore, therefore, it is entitled to charge some persons more than others, and indeed remit the charge of toll together in some cases. They quoted in support *Hungerford Market Co v City Steam-boat Co* [1860] 3 E. & E.365, *Duke of Newcastle v Worksop Urban Council* [1902] 2 Ch.145; 18. T.L.R..472 ; *Northampton Corporation v Ellen* [1904] 1 K.B. 299; 20 T.L.R.168

fares scheme and asked where ‘in the process of discrimination or favouritism to stop if limited classes of persons were given free transport.’ He concluded that the subsidising of particular classes of society is a matter for Parliament and Parliament alone.⁵⁰

Accounting evidence of the transport undertaking showed substantial losses, amounting to £700,000 and therefore in this author’s opinion the court could have adjudicated on the grounds that the trustees were in breach of public trust by continuing to run a scheme at a loss and at the expense of their beneficiaries - a straightforward breach of due diligence and undue risk taking in a trustee stewardship context. The argument advanced by this thesis is that this case could have been looked at from a social context of adjudication; there is room for this argument, since many of the residents who would have benefited were on national assistance benefits and therefore a disadvantaged group; instead the local taxpayer interests were accented.

Jenkins L J regrettably did not explain why local authorities in general are not trustees for the ratepayers. Toward the end of his judgement he did consider due diligence considerations when he stated ‘the defendants owe a duty to their ratepayers to operate their transport undertaking substantially on business lines.’⁵¹

⁵⁰ *Prescott v Birmingham Corporation* [1955] Ch 210, (Vaisey J) [225]

⁵¹ *ibid.*(Jenkins LJ) [238] Jenkins LJ had previously emphasised commercial considerations when at para 237 he stated ‘... the undertaking was to be run as a business venture, or, in other words, that fares fixed by the defendants at their discretion, in accordance with ordinary business principles, were to be charged.’

Parliament was forced to act because of the decision’s impact on both the public transport system nationally as well as locally, and following a Private Member’s Bill enacted the Public Service Vehicles (Travel Concessions) Act 1955 which effectively nullified the effect of the Prescott judgment

See Harman J (as he then was) with reference to interpretation of s 1(4) of that statute in *Litherland UDC v Liverpool Corporation* (1958) 1 WLR 913, 915, where he stated ‘The statute gives a kind of indemnity for past legal acts and provides ... that any local authority operating a public service vehicle undertaking ‘may make arrangements’ for the granting of

This case may be seen through a loyalty prism, since the duty of loyalty may manifest itself not as a prohibition against self-dealing, (the original foundational basis of fiduciary duty in early cases), but rather as a non-discrimination norm (as here). Absent statutory authorisation, agencies such as local government may not exercise their discretion in a manner that arbitrarily advances or undermines the interests of one faction vis-à-vis another. To summarise - trustees cannot indulge in a redistributive process between trust beneficiaries.⁵² This discriminatory norm provides another prism from which to analyse both the *Poplar* and *Prescott* cases. This marks a fundamental difference to the application of trusts in private law where a settlor may specify and even direct in the trust instrument that one beneficiary be treated differently to another, as would be the case where part of an inheritance was placed on protective trust, due to the known financial troubles of a beneficiary.⁵³

concessionary fares'. The Corporation had operated for some time a bus service which travelled through various urban districts, including Litherland. The case arose because of a dispute between the Liverpool Corporation and Litherland UDC as to the method of assessment of the district council's contribution to the fare concessions introduced by the Corporation. Free travel concessions were in operation for blind persons, ex-servicemen and others suffering from certain disabilities, and OAP's over 70. The cost of the service fell on the ratepayers of the Corporation not on the urban district ratepayers. Harman J, making reference to the Prescott judgment stated, 'It was therefore right for Parliament, when legalising these concessionary fares, to legalise also contributions made by authorities outside the operating area by way of contribution, as a matter of fairness and equity'.

⁵² *Prescott v Birmingham Corporation* [1955] Ch 210, 'if the case is to be regarded as turning upon the question whether the decision to adopt the scheme was a proper exercise of a discretion conferred on the defendants with respect to the differential treatment of passengers in the matter of fares, the answer, in our opinion, must be that it was not a proper exercise of such discretion.' We think some support for this view is to be derived from the speeches in the House of Lords in *Roberts v Hopwood*. per Jenkins L J [238]

⁵³ Protective trusts developed in the nineteenth century where a settlor was concerned to protect the interests of a spendthrift child, or protect those who were involved in a risky business. Trust funds would usually be settled on A for life, determinable on A's bankruptcy or attempted alienation of that life interest. In the event of these matters being triggered the trust funds would pass over to beneficiaries named in default and not to A's creditors.

5.2.3 *Bromley LBC v GLC*⁵⁴ ('Bromley') - Opportunity grasped!

The opportunity to consider local authority decisions through the fiduciary lens did however occur again in the final case of our trilogy and some of their lordships were not found wanting. *Bromley* illustrates greater support for the principle of a fiduciary approach in administrative law cases involving local authorities. 'Bromley represents a high water mark of the fiduciary characterisation of local authorities' relations with their ratepayers.'⁵⁵ John Griffiths in his case summary⁵⁶ reminds us of the complexity judicial review proceedings can trigger, but regrettably limits the courts' review function to 'applying common law heads of review'. This thesis shows that equitable principles can have a meaningful role in public law. His remark does however focus our attention on issues thrown up by this case, namely how intensive should the level of scrutiny be in local government challenges and perhaps the more fundamental and controversial constitutional question of whether and to what extent should an unelected judiciary review decisions of an elected body

Bromley was another fares subsidy case and involved the GLC trying to keep its electoral promises to reduce London Transport fares by 25 per cent. Unexpected cuts in Central Government grant to the GLC meant a shortfall, and thus the GLC issued a supplementary rate precept on their constituent boroughs to finance the increased cost. The proposed fare cut alone was estimated to require at least £30 million in revenue support. This burden, coupled with changes to a new block grant mechanism, meant that the loss to the GLC was far greater. The Transport (London) Act 1969 had devolved control over transport fares and pricing levels to the GLC. In

⁵⁴ [1983] 1 A.C. 768 (CA and HL)

⁵⁵ 'Fiduciary Duty and The Atmospheric Trust' Ken Coghill, Tim Smith and Charles Sampford (eds), (Ashgate Publishing Ltd 2013) 83

⁵⁶ See also, John Griffiths, 'Fares Fair or Fiduciary Foul' (1982) CLJ 216, 216-219

the GLC elections of May 1981 fare reductions was a major part of the Labour party's manifesto. The combined effect of these measures meant that the supplementary rate issued in 1981 by the GLC was twice the amount actually required for the fares reduction.⁵⁷ One constituent, the Conservative controlled London Borough Council Bromley, who was not served by an underground station had to collect the additional revenue from its ratepayers and applied for certiorari, based primarily on breach of fiduciary duty. This was refused by the Divisional Court which felt that these were matters for the authority to decide and eventually the electors and not for the court to determine.⁵⁸ The Court of Appeal, however, did not take a deferential approach to local administration and unanimously overturned the decision and quashed the supplementary precept, supported on appeal by an undivided House of Lords.

The Court of Appeal

In their judgements neither Lord Denning MR nor Watkins L.J. made any reference to the notion of a fiduciary duty to ratepayers, but the third member of the Court of Appeal, Oliver L.J. in his influential and valuable judgement did and stated: 'a breach of the fiduciary duty which, it is accepted the council owes to the ratepayers from whom it derives its funds.'⁵⁹ His Lordship went further and spoke of the beneficiary class and thought that this fiduciary duty extended to all electors as well as ratepayers. Lord Denning preferred to accent 'reasonableness' of rate charges and

⁵⁷ [1983] 1 AC 768 (CA and HL)

231. Factual details taken from the case judgement

⁵⁸ *R v Greater London Council, ex parte Bromley LBC* (Divisional Court) (unreported 3 November 1981) Lexis transcript of judgement

⁵⁹ [1983] 1 A.C. 768 (CA and HL, (Oliver LJ) [787 G-b.]
Oliver L J's judgement is found on pp.778-796

scoped the duty to include the travelling public as well as ratepayers.⁶⁰ His Lordship considered that the GLC had exceeded their statutory powers and therefore had acted *ultra vires*. Their actions were null and void, but went on to say that if this conclusion was wrong it was necessary to look at how the GLC had arrived at their decision. He concluded that the GLC had given undue weight to the interests of the travelling public as compared to the interests of the ratepayers. He considered that two duties were imposed on the GLC- 'Its duty to the travelling public to provide an integrated, efficient and economic service at reasonable fares. A duty to the ratepayers is to charge them as much as is reasonable and no more.'⁶¹

He concluded that the GLC had balanced those interests⁶² unfairly and given undue weight to the interests of the travel users. 'It is a gift to the travelling public at the expense of the general body of ratepayers.' Fairness was a central theme of his judgement.⁶³ He stated 'But nevertheless the majority of the council determined to go ahead with the cut of 25 per cent irrespective of the penalising hardship on the ratepayers.'⁶⁴ Further, for example, in the short ten line penultimate paragraph of his judgement Lord Denning used the word 'fair' no less than five times.

⁶⁰ *supra* (note 58), (Lord Denning) [771H-776]

'in carrying out these duties, the members of the GLC have to balance two conflicting interests-the interest of the travelling public in cheap fares-and the interest of the ratepayers in not being overcharged. The members of the GLC hold the balance between these conflicting interests' per Denning L J [p 776A]

Denning L J's judgment is found on pp.771-777

⁶¹ [1983] 1 A.C. 768 .per Denning L J p.[776 A]

⁶² The interest of the travelling public in cheap fares and the interest of the ratepayers not being overcharged

⁶³ *Bromley LBC v GLC* Lord Denning: [777 E] 'The 25% was more *fair* to the travelling public and less *fair* to the ratepayers. Millions of passengers on the buses and tubes come from outside the London area. They come every day. They get the benefit of the 25% cut in fares without paying a penny increase in their rates at home. That is more *fair* to them. It is a gift indeed to them without paying a penny for it.' (my emphasis)

⁶⁴ [1983] 1 A.C. 768 (Lord Denning) [777 E] 'It is positively penal. It is not fair to make these ratepayers pay for these gifts to people who come from far afield.'

Lord Denning referred to the *Poplar* case, where as we have seen the court held that too much weight was given by the local authority to their employees' wage levels than the interests of the Poplar ratepayers and also *Prescott* where the Birmingham Corporation gave undue weight to giving free travel to the elderly and insufficient weight to the interests of the ratepayer.⁶⁵ Denning also referred to *Luby v Newcastle-under-Lyme Corporation*⁶⁶ where he considered the local authority had got the balance correct between the interests of their tenants as a whole and their individual tenants in particular. In this author's opinion that case was not relevant, as it did not deal with the existence of a statutory power, but its exercise as pointed out by Oliver L.J.⁶⁷

Oliver L.J.

Oliver L.J. in a very detailed judgement concentrated on the respective roles of the GLC⁶⁸ and the London Transport Executive ('LTE') as an operating body, particularly their statutory authority. He considered that the GLC's actions were 'ultra vires because they proceeded with total disregard of the statutory procedures which the Act envisaged, and thus, from the inception lacked any statutory

⁶⁵ *ibid* (Lord Denning) '... Poplar councillors gave undue weight to giving their workers a minimum wage and insufficient weight to the interests of the ratepayers.' Also refer *Prescott v Birmingham Corporation* (1955) Ch 210, [578] where the Birmingham Corporation gave undue weight to giving travel to the elderly and insufficient weight to the interests of the ratepayers.'

Lord Denning had further considered the weight the GLC had incorrectly placed on the promises of fare reduction that had been made in the Labour Party's election manifesto, which he considered not a binding promise

⁶⁶ *Luby v Newcastle-under-Lyme Corporation* [1964] 2 QB 64

⁶⁷ [1983] 1 A.C. 768 (Lord Oliver) [780] 'The Luby case was concerned with the Housing Act 1957 and since that Act contains express provisions which demonstrate beyond a peradventure that the housing authority is not obliged to charge a proper economic rent, it really does not help in the least in consulting the Transport (London) Act 1969.'

⁶⁸ See Part 1 of the Act - the role being one of a general nature, section 1 states 'to develop policies, and to encourage, organise and, where appropriate, carry out measures, which will promote the provision of integrated, efficient and economic transport facilities and services for Greater London.'

legitimacy.’⁶⁹ His Lordship therefore did not consider it necessary to consider the subsidiary question of the exercise of the discretion, but did address Bromley’s second ground of argument based on a breach of fiduciary duty of the GLC which it owed to the ratepayers whose money was to be utilised for the new fare scheme. His Lordship agreed and stated: ‘...the rigid application of a policy simply as a matter of political commitment to a section of the local government electorate and without regard to the purpose for which the statutory powers are given by itself demonstrates a breach of the fiduciary duty.’⁷⁰

Importantly for the purposes of this thesis Oliver L J stated ‘That duty is owed not simply to electors but to the whole body of ratepayers, including a large and important number who have no voice at all in choosing local councillors.’⁷¹ The latter is a reference to commercial ratepayers. His definition is however somewhat narrow and may be argued as not including all service users.

House of Lords

The GLC appealed to the House of Lords where four of their Lordships, namely Wilberforce, Diplock, Scarman and Brandon referred expressly to fiduciary duties and relied on trust concepts.⁷² Lord Keith mentioned fiduciary duty, but only with

⁶⁹ [1983] 1 A.C. 768 [780]

⁷⁰ Bromley LBC v Greater London Council [1983] 1 A.C.768 (Lord Oliver) [793A]

⁷¹ Ibid.(Lord Oliver) [793A]

⁷² Lee Bridges, Chris Game et al, ‘*Legality and Local Politics*’ (Gower Publishing Limited 1987) 83. ‘Fiduciary duty featured in the House of Lords decision in the GLC case, in two distinct ways. Firstly, expressly or by implication, the concept influenced four of the five judges (save, Lord Diplock) in their interpretation of the GLC and LTE’s statutory power and in their finding that the latter was obliged to operate, as far as possible on ordinary business principles. This was either because the provisions of the Act had to be interpreted in a way which was consistent with the GLC’s fiduciary duty, or that the duty was reflected in the provisions themselves, particularly those which imposed the financial duties and constraints on the LTE, and indirectly therefore, the GLC. In either case, by breaching its fiduciary duty, the GLC was seen as having exceeded its statutory powers. The reasoning here, owed much to the Prescott case and the words of Lord Justice Jenkins.’

reference of approval of that principle and its application to the Prescott case.⁷³ He construed Section 1 of the Transport (London) Act 1969 through a fiduciary duty lens and concluded that the Act did not empower the GLC to adopt a fares policy which unduly benefited transport users at the expense of ratepayers.⁷⁴ Lord Keith agreed with Lord Brandon that Parliament had evinced an ‘overriding intention in the 1969 Act that the GLC should have regard to ‘ordinary business principles’ in carrying on the undertaking.’⁷⁵ They considered that business principles had not been followed and the interests of the travelling public and the cost to ratepayers were so badly aligned.⁷⁶

A commercial approach was adopted. Unlawful extravagance seemed a key issue; public funds should be used wisely and in a considered business-like manner i.e. not with a view to making a financial loss. With reference to the word ‘economic’ Lord Keith emphasised that ‘it conveys the ideal of careful use of resources, so as to get the best out of them. The resources of the executive include the revenue capacity of its undertaking, and thus support is lent to the concept of running the undertaking on ordinary business principles’.⁷⁷ The message from the courts is loud and clear that

⁷³ *Bromley LBC v GLC* [1983] A.C. 768 (Lord Keith) [832F] ‘So far, the executive would appear to be in no different position than were Birmingham Corporation in Prescott [1955] Ch 210 ... so that the principle of that case would apply to it.’

Lord Keith’s judgment is found on pp.831-835

⁷⁴ *ibid.* Lord Keith [834E-F] His Lordship rejected the argument that the executive were allowed to disregard ordinary business principles, whether the revenue mix was between fare revenue and grant revenue.

⁷⁵ *Bromley LBC v GLC* [1983] A.C. 768 (Lord Keith) 834-5A, ‘There is nothing in these provisions, in my opinion, which is inconsistent with the executive being required to operate its transport undertaking in accordance with ordinary business principles...’

⁷⁶ Ken Coghill, Tim Smith and Charles Sampford (eds), ‘*Fiduciary Duty and The Atmospheric Trust*’ (Ashgate Publishing Ltd 2013) 82

⁷⁷ *Bromley LBC v GLC* 1 A.C. 768, (Lord Keith) [831 D] with reference to the Court of Appeal judgment in *Prescott*, Lord Keith stated ‘the scheme was ultra vires on the ground that the Corporation which owed a fiduciary duty to its ratepayers was not entitled at their expense to confer a gift of free travel on certain classes of persons, and on the further ground that the Corporation’s statutory powers impliedly required the transport undertaking to be run as a business venture, the fares being fixed in accordance with ordinary business principles.’

public altruism is acceptable, but has limits. The underlying theme being that the assets are not the local authority's, but in the public domain and therefore encumbered by public trust limitations. This author identifies this approach as an extravagance criterion. This judicial approach confirms the author's view that stewardship principles are very much a key element to consider when assessing whether a local authority decision is open to challenge.

Lord Scarman accepted the ratio in *Prescott* and astonishingly said that:

the principle of fiduciary duty had never been doubted. Certainly, I do not doubt it. It is no more than common justice in employing where, as in the case under the existing law, those who provide the greater part of the rates have no vote in local government elections⁷⁸

He construed the provisions of the Act of 1969 in the light of a fiduciary duty owing by the GLC to its ratepayers.⁷⁹ He also made an obiter remark that it was unfair that those persons who provide the bulk of the rate income should not have a vote. This statement was a direct reference to the fact that the local business community of shopkeepers and other business entities have no democratic vote in local elections. It therefore behoves a public trust concept based on stewardship principles to include such beneficiaries.

⁷⁸ *Bromley LBC v GLC* [1983] A.C. 768 (Lord Scarman) [838G-839A]

Lord Scarman said with reference to commercial activities of a local authority 'business principles can be as applicable to a public service undertaking as to a commercial venture. The avoidance of a deficit which falls to be made good out of rates is important to ratepayers - some would say of no less importance to them than the making of a profit to persons engaged in a commercial venture.'

Lord Scarman [838C] with reference to the Prescott case said 'It is well put in the headnote as being that local authorities owe a fiduciary duty, analogous to that of a trustee, to their ratepayers.'

⁷⁹ *Bromley LBC v GLC* [1983] A.C. 768 (Lord Scarman) [839C] 'I turn therefore to consider the provisions of the Act of 1969, bearing in mind the existence of the fiduciary duty owed by the GLC to the ratepayers of London.'

Lord Scarman's judgment is found on pp.835-846

Conflicts of loyalty of each statutory body - An ignored aspect

This case was primarily about construction of a statutory power under the Transport (London) Act 1969. Lords Wilberforce⁸⁰ and Scarman⁸¹ emphasised that under section 1 of the Transport (London) Act 1969 the GLC had a statutory duty to provide ‘integrated, efficient and economic transport facilities.’⁸² They both interpreted that section in the light of a fiduciary duty and concluded that the disproportion between the levy raised and the benefit invalidated the proposal.

In this author’s opinion one aspect of this case was unaddressed, namely the clash of fiduciary responsibilities; each local authority had not only duties to its respective beneficiaries (i.e. GLC to the whole body of London ratepayers and Bromley to its confined group of local ratepayers), but between each other. The GLC had a fiduciary role in respect of all the boroughs and whilst it may have been admirable in a political context for them to try and keep electoral promises, it did not satisfy their stewardship role to the individual London boroughs faced with levying additional taxes on their local inhabitants, whether those citizens were fare paying passengers or not.

The GLC were viewing their beneficiary group as all the users of the London transport facility, but failed to balance their fiduciary duty to others, such as ratepayers. Lord Wilberforce said that the statutory provision conferring power on the GLC to fund London Transport could not be read in isolation to their duty to transport users on the one hand and the duty of a fiduciary character to ratepayers on

⁸⁰ *ibid* (Lord Diplock) [814-5]

⁸¹ *Ibid* (Lord Scarman) [837]

⁸² *ibid* (Lord Diplock) ‘The crucial question is section 1, which Lord Wilberforce has already cited; the crucial phrase is ‘to develop policies and to encourage, organise and, where appropriate, carry out measures, which will promote the provision of integrated, efficient and economic transport facilities and services for Greater London.’ Lord Diplock’s judgment is found on pp. 820-831

the other, both of which had to be fairly balanced.⁸³ Lord Diplock also usefully identified what he saw as the beneficiary class, to whom the GLC owed a fiduciary duty as, potential passengers, residents of Greater London who would benefit from a better transport system, and ratepayers (both domestic and commercial).⁸⁴ This clash of interests between interested parties was referred to in chapter four when the impact of fiduciary principles was addressed in relation to who constitutes the ‘beneficiary class’ in a translation of fiduciary principles into a local government context. The conflict of interest lay between the passengers and the ratepayers. Lord Diplock emphasised that the GLC was like other local authorities in receipt of funding from the levying of rates (62 per cent of the total rate income raised from ratepayers engaged in industry, business or commerce) and government grants.

Lord Diplock the champion of the legality approach⁸⁵ interestingly concentrated on fiduciary concepts, elevating them to the status of a quasi-constitutional principle. The existence of the fiduciary duty cast light on the true construction of the legislation.⁸⁶ He thought that the proposed fare increase would lead to a grant loss, and as a consequence a double burden placed upon the shoulders of the ratepayers. He concluded that this was a thriftless use of public monies by the GLC and a deliberate failure to employ financial resources in the best way and

⁸³ *ibid* (Lord Wilberforce) 814H- 815C, 819-820; (Lord Diplock) 829-830; (Lord Scarman) 838-839, 882

⁸⁴ *ibid* (Lord Diplock) [825 C-D], ‘I agree that the person’s whose needs the L.T.E’s public passenger transport services are to meet include all persons (whether ratepayers or residents in London or not) who are potential users of those services, but I do not accept that the phrase ‘the needs of Greater London’ is confined to the needs of persons in their capacity as potential users of the passenger transport services to the exclusion of the needs of persons in their capacity as ratepayers(whether they use the L.T.E’s public passenger transport services or not to have too heavy a financial burden placed upon them in the form of rates.’

⁸⁵ *ibid* (Lord Diplock) ‘ It cannot be emphatically stated that your Lordships in this appeal are not concerned with the wisdom, or indeed the fairness of the GLC’s decision to reduce by 25% the fares charged in Greater London.....All that your Lordships are concerned with is the legality of that decision: was it within the limited powers that Parliament has conferred by statute upon the GLC?’ [817]

⁸⁶ *ibid* [830A]

therefore a breach of fiduciary duty. The GLC had failed in their stewardship role.

Lord Diplock said:

A local authority owes a fiduciary duty to the ratepayers from whom it obtains money needed to carry out its statutory functions and this includes a duty not to expend these money's thriftlessly, but to deploy the full financial resources available to its best advantage...being...the rate fund...and the grants from central government respectively⁸⁷

His judgment has been the subject of criticism,⁸⁸ especially by Martin Loughlin⁸⁹ who considered that Lord Diplock came to his conclusion without examining and understanding the complexities of the block grant system. He states 'On the issue of conflict of interest between service beneficiaries and ratepayers Lord Diplock's analysis is both formalistic and incomplete.'⁹⁰ He also had harsh words for all their lordships, including the fiduciary concept itself 'by ignoring such obvious signposts to interpretation as the legislative history and by utilising an anachronistic

⁸⁷ *ibid* 90

⁸⁸ *Fares subsidy in disarray* (Local Government Chronicle 22 January 1982) 65

Judge aids fares confusion (Local Government Chronicle 29 January 1982) 95

The GLC controller of Finance Mr M F Stonefrost, commented 'It is difficult to avoid the reaction that a judge is substituting his or her 'balance' between collective 'good' and individual 'good' for that of the elected body' in *An Administrator's viewpoint on R v GLC ex parte Bromley LBC* (unpublished paper presented to Oxford University Faculty of Law on 3 March 1983) 3

Maurice Stonefrost was concerned that the House of Lords judgment gave no real guidance in grey areas and felt that there was a danger that there was likely to be a tendency for legal challenges to be made and to the danger that the courts become the decision-makers. In this way, fiduciary duty became, in his words, 'whatever a particular court decides it is.' As Lee Bridges states 'Whilst, a fiduciary duty before the GLC case was, at most, a 'long stop' whose main value was its existence rather than its use, he feared that it would be seen as much than just a reminder of this kind.' Lee Bridges, Chris Game et al, *Legality and Local Politics* (Gower Publishing Company Limited 1987) 85

⁸⁹ Martin Loughlin, *Legality and Locality: The Role of Law in Central-Local Government Relations* (Clarendon Press 1996) 237-242, sub-section headed 'Fiduciary Duty and Urban Public Transport Policy'

⁹⁰ *ibid*, 235. Professor Martin Loughlan, to re-inforce his comment, states that the one third loss of grant through penalties was not mentioned

concept as their guide, the Law Lords effectively succeeded in turning sense into nonsense.’⁹¹

The *Bromley* decision caused shock throughout local government with a flurry for counsel’s opinions on schemes in the ‘pipe-line’. One such opinion was obtained by West Midlands County Council concerning a supplementary precept on 26th January 1982 with reference to the Transport Act 1968 (*Bromley* had involved the Transport (London) Act 1969). Counsel stated the 1968 Act ‘puts on a local authority a duty to provide an integrated and efficient system. That is the purpose of the Act and cannot be used as a tool for general social policy unconnected with the attainment of that purpose.’⁹²

5.2.4 A social welfare lens

Bromley highlights the speck in the judicial lens, because the court could have looked at the actions of the GLC from a positive prescriptive fiduciary duty, not restricted

⁹¹ Martin Loughlin, *‘Legality & Locality’: The Role of Law in Central-Local Government Relations* (Clarendon Press 1996) 343

Presumably Loughlin was saying that their Lordships should have referred to ‘travaux préparatoires’, such as the Ministry of Transport, *Transport Policy* (Cmnd 3057 1966) and Ministry of Transport, *Public Transport and Traffic Control* (Cmnd 3481 1967) in order to discover the transport philosophy expressed in them

⁹² Joint Opinion by William Glover QC and Robert Griffiths, In the Matter of a Supplementary Precept of the West Midlands County Council, 26 January 1982
West Midlands County Council had been the first council to announce fare reductions, and on 18 January the first council to abandon its cheap fares policy, less than 24 hours before the challenge would be heard by Woolf J. In an unreported judgement, *R v West Midlands County Council, ex p. Solihull Borough Council*, Woolf J granted applications by Solihull and industrial giants, Guest, Keen & Nettlefords Ltd for an order quashing the County Council’s supplementary precept of 14p which was declared, ‘null and void’, that the council had already decided to abandon

Lee Bridges, Chris Game et al, *‘Legality and Local Politics’* (Gower Publishing Limited 1987) 41 Lee Bridges states: ‘Some reference to this use of counsel’s opinion appeared in the national and local government press at the time. Sir Frank Layfield QC, for example, was reported as having been consulted by both Greater Manchester and South Yorkshire Councils (Local Government Chronicle, 22 January 1982; Municipal Journal, 5 February 1982; the Guardian, 15 February 1982) ... and Merseyside were known to have approached Konrad Schiemann QC and Charles Cross, (Stephen Marks, ‘Law and Local Authorities: Counsels Opinion on Budgets and Rents’ (Public Money, 19 June 1982) 49-56)

solely to an economic perspective, but also from a social welfare viewpoint asserting that subsidising public transport would have tremendous benefits; reduction of the costs of road maintenance and improvement. Therefore, in the long term ultimately saving the GLC, the individual boroughs and their taxpayers money; a clear example of public stewardship. In addition there were other long term benefits. For example, the environmental aspect of reducing carbon emission, exhibiting stewardship of place and person, not only for the service users of public transport, but air quality for all visitors to London and its environs and significantly for future generations. The court however appeared to refuse to look at the bigger picture of sociological and environmental desirability, holding the underground subsidy ultra vires.

Lord Scarman in *Nottinghamshire County Council*⁹³ regarded the financial burden between taxpayers and ratepayers as fundamentally one of politics and that such matters were for the Secretary of State and Parliament, not the courts. *Bromley* was however subsequently distinguished in a number of cases in the Divisional Court.⁹⁴ One such case was *R v Merseyside County Council, ex p. Great Universal Stores Ltd*,⁹⁵ where Merseyside had reduced its fares initially by only 10% compared to the West Midlands of 25% and by the time GUS obtained permission from

⁹³ *Nottinghamshire CC v Secretary of State for the Environment* (Unreported, CA 3 October 1985); [1986] 2 WLR 1 (HL)

⁹⁴ See, S H Bailey, Jones & Mowbray, *Cases, Materials & Commentary on Administrative Law* (4th ed, Sweet & Maxwell 2005)

The Merseyside case is particularly instructive because it was Woolf J again and he seems to have attached even 'more importance to the manner in which the key decisions were taken than to the substance of those decisions.' Lee Bridges et al, *Legality and Locality* (Gower Publishing Company Limited 1987) 49

See further, pp.49-52 where the case is discussed and its impact assessed.

⁹⁵ [1982] 80 LGR 639 – (Headnote) The G.L.C. case was distinguished, on the ground that the Transport (London) Act 1969 laid greater emphasis upon the obligation of the transport executive to avoid loss than the Transport Act 1968 which applied in the present case. *The Authority must balance the interest which their ratepayers had in not being subjected to an undue financial burden as against the advantage to the area of the proposed transport service* (*Prescott v Birmingham Corp* [1955] Ch.210 considered : *Bromley LBC v Greater London Council* [1983] 1 A.C/. 768 distinguished) (Emphasis added)

Hodgson J to challenge the Council's policy, Members had already taken the decision not to make the planned reductions of 10% over the following two years. Also significantly Merseyside did not lose Rate support Grant (in the form of grant holdback) as well as a different Transport Act, 1968 applying to local authorities outside London. Apart from these differences, for purposes of this thesis it is important to analyse the way Woolf J dealt with matters: It is possible to interpret a stewardship approach. For example, in support of this contention, Woolf J with reference to an affidavit submitted by Keva Coombs⁹⁶, said there was more extensive and 'temperate consideration given to the desirability and consequences of 'putting into effect' the Merseyside policy than there had been in the GLC or, presumably the West Midland case.' The affidavit clearly included factors of a stewardship nature, such as decline in passenger numbers; factors of a social nature, such as low level of car ownership and the hardship caused by the high cost of public transport to a sizeable proportion of the County population who were on state benefits and the increasing sense of isolation of many people in the outer areas of the County.⁹⁷

5.3 Trilogy Case Summary

The three above cases vividly illustrate that sometimes judicial review is involved in local authority decisions that have a political and national dimension. These cases confirmed (as did Lord Bingham in the later *Porter* case, where he spoke of a 'routinely applied' principle) a fixed judicial opinion that all statutory powers are conferred upon trust and must be exercised for the public purpose for which the powers were conferred.

⁹⁶ The Chairman of the Passenger Transport Committee, himself a solicitor

⁹⁷ See, Lee Bridges et al, '*Legality and Local Politics*' (Gower Publishing Company Limited 1987) 50, where full details of the affidavit are recorded

These cases illustrate a number of common features. First, a local government fiduciary duty ('LGFD') is owed to a class rather than to individuals. The judgments treated local ratepayers as the relevant class. This is despite the fact; that, as we have seen local taxpayers are not the only, or necessarily the main, contributors to local government funds. Second, the duty of local authorities to act in the interests of local taxpayers is to deploy their resources in an economic⁹⁸, thrifty,⁹⁹ business-like manner¹⁰⁰, ensuring value for money¹⁰¹. Third, gifts or subsidies came under particular attack when perceived as particularistic - benefiting one group over and above the local ratepayer class, or discriminatory - benefiting a class within a class, such as the pensioners using public transport in *Prescott*. Yet, not all discrimination was deemed problematic. For example, in *Cummings v Birkenhead Corporation*¹⁰² (parents were unsuccessful when they complained of discrimination because children from Roman Catholic primary schools, were only offered places in Roman Catholic-secondary schools). Ungood-Thomas J's decision is interesting. He argues that although there was discrimination between classes of parents and children in the exercise of the local authority's 'statutory duties and powers', this was independent of the application of the rates, and therefore not a matter of fiduciary duty (cf Earl of Hanbury in *Board of Education v Rice*).¹⁰³

Fourth, these judgments eschewed a 'power/vulnerability' model of fiduciary duty, deploying instead a commercial paradigm, analogous to those of a trustee in charge of a trust fund (eg, *Roberts*, *Prescott*, *Cummings*, *Pickwell*). The fiduciary

⁹⁸ *R v Newcastle-upon Tyne County Council, ex parte Dixon* [1993] 92 LGR 168

⁹⁹ *Bromley LBC v GLC* [1982] 1 All ER 129

¹⁰⁰ *Roberts v Hopwood* [1925] All ER 24; *Prescott v Birmingham Corporation* [1954] 3 All ER 698

¹⁰¹ *R v Hertfordshire CC, ex parte Nalgo*, (Unreported, 14 February 1991)

¹⁰² [1970] 3 WLR 871)

¹⁰³ [1911] A.C. 179

model employed reinforces the court's interpretation of 'taxpayer's interests' with trusts and fiduciary duty being conceptualised in ways that advance an economic property based model of government. Professor Davina Cooper states 'Courts assume a set of interests; namely, that taxpayers want efficient, business-like services, with no reallocation of resources on the basis of philanthropic ideology, and importantly further states 'by the combining of fiduciary duty and trust law....the rights of those who fund council services through taxation are emphasised, while the redistributive aspects of trusts (at least formally), and the non-or quasi property basis of many fiduciary relationships are ignored.'¹⁰⁴

Griffiths in his article ¹⁰⁵ is critical of the fiduciary reasoning approach in *Bromley*, as an example of judge-made principle that local authorities owe a fiduciary duty to their ratepayers. He makes five points of objection, some of which have now been taken over by judicial developments, since the date of his article some 34 years ago. One objection does still have merit, namely the composition and size of the beneficiary class, which was discussed in chapter four. Griffiths asked: 'is it not becoming unrealistic to regard ratepayers in general as sole beneficiaries in a fiduciary relationship with their councils in view of the fact that some councils obtain approximately 70% of their revenue from central government grants'?

This author also emphasises the multitude of interests, not only of service users, but other stakeholders. Professor Finn states referring to *Bromley*: 'Interests of passengers and ratepayers arguably needed to be balanced rather than prioritised. Equitable doctrines are unequal to the task. For fiduciary law to achieve fairness, it

¹⁰⁴ Davina Cooper, 'Fiduciary Government ; Decentring Property and Taxpayer's interests' (1977) 6(2) *Social & Legal Studies* 235, 249

¹⁰⁵ Griffiths J, 'Fares Fair or Fiduciary Foul' [1982] *CLJ* 216, p.

could be proved only by (unhelpfully) assuming that fiduciary obligations were owed to all interested parties.’¹⁰⁶

With respect this misinterprets what is being argued, namely that loyalty to the person will always cause problems, but not where the loyalty under a public stewardship concept is applied to a statutory purpose. Achievement of the statutory goal is the paramount concern of the local authority, albeit that at the end of the day individuals, groups or others benefit. The statutory purpose was to achieve an efficient transport system.

Griffiths in advocating a limited role for fiduciary duties in a local government setting is supported by a powerful ally, namely Ormrod L J’s judgement in *Pickwell v Camden London Borough Council and others*.¹⁰⁷ His lordship stated that ‘some reliance was also placed on the fiduciary duty owed by Camden to its ratepayers, but this line of attack must have a very limited application’. Ormrod L J did not expressly explain what his limitation meant, but notwithstanding clearly saw Camden in a fiduciary role and considered: ‘it arises because *councillors are entrusted with ratepayers’ money* to use it for duly, that is legally authorised purposes and not otherwise, much as trustees hold the trust fund, to apply it for the purposes authorised by the trust instrument or by statute, as the case may be.’¹⁰⁸ (Emphasis added). This is an explicit analogy to private trust law, and the use of the indicia of ‘entrustment’, a central part of the fiduciary relationship definition by Tamar Frankel referred to in chapter two.

¹⁰⁶ 1999 pp. 56-63

¹⁰⁷ [1983] QB 1, 962; 2 WLR 583; [1983] 1 All ER 602, (hereafter ‘*Pickwell*’) (Ormrod LJ and Forbes J)

This case involved a strike by local authority manual workers nationally. Camden negotiated a settlement with its union branch at a settlement above what was eventually agreed nationally. The increase cost of raising the minimum earning level of its workers to £60 for a revised 35 hour week was £950,000 over the three years to 1980/1.

¹⁰⁸ *ibid*, (Ormrod LJ) 35

Ormrod L J, sitting with Forbes J , at first instance considered ‘the existence of this duty (meaning fiduciary) ‘a relevant factor to be taken into account in determining the ambit of statutory powers of discretion ’¹⁰⁹, but applied the traditional Wednesbury principle in reaching his decision and refusing to grant the Declaration sought by the District Auditor. Fiduciary duty was simply seen as a relevant factor in the exercise to determine whether the act complained of was unreasonable.¹¹⁰

Pickwell is valuable on at least four counts. Firstly, because it emphasised that even in a political climate of a national strike and wage settlement in a ‘winter of discontent’ that the court did have a role to play in deciding whether items of expenditure were lawful or not, although as Ormrod L J stated ‘it is not for the court to pass judgement on the wisdom or un-wisdom of the wage settlement of March 1979’. The court maintained a correct constitutional balance by not entering into the merits or otherwise of council staff action. Second, the changing role of the district auditor was emphasised.¹¹¹ Third, and importantly for the purposes of this thesis, the court donned Camden Council with a fiduciary mantle¹¹² and looked at the

¹⁰⁹ *ibid*, Ormrod LJ

¹¹⁰ A common judicial approach then developed, whereby the interest of the ratepayers was one factor and was to be balanced with other interests and not to be over-emphasised or over-protected

See further, Lee Bridges, Chris Game et al, ‘*Legality and Local Politics*’ (Gower Publishing Limited 1987) 82, where it states ‘Dicta of this kind seem to make it clear that that it is wrong to see fiduciary duty as standing apart from the principles laid down in *Associated Provincial Picture Houses Limited v Wednesbury Corporation* and operating as an overriding consideration dictating a certain course of action which, if it is not followed, will automatically render a decision unlawful. Rather, as a relevant condition, it is something which must be taken into account but which does not assume paramount importance, except in the rare case in which to treat it otherwise would be to act so unreasonably that no reasonable authority could have acted that way (i.e. the Wednesbury test of unreasonableness).’

¹¹¹ [1983] QB 1, 962; 2 WLR 583; [1983] 1 All ER 602 Local Government Act 1972, s 61 applied whereby the District Auditor ceased to be the person with power to disallow the surcharge and became the applicant. The court is no longer an appellate court, but one of first instance who decides

¹¹² *ibid*. (Forbes J) [603] ‘Of course it is plain that a local authority owes a fiduciary duty to its ratepayers; it also owes a duty laid on it specifically by parliament, to provide a wide

discretionary decision made in response to the situation facing them. Forbes J distinguished the *Poplar* case by saying ‘it seems to me that in this climate we are worlds away from Poplar in the 1920’s where a calm and deliberate decision to indulge in what then passed for philanthropy was being taken.’

This author favours looking at *Pickwell* from a stewardship lens. The strike had serious effects on Camden’s inhabitants, workers and visitors alike to the locality and the whole administrative machine of the borough was breaking down. Rubbish was piling up in the streets and public health hazards were a concern. Council staff were in unheated administrative buildings and bodies were waiting to be buried and a further 30 bodies in mortuaries. The council had acted like a responsible steward by protecting all its beneficiaries, and taking into account other relevant considerations of a social welfare nature, including public health; an example of fiduciary obligation being used in a prescriptive positive stewardship way for community benefit. This case illustrates how a local authority should balance potentially competing interests of different beneficiary groups. Forbes J recognised that although the council was under an implied fiduciary duty to wisely use public funds, that fiduciary duty must be read in conjunction with another implicit, but equally pervasive obligation ‘to provide a wide range of services to its inhabitants. If high payments were needed to secure that objective then those payments could defensively be construed as wages.’¹¹³ This observation is highly relevant, since it focuses attention on the contextual nature of fiduciary obligations.

range of services to its inhabitants, be they ratepayers, electors or neither ... it must therefore often be involved in balancing fairly those interests which may frequently conflict.’

¹¹³ *Pickwell v Camden London Borough Council* [1983]1 ALL.E.R 602, (Forbes J) [603]

Non-discrimination and efficient management

An important lesson to learn from our case trilogy is that they all in some way involved local authorities using their discretionary power in a discriminatory way. Choices would affect others in some way. The polycentric effect of decision making was discussed in chapter four. In *Poplar* it was the wage levels of their work force, in *Prescott* concessions to travel users in a defined disabled or elderly person's category and in *Bromley* discrimination in favour of objectives of a transport policy. If we are to conclude that local authorities are sometimes in a fiduciary relationship with their service users and therefore subject to complying with fiduciary obligations, it is fundamentally important to ask whether it can ever be right for a local authority to exercise discretion in favour of one group to the disadvantage of the other. This discriminatory aspect of fiduciary duty was also noted by Loughlin. He states '...the discriminatory principle seems analogous to the responsibility of a trustee not unduly to favour one beneficiary at the expense of the general group of beneficiaries.'¹¹⁴ It is possible to view the previous case trilogy through a stewardship lens. In each case, stewardship of local authority assets was central. In fact Lord Justice Sumner referred to stewardship in the *Poplar* case stating: '..they have settled with their employees, but they are accountable employers still for they administer public funds, which have been raised by levying rates, and *they must give an account of their stewardship.*'¹¹⁵ (Emphasis added)

A key issue for this author is seeking to reconcile benefiting a small group disproportionately at the expense of the general body that is unlawful. For example, a local authority providing funds to a women's welfare centre, as opposed to extra

¹¹⁴ Martin Loughlin, '*Legality & Locality: The Role of Law in Central-Local Government Relations*' (Clarendon Press 1996) 214

¹¹⁵ *Roberts v Hopwood* [1925] AC 578 (Lord Sumner)

funding for a local drug preventive initiative inevitably involve discriminatory questions. Difficult interests are at play; both are worthy causes, but so long as the council's decision is made in an informed way with a review of all pertinent factors (including impact studies) and compliance with public law principles, including a reasonableness overview it would seem to be lawful. There must also be no element of a gift to a particular section of the locality: public funds are not to be gifted or frittered away, but to be used for performance by the local authority of its statutory purposes.

Two basic dimensions of the concept of fiduciary duty may be distinguished; an efficient management principle and a non-discrimination principle.¹¹⁶ Each dimension of the duty enables the courts when reviewing a council's administrative decision to conduct a more searching enquiry and not one just limited to facets of exercise of power. The potential problem of applying fiduciary obligation in situations where different interests clash and a balancing approach necessary is illustrated by a little known case of *Giddens v Harlow District Auditor*,¹¹⁷ cited in *Pickwell*.¹¹⁸

¹¹⁶ *ibid*, 217

¹¹⁷ [1972] 70 LGR 485, this case records tests to be applied on grounds of intervention by district auditor

G a ratepayer objected to H's use of council funds on two counts. Firstly, the local authority had deferred rent increases for council house tenants and made good the deficit out of the general rate fund, and secondly had purchased Parndon Wood as a nature reserve. His challenge was on the twin grounds that H had not spent the money for the general wellbeing of the ratepayers, and that it was politically motivated. The borough auditor dismissed these objections and G appealed to the Divisional Court. His appeal was dismissed on the basis that the auditor had applied the correct decision-making principles in accordance with the *Wednesbury* formula. It is easy to understand the element of the decision relating to the purchase of the Parndon Wood green space that all could enjoy and fitted the original vision of architect and master planner Sir Frederick Gibbard when Harlow New Town was conceived in a rural area. The use of public funds, however for rent decreases to council tenants, is more controversial and difficult to reconcile with the discriminatory focus in the *fares fair* cases discussed above, as a defined part of the Harlow's inhabitants were selected for separate beneficial financial treatment at the expense of others; public sector housing tenants were favoured over private house owners

5.4 Conclusion

This chapter has attempted to shed light on the concept of a public trust and how it could be used in a public law sphere. That concept has found its niche in relation to protection of natural resources and the rights of indigenous peoples. In addition Canadian law recognises that the Crown owes fiduciary duties to disabled veterans whose pension funds the Crown manages.¹¹⁹ It may be that a public trust concept finds expression in fiduciary principles, whereby a local authority is conceived as entrusted with wide discretionary power¹²⁰ by its citizens, over property and interests, for the specific purpose of welfare of their ‘public’, meaning all the service users in their locality and not confined to the council taxpayer class only. That power is held, as it were encumbered by a form of trust; the trust relationship is triggered as a result of a conditional delegation of power by the citizen. There is trust that local authorities will perform their statutory powers lawfully and for community benefit.

In a sense the fiduciary concept is the oldest and most familiar model of administrative law. Chapter four gave a brief sketch of the genesis of the public trust concept from Cicero to John Locke and then referred to the part played by the turnpike trusts, a form of public trust mechanism concerning road repair and maintenance in the 18th and 19th centuries. The discussion then proceeded to show the emergence of the public trust as a useful vehicle in administrative law to curtail

This case is at variance with the reasoning of Vaisey J in *Prescott*, p.225, where he stated, ‘The subsidising of particular classes of society is a matter for Parliament and for Parliament alone.’

¹¹⁸ (1972) 7 LGR 485, 1.01 (Divisional Court)

¹¹⁹ *Authorson v Canada (Attorney General)* [2002] 58 OR (3rd) 417, [73-74]; 215 DLR (4th) 496 (CA) reversed on other grounds. 2003 SCC 39; [2003] 2 SCR 40 (at the Supreme Court of Canada, the Crown conceded that it owed a fiduciary duty, so the issue was not argued before or decided by the Court)

¹²⁰ Power used in the sense of a dynamic concept, from its original Greek derivation

abuse of power by local authorities. In this way a foundation was laid for the case analysis in this chapter.

This chapter concentrated on a case review of three seminal administrative law cases, involving exercise of discretionary decision making power by local authorities. The main purpose of the review was to explore whether there was uniformity in judicial thinking on the subject of fiduciary principles in administrative law. Over a fifty year span we saw judicial consistency in use of techniques of statutory interpretation and acceptance by judges on varying levels of fiduciary application. For example, it was only the *Bromley* judgments that addressed issues of use of fiduciary principles and concerns of discrete beneficiaries. Hitherto, as we have seen the interests of the local taxpayer class was paramount.

The case review reaffirmed the author's belief that fiduciary principles are only one tool (limited) in the judicial armoury to be used against abuse of power by a local authority. Equitable concepts are powerful strands in the English legal system, which is stronger when meshed with established public law principles developed by the courts in administrative law.¹²¹ As illustrated, a major problem in using fiduciary duty in public law is its central characteristic of a duty of loyalty, which is difficult to apply in the relationship between local authorities and their service users. A local authority's broad responsibility to act in the public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group will be rare.

In '*Fiduciary Duty and the Atmospheric Trust*' there is a valuable section which states: 'using fiduciary relationships to resolve local government problems may be that too one-sided a range of interests is consulted. Parties protected by the

¹²¹ Sir David Williams QC 218

fiduciary relationship are privileged inconsistently with the proper exercise of discretions conferred by statute on public bodies.’¹²²

Those authors use *Bromley* as an example of where fiduciary categories overrode the discretion the GLC had under section 1 of the Transport (London) Act 1969, and the democratic mandate they had won in the preceding years GLC elections and that the interests of passengers and ratepayers arguably needed to be balanced rather than prioritised. They concluded ‘that equitable doctrines are unequal to the task. For fiduciary law to achieve fairness, it could be proved only by (unhelpfully) assuming that fiduciary obligations were owed all interested parties.’¹²³ This is a misunderstanding of fiduciary duty, and arises because notions of loyalty are applied to individuals or groups and not, loyalty to statutory purpose. It is correct that academic commentators have been unenthusiastic¹²⁴ and critical¹²⁵ of using the fiduciary concept in the public sphere.

With reference to *Poplar*, and *Bromley*, Conaglen states ‘although it is not clear that fiduciary doctrine was the true basis of the decisions; they could easily be rationalised on grounds of irrationality or unreasonableness.’¹²⁶

¹²² ‘*Fiduciary duty and the atmospheric trust*’ Tim Smith, Ken Coghill, Charles Sampford (eds) (Ashgate Publishing 2012) 84. This book contains a diverse range of authors who examine whether the ancient concepts of fiduciary duty and a public trust can be revived, reinterpreted and invoked to stimulate government actions, particularly regards the atmosphere and climate change

¹²³ Ibid 84

¹²⁴ Bailey (2004) [4.92]

¹²⁵ J Dignan, *Policy Making and the Courts* (1983) 99 LQR, 605, 644; Griffith (1983) 218-9; Ratcliff (1996) 52-3; Martin Loughlin, ‘*Legality & Locality*’ (1996) (Oxford: Clarendon Press), 234-7; J Alder, *Incommensurable Values and Judicial Review: The Case of Local Government*, (2001) PL 717, 726-7

See also David Williams QC, *Law and Administrative Discretion*, *Indiana Journal of Global Legal Studies*: vol.2:Iss. 1, Article 13, 1994, with reference to fiduciary obligation stated; ‘Now that judicial recognition is much more widely accepted at all levels of administration, it is apparently no longer needed.’ p. 199

¹²⁶ Professor Matthew Conaglen, ‘Equity’s role’ chapter 26 in P G Turner (ed), ‘*Equity and Administration*’ (Cambridge University Press 2016), p. 521

Professor Fox-Decent is critical of a general judicial unwillingness to expand public fiduciary duties beyond traditional property holding arrangements. He identifies it as a fundamental mistake to assume that ‘the content of the fiduciary obligation is necessarily the private law duty of loyalty in which the fiduciary acts solely on behalf of a discrete beneficiary.’¹²⁷ Fox-Decent draws on the trustees’ role in private trust law where a decision sometimes has to be made between beneficiaries of different classes and mentions that the decision must be made fairly and impartially, with due regard for each beneficiary within the discretionary power concerned. In Fox-Decent’s view fiduciary obligations are not concerned with ‘loyalty per se’, but with an obligation to act fairly and reasonably ‘in accordance with the other-regarding purposes for which fiduciary power is held or conferred.’¹²⁸ The author, whilst agreeing with much of Professor Fox-Decent’s work cannot support this statement, since it waters down the central loyalty core of fiduciary duty, into one of a duty of care; it is the loyalty factor which supports the negation of self by the fiduciary to not get involved with conflict of interest situations.

It seems more sensible to concentrate on the actual nature of a public fiduciary duty or public trust, which are often cast in metaphorical terms. Frederick Maitland considered public trusts and stated ‘There is metaphor here. Those who speak thus of public trusts would admit that the trust was not one which any court could enforce, and might say that it was only a ‘moral’ trust’.¹²⁹ In a similar vein Megarry VC¹³⁰

¹²⁷ Professor Evan Fox-Decent, ‘Sovereignty’s Promise: The State as Fiduciary’ (Oxford: Oxford University Press 2011) 167

¹²⁸ *ibid.*

¹²⁹ Frederick Maitland, ‘Trust and Corporation Note’ in HAL Fisher (ed), *The Collected Papers of Frederick William Maitland* (Vol 3, Cambridge University Press 1911) 403.

¹³⁰ *Tito & Others v Waddell & Others (No 2)* (1977) 1 Ch 106, 216, this case dealt with a claim for mining royalties received from two transactions of 1931 and 1947. In 1900 phosphate was discovered on the small Pacific island of Paraban - the same year the island became a British settlement. Licences were granted to mining companies. There was nothing in the Ordinances, or other documents which showed that the Crown had undertaken any

drew a distinction between what he called trusts in the ‘strict’ or ‘lower’ sense (conventional trusts) and trusts in the ‘higher’ sense (imposing political or moral obligations) and stated ‘the term ‘trust’ is one which may properly be used to describe not only relationships which are enforceable by the courts in their equitable jurisdiction, but also other relationships such as the discharge ...of the duties or functions belonging to the prerogative and the authority of the Crown.’ The problem however of identifying an unenforceable trust relationship was acknowledged by him and caused ‘certain awkwardness in describing as a trust a relationship which is not enforceable by the courts.’¹³¹

The next chapter will explore the feasibility of using stewardship principles as outlined in chapter four and does so by emphasising the practical essence of the stewardship concept by local authorities when exercising their statutory powers of land disposal under section 123 of the Local Government Act 1972 and the courts’ interpretation of that power.

unenforceable trust or fiduciary obligation. The claim therefore by the Parabans for breach of trust or fiduciary duty failed. *Kinlock v Secretary of State for India in Council* [1882] 7 App Cas 619 HI applied.

See, ‘Harsh but fair?’ (2007) 86(May) TEL & TJ 17-20

¹³¹ *ibid*, *Tito & Others v Waddell & Others (No 2)* (1977) 1 Ch 106, Megarry VC

See pp 235-238, where Megarry VC examines whether there was a fiduciary relationship under the 1937 Ordinance and questions of whether an innominate statutory relationship in the nature of a trust. He stated: ‘The categories of fiduciary obligation are not closed, and I see no reason why statute should not create a relationship which carries with it obligations of a fiduciary nature.’ [235B-G]

CHAPTER SIX

STEWARDSHIP IN THE CONTEXT OF SECTION 123 of the LOCAL GOVERNMENT ACT 1972 (Land Disposal)

6.1 Introduction

The purpose of this chapter is twofold: first, to explore practical stewardship in the relationship between local authorities and their service users', and further to demonstrate the value of fiduciary duty in the context of local government with particular reference to section 123 of the Local Government Act 1972.¹ Section 123 of the Local Government Act 1972 deals with the discretionary power of sale by local authorities of their land or interests therein (eg. grant of easements or options). In such circumstances, the fiduciary duty is not limited by constraints of loyalty, because compliance with the statutory purpose of obtaining 'best consideration' is the key objective; an objective which is not focussed on any individual or group to which loyalty may be owed.

This chapter continues to explore the potential use of concepts of trust and fiduciary duty in a local authority setting, but does so in the specific context of land disposal by virtue of powers conferred on local authorities by section 123 of the Local Government Act 1972. Concepts cannot exist in a vacuum; they must have some practical beneficial use and purpose for society and the way in which it functions. Fiduciary duty has been found to arise in an extraordinary broad range of ad hoc circumstances and the results reached by the courts are sometimes contradictory. The case law on section 123 is equally contradictory, and therefore illustrates issues which

¹ Ian Loveland, 'Local Authority Land Sales: are councils under a fiduciary duty to accept the 'highest offer'?' (2002) JPL 257

are typical of many areas.

Focussing on a distinct area of local government decision making provides a useful framework. The justification for selecting an analysis of case law on section 123 is that it vividly demonstrates that fiduciary duty has a role to play in administrative law where judges are able to impose such an equitable obligation. In doing so social welfare objectives can be achieved. It also illustrates judicial recognition of a stewardship of community assets. The chapter will adopt an ethical stewardship framework, to explore the case law in order to assess whether the use of concepts based on fiduciary duties can be developed by judges to achieve socially responsible outcomes.

The courts have clearly found the equitable principle of fiduciary duty of benefit when construing section 123. They have implied a fiduciary duty on the part of local authorities when disposing of their land. Such judicial interpretation vividly illustrates not only the practical value of equitable principles, such as public trusteeship or fiduciary duty, but also the way equity, by performing its traditional historical role, can complement or work alongside public law principles to achieve just outcomes. Judicial interpretation of that section can also be seen as a distinct aim by judges to achieve outcomes similar to those implied by the concept.

In addition Parliamentary Circulars, such as Circular 06/03 also reaffirm a fiduciary approach. That circular states ‘when disposing of land at an undervalue authorities must remain aware of the need to fulfil their *fiduciary duty* in a way which is accountable to local people.’² (Emphasis added)

At this stage it is necessary to refer briefly to the recently introduced general

² Local Government Act 1972 general disposal consent (England) 2003 disposal of land for less than the best consideration that can reasonably be obtained (Office of the Deputy Prime Minister, Circular 06/03)

power of competence ('GPC') by section 1 of the Localism Act 2011.³ Under that provision local authorities are now able to do anything that an 'individual may generally do.' Thus local authorities now have very wide discretionary powers vested in them by statute and it remains to be seen how that power will be used and the way in which the courts will interpret those powers. It appears initially that the general power of competence has reversed the ultra vires doctrine,⁴ but we shall of course have to await judicial enlightenment in this respect and in the meantime can only offer conjecture based on case law and previous judicial approaches. As section 123 is still in force it must strictly be adhered to.⁵ Notwithstanding these powers, a local authority, in certain circumstances has a fiduciary duty to its service users and must fulfil that duty in a way that is accountable to local people.

³ The Localism Act 2011 introduced the General power of Competence (GPC), which allows a council to do anything an individual can do, provided it is not prohibited by other legislation. The GPC replaced the previous wellbeing powers. Notwithstanding these wide powers, established public law principles will apply with a fiduciary obligation oversight. The GPC does of course have significant constitutional ramifications, but at present there has only been one challenge brought under that Act relating to the saying of prayers before a council meeting. It is mentioned here for sake of completeness because that power is not unrestricted in the sense that it is subject to prior legislation

See Local Government Association, *The General Power of Competence*, July 2013, for a general overview on effect for local authorities,

⁴ Professor Andrew Le Sueur, 'Fun- Loving guys', government 'doing anything individuals that do' and the rule of law', UK Constitutional Law Group, 29th March 2012

<http://constitutionallaw.org/2012/03/19/andrew-le-sueur>

Helen Mountfield QC, *The 'General Power of Competence' in the Localism Act 2011: Devolving Democracy or the End of Accountability?* Matrix Chambers, Public Law Conference, 14th October 2012

Chris Sear, *Local authorities: the general power of competence*, House of Commons Library, 15th March 2012

⁵ Alec Samuels, *Local authority disposals: best price reasonably obtainable* (The Conveyancer and Property Lawyer 2012). As Alec Samuels states 'the power of general competence cannot displace any specific statutory enactment or binding judicial decision, such as the obligation to obtain the best consideration reasonably obtainable.'

6.2. Statutory Framework

6.2.1. Section 123 of the Local Government Act 1972

Section 123 of the Local Government Act 1972(C.70) ('the LGA') provides a general dispositive power for a principal council.⁶ It allows a local authority to dispose of an interest in land on such terms as it considers appropriate subject to it obtaining the best consideration that can reasonably be obtained for that land or interest. Section 123 of the Local Government Act 1972 (as amended) provides as follows: 'Subject to the following provisions of this section, and to those of the Playing Fields (Community Involvement in Disposal Decisions) (Wales) Measure 2010 a principal council *may* dispose of land held by them in *any manner they wish..* Except with the consent of the Secretary of State, a council *shall* not dispose of land under this section, otherwise than by way of a short tenancy, *for a consideration less than the best* that can be reasonably obtained. (Emphasis added)

The use of the words 'can reasonably be obtained' obviously take cognisance of land that is subject, to some physical defect, such as a form of environmental pollution or repair defect.⁷ Sub-section two is mandatory and uses the word 'shall' and it is only the specific written prior approval of the Minister that can override this requirement of best consideration.⁸ In this way the Minister acts as an overseer or guardian as protective of the general interests of society and specifically for

⁶ A principal council is defined as a County Council, District Council or London Borough council. Section 127 makes identical provision to section 123 in respect of parish or community councils, or the parish trustees of a parish

⁷ *R v Pembrokeshire CC, ex parte Coker* [1999] 4 All ER 1007, where Council land had been valued at -£600K, where the land was vandalised and the adjoining sea wall was in a severe dilapidated state

⁸ Short tenancies are an exempted category and there are also special procedural provisions that need not concern us here where the nature of the land being disposed of is an open space (advertising requirements - notice of intention to dispose of an open space and consider objections). Exception to best value-under subsection (7) a short tenancy is defined as a term granted for less than 7 years or on an assignment where the residue is not more than seven years to run

a local authority's inhabitants.

6.2.2 State Aid Rules

All disposals must comply with the European Commission's State Aid Rules ('SAR').⁹

The rationale is that when disposing of land at less than best consideration the council is in effect providing a subsidy to the occupier of the land. In such cases the council must ensure that the nature and the amount of the subsidy comply with the SAR. Failure to comply means that the aid is unlawful and may result in the benefit being recovered with interest from the recipient (unless the de minimis principle applies).¹⁰

6.2.3 General Disposal Consent

Circular 06/03: Local Government Act 1972: General Disposal Consent (England)

2003 gives authorities consent to a land disposal subject to the circumstances specified in paragraph 2 and provides guidance to authorities exercising this duty.

The specified circumstances are:

The local authority considers that the purpose for which the land is to be disposed is likely to contribute to the achievement or any one or more of the following objects in respect of the whole or part of its area or of all or any persons resident *or present in its area* - (Emphasis added) that parliament considers other service users who come into a local authority area, whether for work or leisure count as 'beneficiaries', whose needs must be taken into account.

The promotion or improvement of economic well-being;

The promotion or improvement of social well-being;

The promotion or improvement of environmental well-being;

⁹ The *Commission Communication on State aid elements in sales of land and buildings by public authorities* (97/c 209/03) provides general guidance on this issue

¹⁰ If, however, the occupier receives less than approx. £155,000 (200,000 euros) in state aid over a three year period the de minimis principle will apply. The rationale being that small amounts of aid are unlikely to distort competition

And

a) The difference between the unrestricted value (i. e. The best price reasonable obtainable for the property on terms that are intended to maximise the consideration) of the land to be disposed of and the consideration for the disposal does not exceed £2,000,000 (two million pounds). The General Consent Order gives automatic consent for disposals under £2 million pounds to be carried out without the minister's consent.

It is for the local authority to decide whether a disposal requires specific consent under the 1972 Act, as the Secretary of State has no statutory powers to advise a local authority that consent is required in a particular case. Clearly the Guide¹¹ envisages a marriage between established public law principles and principles of equity. This is illustrative of a prescriptive approach to exercising fiduciary duty which was discussed in chapter 3, as it imposes upon a local authority to do something i. e: achieve 'best consideration' on land disposals.

6.3 Mode of sale

Sub section (1) deals with the manner of sale and is couched in discretionary language 'in any manner they wish.'¹² The phrase 'any manner' was explored in *R (on the application of Salford Estates) v Salford City Council*¹³ where, judge

¹¹ Incorporated in circular 06/03 is a Technical appendix which gives helpful advice on a number of valuation aspects, for determining whether proposed land disposals fall within the Circular, and importantly reference to in the Circular content to the Appendix states 'By following this advice an authority will be able to demonstrate that it has adopted a consistent approach to decisions about land disposals by carrying out the same step by step valuation process on each occasion. Such supporting documents will provide evidence, should the need arise, that an authority has acted reasonably and with regard to its fiduciary duty.'

¹² Thus a local authority may choose to sell by private treaty, on the open market, or by public auction (with or without a reserve) formal tender, informal negotiated tender or exchange of land. These choices are, of course, subject to exercises of due diligence, such as impact studies on the disposal, future needs of the community and expert valuations. All procedures and a robust audit trail that a dutiful council as trustee would be expected to follow

¹³ [2011] EWHC 2135 (Admin), Salford Estates sought a judicial review of the council's decision to sell land to Tesco on the basis of an independent valuation, rather than go out to the open market. Tesco owned land in the middle of a larger site owned by the council. The additional land purchase would enable Tesco to build a large superstore. The court ruled that

Waksman QC although considering the application to be out of time for judicial review did provide some useful obiter remarks. The council sold the land on the basis of an independent valuation, rather than test the land value by going out to the open market. Section 123 does not prescribe a particular process. Rather, it underscores the treatment or if preferred, acknowledgment by the legislature that elements of trusteeship/stewardship of public assets are at the core of the relationship between local authorities and their service users.

The wording of section 123 (2) by implication recognises a duty that is analogous to a fiduciary duty of a local authority. This continues the theme of this thesis that assets are part of the public purse and not for the local authority to do with them as they will. There is an overriding stewardship factor which demands accountability. While parliament has not directly used such relational words the judiciary have nevertheless overlaid such equitable principles of analogous trust and fiduciary duties directly onto the statutory construction of sub-section 2.

6.4 Tensions between ‘best consideration’ and social considerations

Financial considerations play a significant part in a local authority’s service delivery decisions, but there is interplay of other factors, including local environmental and social care concerns that need to be considered. This tension and delicate public interest balance is no more evident than on the disposal of council land. We now consider case law with the prime aim of examining how the courts have interpreted section 123.

the method of achieving the ‘best price’ did not matter, and the council was under no obligation to follow set procedures and therefore had complied with its section 123 duty. There was no prescribed route to achieving the best price reasonably obtainable See further, *R v Bolsover District Council, ex parte Pepper* [2000] EGCS 107; (2001) LGR 43, where it was held that there is no obligation on the council to dispose of land, if it does not wish to do so, even after an advertising and procurement process has commenced

The question asked is how (if at all) a public trust conception of fiduciary duty affects both the actions of a local authority and when challenged the judge's approach? *Lemon* illustrates judicial thinking and reasoning on what is meant by the phrase 'best consideration' in the context of additional social factors, such as employment that are often 'add ons' to an agreed sale price. It should be noted that best consideration is not the same as best price available.

As a general observation section 123 cases¹⁴ are inevitably fact-sensitive. Local authorities have a legal onus upon them to show both that they have discharged their statutory functions by compliance with public law principles and their fiduciary duties in respect to the disposal of land. Failure to satisfy either of these requirements may lead to the disposal transaction being set aside by the court.

6.4.1 The Lemon case¹⁵ - social value of Job creation

Lemon concerned the definition of 'consideration' under section 123 and specifically whether 'consideration' could include social objectives, such as job creation. Lemon Land limited ('L') and the London Development Agency ('LDA') were rival bidders for land in the London Borough of Hackney. Hackney had obtained an open market valuation which valued the land at £2.2 million, a value accepted as correct by the council's regeneration committee. The two bids were

¹⁴ See generally, Sarah Lines, 'Navigating s.123 and land disposal duties' Local Government Lawyer, 13th June 2013

Karen Schuman, 'Development Disposals: Ensuring Best Value' 24 January 2013, Barrister 1 Chancery Lane, London

Both articles review recent case law

¹⁵ *Lemon Land Ltd, R (on the application of) v London Borough of Hackney* [2001] EWHC Admin 336; (2002) 1 EGLR 81

See generally, '*Chitty on Contracts*' (31st ed, Sweet and Maxwell 2012) chapter 3, Consideration and chapter 4, The concept of valuable consideration

Encyclopaedia of Local Government Law, chapter 2-282-Local Government Act 1972; disposal of land by principal councils

'*Cross on Local Government Law*', London: Sweet & Maxwell, chapter 5 Acquisition, Appropriation, Disposal and Development of land. (Loose Leaf version, last updated October 2016)

very similar in monetary terms. Lemon offered £2.064 million increased later to £2.45 million, including a contractual obligation to continue to accommodate a charity on the land. The LDA offered £1.65 million on the basis of existing usage of no residential use or allowance for 'hope value' for the prospect of planning permission for change of use, including residential use and on a vacant possession basis. Although Lemon's bid was greater in monetary terms by £800,000, Hackney and the LDA were however anxious to ensure that the use and development of the property would generate employment opportunities within Hackney. As a result the Council accepted the LDA's offer on the basis that whilst Lemon's proposals would create 160 and 200 jobs respectively, the LDA's proposals would create 322 jobs.

Thus an additional social employment factor was brought into the equation. The Council had calculated that the value of each job equated in money terms to a total of £732,000 (each job being valued at £6000) and that by adding the value of those non-monetary benefits to the 1.65 million offered by the LDA those proposals seemed the better consideration.

The scenario in the case is typical of the type that often faces local authorities when considering the disposal of land when supplementary social issues are involved. This case illustrates that local authority land disposal is not isolated from other concerns, such as welfare, community and social issues. Lemon challenged Hackney's decision and succeeded at first instance before Lightman J who having construed section 123(2) of the Local Government Act 1972 held that it did not allow the Council to treat any part of the sum attributable to job creation as part of the purchase consideration. The learned judge emphasised the trustee role of the Council and their consequent responsibility to be able to prove effective use of resources by means of an audit trail.

It followed from this judgement that for section 123 purposes any element of consideration taken into account must be capable of having a commercial or monetary value to the local authority itself. Lightman J said:

The requirement that the elements in the consideration should be capable of having a commercial or monetary value to the local authority reposes on the local authority the responsibilities of *a trustee* of its land and enables its *stewardship* to be effectively audited ¹⁶ (Emphasis added)

In this respect we need to consider the phrase ‘having a monetary value’ and the methods used to give value to non-monetary benefits that are often involved in the ‘mix’ when land is sold by local authorities for development.

6.4.2 Non-monetary benefits

Lemon is authority that non-monetary factors (or socially desirable projects) influencing a local authority’s decision when selling land must be financially auditable and capable of having an assessable monetary value for section 123 purposes. This author considers this somewhat of a narrow view and that stewardship obligations should have a wider remit to further social goals. It should be noted that here is a major exception to the best value rule by virtue of General Disposal Consents where a disposal by the Council is to a registered social landlord of land for development for provision of social and affordable housing purposes. In this way social objectives are achieved, but are of course limited by the status of the purchaser concerned. On a sale by a local authority of a prime development site the competing purchasers will usually be major supermarkets. If so, the social landlord exemption does not apply and the full rigour of section 123 ‘best consideration’ applies.

This section specifically addresses whether a perceived social value can lawfully be taken into account and form part of the consideration for the purposes of compliance with the statutory provision of section 123 and its insistence on ‘best

¹⁶ *Lemon Land Ltd R v Hackney London Borough Council* [2001] EWHC Admin 336, [11]

consideration.’ It is useful to discuss the different judicial approach by reference to the case of *Structadene*.

6.4.3.1 Employment

There have been inconsistent first instance decisions shown by contrasting *Lemon* with the earlier case (co-incidentally also involving Hackney Borough Council) of *Structadene*.¹⁷ The defendant council owned a site in Tilia Road, London E.5 where business units were let to twelve tenants. The council proposed to sell the land at public auction, but then decided to deal with the incumbent tenants and eventually sold it to them for £400,000. *Structadene* immediately prior to the auction offered £450,000, later increased to £500,000. Hackney refused to deal with the new bids and informed the company that the proposed sale to the tenants was irreversible. An injunction restrained Hackney from completing the sale and the matter went to judicial review. Elias J construed section 123 as follows: ‘I accept that in an appropriate case, it is possible for a council successfully to contend that there are social or other benefits to the local community that outweigh the loss from the failure to obtain the best price.’ Interestingly, he went on to say that ‘the interests of local taxpayers are not decisive but must be taken into account.’¹⁸ Regrettably, Elias J did not expand on precisely what he meant by ‘social or other benefits.’

It appears therefore that the outcome may have been different had the council produced such cogent evidence. Referring to the paucity of the witness statements, Elias J said: ‘The statement suggests, but does not state in terms, that the council may have been intending to comply with one of its Standing Orders which give

¹⁷ R (on the application of *Structadene Ltd*) v Hackney LBC [2000] EGL 168; [2001] 2 All ER 225

¹⁸ *ibid*, (Elias J) [173]

commercial tenants the first opportunity to purchase the property. It maybe, that the council wished to help small businesses, but again this would be speculation.’¹⁹

Clearly Elias J had a favourable disposition to such matters, but on the evidence presented the applicant’s grounds of challenge (based on breach of section 123, and *Wednesbury* unreasonableness) significantly, in the context of this thesis, also argued that the council were in breach of their fiduciary duty to the ratepayers and this argument was upheld. The council’s decision to sell to the tenants was quashed and their contract declared invalid. Elias J said ‘ It will be a breach of the fiduciary duty if the council fails to obtain the best price for the local taxpayer and referred in support to Lord Diplock’s statement in *Bromley*²⁰ a case analysed in chapter five.

As we have seen quite the opposite conclusion was reached in *Lemon*. Lightman. J observed that ‘the policy behind s.123 (2) is that in a sale of land by a local authority a distinction must be drawn between commercial and non-commercial transactions; If there is any element of discount or grant in a transaction, then the consent of the Secretary of State is necessary.’²¹ The decision in *Lemon* was reached without any reference to *Stratadene* or an earlier case of *R v Darlington Borough Council, ex parte Indescon Ltd*,²² where Kennedy J said in summary, that: ‘a court should be very reluctant to question a local authority’s decision as to a s 123 disposition unless it breached public law principles of failure to take proper advice, accepted erroneous advice or in following advice must have known it was acting unreasonably.’

¹⁹ *ibid*, (Elias J)

²⁰ *Bromley v GLC* [1983] AC 768, [829H] (the ‘fares fair’ case)

²¹ *R (on the application of Lemon Land Ltd) v Hackney LBC* [2001] EWHC 336, [6]

²² [1990] 1 EGLR 278

This is of course the standard approach of deference taken by the courts on judicial review. Loveland states: ‘the ratio of the judgment provides no support at all for the proposition that LGA 1972, s 123 dispositions must be for the highest price offered, nor that an authority’s discretion under s 123 can be exercised only in accordance with monetary or commercial considerations.’²³

Underlying the discussion on best consideration obtainable has important stewardship implications for the achievement by local authorities of schemes involving social purposes and locality improvement. Often, in major land sales a Council will want to achieve some local benefit, for example social housing. To reiterate, section 123 relates only to an ascertainable and auditable monetary commercial value. Job creation as we have seen in *Lemon* is a non-commercial aspect. It does not form part of the contractual consideration, because consideration intrinsically involved detriment and there would be none to the buyer in that regard because he would have had to have created jobs and incur the employment costs anyway. It cannot be a price for the purposes of section 123 consideration.

6.4.3.2 Nomination rights

However, nomination rights do seem to have received judicial approval as representing a commercial value that may be quantified. They are of direct and tangible benefit to the authority. It is difficult to place monetary value on nomination rights. The formula could be based on the cost to the authority of providing private sector temporary accommodation multiplied by the number of nomination rights²⁴ the council reserves to itself under the development sale agreements. Nomination rights

²³ Ian Loveland, ‘Local Authority Land Sales: are councils under a fiduciary duty to accept the ‘highest offer’?’ [2002] JPL 257

²⁴ By ‘nomination rights’ is meant an agreement securing the council’s right to nominate persons from their housing register to whom affordable housing will be occupied

are extremely valuable to a local authority in the exercise of its statutory housing duties, for not only do they help to free up those waiting on the housing list, but are an example of stewardship.

6.4.3.3 Overage payments and Section 106 Agreements

Section 123 challenges continue to emphasise the difficult balancing process that a local authority has when selecting its land purchaser. The recent case of *R (on the application of London Jewish Girls High Ltd) v Barnet LBC*²⁵ illustrates this. Mitting J made some interesting obiter remarks. This case does graphically illustrate how what appears initially to be a bipolar decision i.e. a disposal of land to a developer can generate polycentric issues - housing needs versus educational needs. The council had decided to sell a former Council vacant development site, previously occupied under a long lease by Hendon FC. The shares in that football club, including the assignment of the lease term residue of the ground was purchased by a development company. The rival bidder was a girls High school that had to vacate its present premises (operating its school from a synagogue) by 2013. The council's resources committee, following the advice from the district valuer, concluded that they would accept a cash offer of £2.8 million from the developer plus overage payments per habitable room of private housing that the developer obtained permission to build over a certain figure. In addition certain payments were to be made to the council under a section 106 agreement²⁶, such as contributions to other local service

²⁵ [2013] EWHC 523 (Admin); [2013] B.L.G.R.387

²⁶ Planning obligations are created under section 106 of the Town and Country Planning Act 1990. They are legally binding obligations that are attached to a piece of land and are registered as a local land charge against that parcel of land. They enable councils to secure contributions to services, infrastructure and amenities in order to support and facilitate a proposed development

'overage' is a term used in property transactions to mean a sum which a vendor may be entitled after completion if a specified condition is satisfied; the condition may be

infrastructure, including schools and highways. The scheme also included at least 100 units for residential development. The developer's offer was however dependent upon a successful planning application. Meanwhile, the school discovered the council's intention to sell to the developer and submitted a bid of £3.5 million, expressed without reference to 'subject to contract' and could therefore have constituted an unconditional offer which the council could have accepted as it stood, but the council preferred their original decision. The school brought proceedings for judicial review and an interim injunction was granted to stop the sale. They submitted that the local authority decision to sell to the developer would breach section 123(2) of the Local Government Act 1972. In essence they argued that perceived benefits which could not lawfully form part of the consideration had been wrongly taken into account by the council.

Mitting J opined that there was no problem with the overage payments, but did state:

benefits that could not be taken into account in assessing the consideration were the creation of affordable housing units and payments promised under the section 106 agreement to offset the costs to the local authority created by the completion of any development, as they represented payments to offset the costs of development, not elements that related to the sale of the land.

Mitting J also made obiter remarks concerning nomination rights²⁷ reserved to the council²⁸ over affordable housing and considered that such benefits could be

-
- the grant of a planning permission for a new use that makes the land more valuable; or
 - the construction of more than a specified number of houses on the development site; or
 - the on-sale of the land in its present condition where the vendor fears that the buyer will take advantage of any uplift in price of the sold land, especially in a rising market

²⁷ Nomination rights mean the contractual right of a local authority to nominate nominees for housing by a registered social landlord when a unit becomes empty, sometimes up to 75 per cent

²⁸ [2013] EWHC 523 Mitting J ' Rights reserved to the local authority in any sale to a registered social landlord to nominate tenants of the housing units was likely to be a benefit that could be taken into account. {paras 23,26]

taken into account, as they could be financially quantifiable by experts and were benefits accruing to the council from the use of the land that were of a commercial and monetary value to the council. He further said ‘this case does serve as a timely reminder that obtaining the ‘best consideration’ does not necessarily entail selecting the highest offer in pure cash terms.’²⁹

6.5 The Court’s approach

Who decides the legality of the ‘benefits’? The courts will be reluctant to interfere with a local authority decision in keeping with the general judicial public law approach that the local authority is assumed to have detailed knowledge of what is best in and for their local situation. Deference is a huge topic and outside the remit of this thesis.³⁰

6.5.1 Role of Equity

Does the problem of a narrow judicial approach to non-monetary benefits hinder progress in areas such as, local social housing or regeneration projects? The requirements of local authorities’ ordinary common law duties are well understood in the need to exercise due diligence and good faith and get the land valued.³¹ These may be seen more as general legal duties of care covered by tort law, rather than specifically fiduciary in nature.

²⁹ [2013] EWHC 523 (Admin) (Mitting J)

³⁰ See for further discussion of deference, J Jowell ‘Judicial deference: servility, civility or institutional capacity?’ (2003) PL 592; Richard Clayton, ‘Judicial Deference and democratic dialogue: the legitimacy of judicial intervention under the Human Rights Act 1998’ (2004) PL 33; Lord Steyn, ‘Deference, a Tangled Story’ (2005) PL 346; The Hon Michael J Beloff QC, ‘The Concept of Deference in Public Law’ (2006) JR 213

³¹ The District Valuers’ office can assist here as does HM Treasury Guidelines ‘Managing Public Money’ and reference to the Royal Institute of Chartered Surveyors ‘Red Book’ by independent professional valuation and or in addition market testing

Land disposals also illustrate in a graphic and understandable way how a fiduciary relationship between local authorities and their service users may arise, and the core element of being loyal to the beneficiary's interest can find expression in the way a council disposes and handles the sale of surplus land. Loyalty can be directed to achieving the statutory purpose - 'best consideration'. It can also represent an exercise in polycentric management, as there will be no shortage of interested voices when a major local authority land sale is proposed, such as those who object to the sale itself, its terms or the proposed development generally.

6.5.2 Must the best price always be obtained?

In our analysis it is important to recognise that Section 123(2) refers to best consideration rather than best price - the two are not the same. However Roch J in *R v Middlesbrough B C, ex parte Frostree Ltd*³² held that the best value principle meant simply the highest monetary value to the exclusion of all other considerations. The Council had accepted a bid of £73,000 for land to be used by the purchaser for recreational purposes, a purpose the council strongly supported. The Council rejected a bid from Frostree of £85,000 who intended to use the land for purposes which the council regarded as less satisfactory. Roch J Stated: 'The Council should have reached its decision solely by reference to the respective amounts that were on offer. The applicant's offer was clearly the better offer, and the Council's statutory duty required it to have accepted that offer.'³³

³² *R v Middlesbrough B C, ex parte Frostree Ltd* (Unreported, 16 December 1988) (QBD); (1988) EG 180 (CS)

See further Thomas Jefferies, Barrister, Landmark Chambers, 'The Duty to get the best price on the sale of land' <

http://www.landmarkchambers.co.uk/userfiles/documents/resources/THE_DUTY_TO_GET_THE_BEST_PRICE_ON_THE_SALE_OF_LAND.pdf> accessed 29 September 2016.

³³ *ibid*, (Unreported 16 December 1988) (QBD), brief report on Lawtell at TLT 12/1/89

This definition was however usefully extended and clarified by Lightman J in *R v Pembrokeshire CC, Ex parte Coker*³⁴ where he confirmed that it was acceptable for a council to take cognisance of ‘non-monetary’ factors. Lightman J it will be remembered was also the judge in *Lemon*.

There has been no appellate decision on section 123 – all the case law is at first instance. It is possible however to state with assurance certain factors emanating from case law. Thus a covenant by the tenant to use its best endeavours to employ a specified number of people will not be a part of best consideration – this was again a decision by Lightman J in *R V Pembrokeshire CC Ex parte Coker*³⁵, nor will the desire of a council to retain a particular use which will create jobs – the *Lemon* case, or the desirability favoured by the local authority of the proposed use of the property as a health and fitness club by Roch J in *Frostrree Ltd.*³⁶ It is further accepted that the sale price for a parcel of land may be dictated by its physical characteristics. For example, where it has been contaminated or in some way its true value is affected by disrepair there must obviously be a price adjustment for clean-up costs to remove the contaminated source by the purchaser, or price adjustment for repair contributions, otherwise the land or property may be unsaleable. Early disposal in such situations is clearly in the interests of all interested stakeholders, the local authority, its ratepayer, service users and central government.

³⁴ [1999] 4 All ER 1007

Further comment see, ‘Best Price Reasonably Obtainable’ (2003) 6(2) JLGL 38

³⁵ *R v Pembrokeshire County Council ex parte Coker* [1999] All ER (D) 713, the purchaser covenanted in a disposal of a commercial lease that it would use its best endeavours to employ a specified number of individuals. The council had preferred that bidder on the ground that it would mean the creation of extra jobs for the area. They obtained planning permission for a steel rolling mill. An aggrieved party C challenged on the basis that its offer (£100K for a 99 year lease) had bettered that put forward by the other party, a subsidiary of a plc, because it had the effect of creating jobs and that consent should have been obtained from the Secretary of State. The application for judicial review was refused.

³⁶ *R v Middlesborough BC, ex parte Frostrree Ltd* (Unreported, 16 December 1988)

6.5.3 'Chalk and Cheese' bids

The difficulty is trying to place a monetary value on 'benefits' that a local authority may derive from say a new playground, skate park or nursery as opposed to a cluster of new executive homes. Professor Loveland discusses this dilemma, by what he calls 'chalk and cheese' bids. He uses an illustration of a sale by a local authority of a piece of derelict land situated in an area deprived of any leisure and child care facilities. It has no resources to develop the land itself. Two rival bids are submitted, one from a small charity who want to create a day nursery, a park with a children's playground incorporated. This bid enjoys local support.

The other bid is from a property company who want to develop the land for construction of high value executive housing. Loveland states;

'If the Lemon/Coker interpretation of s.123 is correct, the authority may not sell the land to the charity even if the authority reasonably concluded - entirely sensibly - that the needs of the community would be much better served by a park and a nursery than by an expensive new housing development. In effect the property company has bought out the authority's capacity to administer its community in accordance with (its perception of) the wishes of the inhabitants.'³⁷

In this author's opinion Professor Loveland makes a valid and very important critique, for if councils are frustrated in this way from achieving what they believe to be in the best interests of their community, harm is caused in a reverse way by the application of fiduciary principles, which strangely was why they were applied in the first place, namely to prevent harm - the prophylactic nature of fiduciary obligation has been defeated.

³⁷ Ian Loveland, 'Local Authority Land Sales: are councils under a fiduciary duty to accept the 'highest offer'?' (2002) JPL. 257. 9

There must be judicial balance in the way the courts apply s 123 when faced with ‘chalk and cheese’ bids. The author considers the approach of Lord Russell correct when some 119 years ago in *Kruse v Johnston*³⁸ he said:

Surely it is not too much to say that, in matters which directly and mainly concern the people of the county who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than the judges.

6.5.4 ‘Bird in hand’ principle

The phrase, a ‘bird in hand’ was used by Wynn Parry J in the private law trust case of *Buttle v Saunders*³⁹ where taking a practical approach he said that a bird in hand is accepted: on the grounds of common sense a council is expected to accept a firm bid, rather than a higher bid that may be speculative and have no substance, other than be a ‘spoiler’ bid. It also represents good stewardship. Thus a local authority will not breach section 123 or its overriding fiduciary duty if it prefers to accept a bid at a lower price than that of a last-minute ‘spoiling’ bid. In *R (on the application of Lidl) UK (GMBH) v Swale BC and Aldi Stores Limited*⁴⁰ the court determined that ‘The Council is in the position of a trustee in relation to the land which it holds on behalf of the community.’

³⁸ [1898] 2 QB 91, 99

³⁹ [1950] 2 All ER 193; (1950) 2 Ch 193

⁴⁰ [2001] EWHC Admin 405 This case was brought as a result of a bid by Lidl on a site Aldi had been assembling with the council’s approval and Lidl tried to delay while they sought their own planning consent, on another site in the same town. Lidl’s bid was regarded as a spoiling tactic

6.5.5 Focussing on stewardship of community interests

In *R (Island Farm Developments Ltd) v Bridgend B.C.*⁴¹ (Admin) Collins J noted the context of section 123 and acknowledged that the council in reaching its decision, immediate financial benefits were not the only consideration and had to be balanced with what were the best interests of the council and its inhabitants of Bridgend.⁴² Importantly for the purposes of this thesis Collins J said ‘The loss of the development potential for the whole of the land designated in the unitary development plan were to go ahead, would result in a loss of a considerable number of potential jobs.’⁴³ He therefore viewed the exercise to be carried out by a local authority proposing a section 123 disposition wider than simply fiscal concerns, but also included economic and social considerations; future local employment conditions is a relevant rational factor. This approach accords with the ethical principle of stewardship espoused by this author and discussed in chapter four. Lightman J in *Lemon* when referring to the need for benefits to have a commercial value said that it ‘...reposes on the local authority the responsibilities of a trustee of its land and enables its *stewardship* to be effectively audited’. (Emphasis added)

6.5.6 Public Law approach

The public law approach is summed up by Kennedy J in *R V Darlington BC ex parte Indescon*⁴⁴ in this case Kennedy J enunciated what are referred to as ‘the Indescon principles’:

⁴¹ [2006] EWHC 2189, the claimants sought judicial review of a council resolution to refuse to sell a Science Park to them. The claimants owned adjoining land and had obtained planning permission for development. The redevelopment was very controversial locally and following an election and change of political leadership the negotiations were discontinued.

⁴² *ibid*, [52]

⁴³ [2006] EWHC 2189, para 44

⁴⁴ [1990] 1 EGLR 278 (Kennedy J)

‘...a court is only likely to find a breach or an intended breach by a council of the provisions of section 123 (2) of the (LGA) 1972 if the council has

- (a) failed to take proper advice or
- (b) failed to follow proper advice for reasons which cannot be justified or
- (c) although following proper advice, followed advice which was so plainly erroneous that in accepting it the council must have known, or at least ought to have known, that it was acting unreasonably’⁴⁵

In this way a combination of public law principles and equity can achieve a better decision outcome.

Case law is represented only by first instance decisions. There is no appellate authority of whether or not section 123 imputes a fiduciary duty onto the disposal by a council of its land, and if so how exacting that duty might be represented. On examination of the cases on section 123 it is abundantly clear there is a common judicial approach, albeit differing in emphasis from time to time on what non-monetary factors may be taken into account. Statutory interpretation seems to indicate a favourable promotion of social objectives, provided those social orientations are capable of a monetary valuation and therefore auditable in nature. It may be considered as Loveland does that ‘the approach taken by Elias J in *Structadene* and Kennedy J in *Indesco* is much more satisfactory in terms of constitutional principle than that favoured by Lightman J in *Coker* and in *Lemon*’.⁴⁶

6.6 Conclusion

The courts will undoubtedly be faced in the future with application or otherwise of overriding fiduciary considerations, especially in very difficult factual situations of trying to perform some juggling act with sectional interests, often of a diverse and conflicting nature, where the competing claims may be of comparable community

⁴⁵ [1990] 1 EGLR 278, [282H]

⁴⁶ Ian Loveland, ‘Local Authority Land Sales: are councils under a fiduciary duty to accept the ‘highest offer’?’ (2002) JPL 257, 5

legitimacy, as illustrated by *Lemon*. With an increasing emphasis on regeneration and renewal of ‘run down’ urban areas there is an added pressure on local authorities to explore options on how to achieve their socio-economic welfare objectives, while still complying with their statutory duties under section 123, including their overall stewardship role of community funds. Case law has however clarified a few key issues regarding a council’s compliance with their section 123 obligations. There will however always be the overarching question of how do you assess fairly ‘community value’ for the ‘community good.’

The judicial interpretation of section 123 emphasises that the important consideration on disposal of land by a local authority is the outcome to achieve the best consideration, rather than its process and that monetary value is the best consideration in whatever form, whether overage, sale price upfront or deferred. However, social and economic benefits may justify a disposal at undervalue, but only in certain defined statutory circumstances or when that benefit is financially quantifiable and can be audited. Professor Alec Samuels, however, has expressed doubts and stated: ‘A discount for social or economic benefits is dubious, arguably unlawful, even if it can be proved to be a quantifiable commercial or monetary benefit to the local authority and local community, without which the land would have gone for a higher price.’⁴⁷

If there is uncertainty, the safest practice is to obtain the prior consent of the Secretary of State. This protection may be preferred; its value was spoken of by Elias J in the *London Jewish Girls school* case⁴⁸ as it cannot be said that the case law is

⁴⁷ ‘Local authority disposals: best price reasonably obtainable’ (2012), 5 Conv 405, 407

⁴⁸ *R (on the application of London Jewish Girls High Ltd) v Barnet LBC* [2013] EWHC 523 (Admin); B.L.G.R. 387 ‘It seems to me that the Secretary of State has a wide discretion to give his consent and can do so even if the Council has struck a balance between

consistent. A practical solution for local authorities to avoid the risk of challenge by judicial review of the lawfulness of discounts or ‘trade-offs’ and breach of fiduciary duty, may be to appropriate the land for planning purposes (if the land was not originally acquired for that purpose) and then effect the disposition through the planning legislation.⁴⁹ This route is however, only available where those ‘social issues’ can properly be regarded as raising ‘planning considerations.’

For Lieber⁵⁰, Constitutional Law was a branch of the law of trusts. All of us as citizens are, in his view, fiduciaries. We have no rights, he repeatedly affirms, that are not linked to duties, especially those exercising power or influence on public affairs who have duties to their fellow citizens. As Professor Paul D Carrington states ‘For Lieber the principles of interpretation and construction are an important part of the standard of public ethics, dictates as to how those who apply the lash of power, conform to the common understanding of texts to which their actions give meaning. Both construction and interpretation are to be guided by considerations of the public interest as seen through the spectacles of the community to be served’.⁵¹

The judicial green light for freedom for a local authority to have regard to considerations of a non-commercial or monetary value on any of their property disposals, subject to the qualifications mentioned, should be highly prized as a powerful tool in a time of restraints of local government finances and pressure to come up with imaginative schemes to meet social welfare needs. Therefore such a purposive judicial interpretation of section 123 is to be welcomed. This approach

non-economic or social benefits on the one hand, and financial benefits on the other, which would put it in breach of its *fiduciary duty at common law*.’ Mitting J (my emphasis).

⁴⁹ Town & Country Planning Act 1990

⁵⁰ Francis Lieber, *Legal and Political Hermeneutics* in William G Hammond (ed), (F H Thomas 1880) 195. This work was first published in 1838

Legal and Political Hermeneutics, publisher: The Legal Classics Library, 1994

⁵¹ ‘Meaning and Professionalism in American Law’ (1993) 10, *Constitutional Commentary*, Duke Law School, 297

also highlights that where public funds are involved there is more judicial support to impose a fiduciary obligation as an accountability mechanism, alongside established public law grounds.⁵² Some cynics might argue more as a judicial comfort blanket than a social engineering exercise. Nevertheless, a local authority's fiduciary duty under section 123 will be strictly interpreted and discounts, trade-offs or benefits in return for a lower price will be open to challenge.

Equity's influence once again appears constrained by the court's failure to appreciate the scope of fiduciary duty and limit it to an economic duty only. Notwithstanding, it should be noted that many of the section 123 cases invoked *Buttle v Saunders*,⁵³ illustrating as Alex Samuels states: 'the easy transferability that many courts have assumed exists between trusts law in relation to private trusts and local authority action.'⁵⁴

The use of the word 'easy' may be challenged for as we saw in chapter four translating equitable principles into the public law field raises difficult obstacles. Nevertheless, the cross reference to private trust law cases does illustrate that in some instances cross fertilisation between equity and common law can combine to assist judges in their task of statutory interpretation.

⁵² See, *R (on the application of Galaxy Land Ltd v Durham County Council* [2015] EWHC 16 (Admin). The case involved a decision by the local authority to transfer land to an external body for the purpose of residential development. The decision to transfer the land was successfully challenged in the High Court on several grounds, where Cranston J, at [49] stated that 'a purported discharge of a duty under the section can be impugned on ordinary public law principles.' The Cabinet decision was legally flawed for a number of reasons, including the officers had not taken fully into account the strategic nature of the council's landowning interests and that should have fed through to the Cabinet

See case comment by Nathan Holden, *Section 123 Local Government Act 1972 ... again!* (Local Government Lawyer 26 March 2015)

⁵³ *Buttle v Saunders* [1950] 2 All ER 193, 16

⁵⁴ Alec Samuels, *Local authority disposals: best price reasonably obtainable* (The Conveyancer and Property Lawyer 2012) 411

There may however, be areas of public law that are far less accommodating to equitable principles, where the overriding need for public law is to focus on what is in the public interest, a factor that can prevent individual justice, especially where courts have to decide whether to uphold a legitimate substantive expectation.

CHAPTER SEVEN

FAIRNESS IN PUBLIC LAW

An analysis of the concept of Substantive Legitimate Expectation

From time to time –lawyers and judges have tried to define what constitutes fairness. Like defining an elephant, it is not easy to do, although fairness in practice has the elephantine quality of being easy to recognise....for the purposes of my judgment I intend to ask myself this single question: did the (decision-maker) act fairly towards the plaintiff ¹

7.1 Introduction

This chapter is in two parts. The first part considers a preliminary question that is perhaps basic to whether equitable notions of fairness are applicable in public law, namely the extent to which public law is fundamentally concerned with fairness. The second part looks at notions of fairness with particular reference to substantive legitimate expectations in local government.

The first question considered may appear naïve, as it is widely assumed that securing fairness is a fundamental goal of public law.² In truth this assumption is not

¹ *Maxwell v Department of Trade and Industry* [1974] 2 All ER 129 (Lawton LJ), this case did not involve legitimate expectation, but broad aspects of fairness concerning the work of inspectors, who Denning LJ said did their work with ‘conspicuous fairness.’

² See frequently cited statement of principles governing standards of fairness by Lord Mustill in *R v Secretary of State for the Home Department, ex p Doody* [1994] AC 941:

- (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.
- (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.
- (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.
- (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.
- (5) Fairness will very often require that a person may be adversely affected by the decision will have an opportunity to make representations on his own behalf either

universally accepted. In particular what may be described as the imperium model of judicial review presents the role of the court in public law judicial proceedings to be concerned with ensuring that public bodies act in accordance with the powers conferred upon them by parliament. They may be able to do this without any discussion of fairness.³ For example a pure construction of a local authority's statutory duties or powers need not involve any consideration of fairness.

Some argue that this is a very thin view of judicial review, and that the common law is fundamentally about rights and fairness and that it would be an abuse of power for a public body to act unfairly. They point to the extension of principles of natural justice and fairness and to the extension of judicial review from matters of process to matters of substance, a prime example being in the context of legitimate expectation.⁴ This view is adopted in this thesis, save that it exhorts greater use of the tools of equity (where doctrinally appropriate) alongside existing public law tools. The two conceptions of the doctrine of legitimate expectation as 'power constraining'

before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both

- (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer

³ See Sedley J, Dixon [1998] Env L R 111: 'Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs - that is to say misuses of public power.'

See further, Wade & Forsyth, 'Administrative Law', Oxford University Press 11th ed, 2014, 'The system of judicial review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of the decision: is it correct? When subjecting some administrative act or order to judicial review the court is concerned with its legality: *is it within the limits of the power granted?*' (Emphasis added)

⁴ See, Abhijit Pandya, 'Legitimate Expectations in English Law': Too Deferential an Approach' [2009] JR 170. 'The doctrine of legitimate expectations in English Law protects individuals from changes to representations made by government bodies. *This protection can arise by giving individuals either due process rights or substantive rights.*' (Emphasis added)

or as a ‘right-conferring’ have been succinctly recorded in a recent work by Joanna Bell.⁵

This chapter aims to give a general overview of the doctrine of legitimate expectation, its origin and development including its anatomy, with the case of *Coughlan*⁶ used as a central pivot. That case assists the author’s overall argument that equity has a role to play in public law, albeit limited where the concept of substantive legitimate expectation is concerned. That role, it will be argued, is rooted in public law’s emphasis on protecting the public interest against abuse of power by public bodies, such as local authorities. This author argues that there is a public interest in fair treatment by public bodies of citizens, which must be protected against abuse. Abuse can occur where local authorities resile from a procedural or substantive promise. The court only allows such promises to be thwarted if a local authority can justify that doing so is necessary and proportionate. In this way it is evident that these public law principles are infused with notions rooted in equity. Notwithstanding, equity would be unable to prevent an injustice to an individual, even where a substantive legitimate expectation is proved to the court’s satisfaction, if the public interest is accorded greater weight.⁷

⁵ Joanna Bell, ‘The doctrine of legitimate expectations; power-constraining or right-conferring legal standard?’ (2016) PL 437

⁶ *R v North East Devon Health Authority, ex parte Coughlan* [2000] 3 All ER 850

⁷ See the so called prisoner cases of *Re Findlay* [1985] AC 318, applied in *R (on the application of Khatil) v Secretary of State for Justice* [2015] EWHC 606 (Admin). A prisoner applied for judicial review against his escape risk classification
R v Secretary of State for the Home Department, ex parte Hargreaves [1997] 1 All ER 397
Prisoners whose expectations of home leave and early release were not to be fulfilled by reason of a change of prison policy

As Schonberg remarks: 'There is a growing recognition in Britain that legality and administration in the public interest must be limited or balanced against, requirements of morality or fairness, and that it is incumbent on the courts to enforce such limits through principles of judicial review.'⁸

Lord Justice Lawton's comment cited at the beginning of this chapter identifies the key problem in examining notions of fairness - its ability to mean different things to different people. Practical expressions of fairness are much easier to identify in procedural terms than instances involving substantive unfairness. This chapter continues to explore and exhort the potential influence equity can have in public law in a practical sense. The difference between procedural and substantive legitimate expectation will only briefly be sketched, on the basis that to a large extent procedural legitimate expectation is settled, whereas substantive legitimate expectation is not. It still greatly exercises judicial and academic minds, because it draws the court into a more merits weighing review and therefore goes to the heart of our understanding of fairness in a legal sense.

Procedural legitimate expectation and substantive legitimate expectation are very different. Procedural legitimate expectation deals with matters of process, such as a right to consultation, a hearing or representation, whereas substantive legitimate expectation is more problematic because it enables the court to stand in the shoes of the public body, which is constitutionally questionable.

⁸ Soren J Schonberg, *Expectations, Fairness and Lawful Administration in the Public Interest*, chapter 1 in '*Legitimate Expectations in Administrative Law*', eds, Soren Schonberg, Sren J Schnberg and S Ren Sch berg (Oxford: Oxford University Press 2000)

This author's view is that legitimate expectation is very analogous to the private law doctrine of estoppel. In fact Cameron Stewart⁹ argues that estoppel and substantive legitimate expectation are synonymous. There are resemblances of the equitable concept of estoppel,¹⁰ which must of course be read into the public law context, where estoppel as such is not recognised. This apparent similarity between estoppel and legitimate expectation in public law raises the possibility that private trust law concepts would have a role in this area of public law. This chapter explores whether this is the case. However, on closer examination it appears clear that estoppel and legitimate expectation are not as similar as some might assume, because public interests can always defeat expectations. Despite the potential relevance of equity in relation to certain matters, for example, the force of the promise¹¹ and establishment of the expectation engendered, equity's role is very limited when it comes to the court's willingness to protect a legitimate expectation against a public interest. However, this does not mean that equity has no role, rather that its role has been subsumed into the common law, especially in relation to the test the courts will apply when considering whether an authority can thwart a promise. This is evident in the *Coughlan* case where the Court of Appeal went further than had previous courts to protect a substantive legitimate expectation and to require clear justification from the public body.

⁹ Cameron Stewart, 'Substantive Unfairness: A New Species of Abuse of Power?' (2000) 28 Fed L Rev 617, citing Simon Brown LJ's comments in *R v Devon County Council, ex parte Baker* (1995) 1 All ER 73

¹⁰ The familiar triptych of representation, reliance and detriment is common to both private law estoppel and legitimate expectation

¹¹ See, Alastair Hudson, '*Equity & Trusts*' (Cavendish Publishing Limited 2003) 491. 'Estoppel achieves justice by preventing a person from going back on his word. The difference between an ordinary promise and a promise giving rise to an estoppel is that it is a requirement of the latter that the claimant must have suffered some detriment in reliance on that promise.'

Exploring legitimate expectation in relation to estoppel by representation clearly distinguishes the different emphasis of the courts. In private law estoppel the court's focus is on whether there has been unconscionable behaviour by the promisor, resulting in detriment to the promisee, whereas public law focusses on the public body itself i.e. have they legally justified breaking their promise? It must not be forgotten that equity is based on conscience. Estoppel developed in private law transactions by one person with another. It is not surprising therefore, that where one party seeks to have a court apply estoppel in public law that new and different considerations arise. The judicial review proceedings will involve not just the citizen and the local authority whose official has made the promise, but numerous other citizens who may be affected by anything done or said by the council official.

Fairness expressed in consistent conduct

Consistency has a strong intuitive appeal to our sense of justice (or injustice if a decision maker is being consistently unfair) and is intertwined with the notion of fairness that demands that like cases be treated alike. Consistency, as a principle is supportive of the values of the rule of law in the sense that it aids predictable conduct. The term 'consistency' is however not easy to define. Inconsistency may however be more desirable than fixed rigidity. It may, for example, flow from the desire on the part of the administrator to look in more detail at the individual merits of the matters being processed, rather than applying a fixed rule. In that way justice is individualised¹². Thus consistency can be arbitrary and inconsistency can be fair to the individual. The challenge then is to achieve an appropriate balance between

¹² Sir Jeffrey Jowell, 'The Rule of Law and its Underlying Values' in, *The Changing Constitution* Sir Jeffrey Jowell and Dawn Oliver QC (eds) (7th ed, Oxford : Oxford University Press 2011)

consistency and flexibility and the ability of local authorities to respond to changing circumstances.

Lord Denning said:

it was the duty of the Price Commission to act with fairness and consistency in their dealing with manufacturers and traders.....It is not permissible for them to depart from their previous interpretation and application when it would not be fair or just for them to do so....it is a misuse of power for (the Commission) to act unfairly or unjustly to a private citizen when there is no public interest to warrant ¹³

Implicit in Lord Denning's remarks is that public bodies can change their policies even if unfairness results, subject to an overriding public interest being present, as illustrated later by reference to the application of legitimate expectation in the clutch of prisoner cases¹⁴. Richard Clayton QC would agree that unfairness that results from departures by a local authority from its declared policy is difficult to defend on two grounds. Firstly, because of the injustice afforded to particular individuals, and secondly because such departures offend established general principles of good administration.¹⁵ Therefore the onus upon the local authority is a substantial one.

¹³ *HTV v Price Commission* [1976] ICR 170 (CA) 185

See also Lord Scarman in the same case at 851-852 extolling the virtues of consistency. Policy making through case-by-case adjudication may be described as conforming to an incremental model of policy creation by 'muddling through' - see Charles Lindboom, 'The Science of Muddling Through' (1959) 19 Public Ad Rev 79

¹⁴ See for example *In re Findlay* [1985] 1 AC 318; *R v Secretary of State for the Home* [1997] 1 WLR 906; *R (Vary) v Secretary of State for the Home Department* [2004] EWHC 2251 (Admin); *R (Lowe) v Governor HMP Liverpool* [2008] EWHC 2167 (Admin); (2009) Prison L R 197

¹⁵ Richard Clayton, 'Legitimate Expectations, Policy and the Principles of Consistency' (2003) 62 Cambridge Law Journal, 93, Clayton's main thesis is that where expectations are generated by policy promises they should be treated differently from personal promises and analysed as illustrations of the principle of consistency rather than under the substantive legitimate expectation doctrine.

See further, Professor Mark Elliott, 'Legitimate Expectation, Consistency and Abuse of Power' (2005) JR 281

The defence to consistency as illustrative of a fairness argument by supporters of the imperium viewpoint may require that public bodies give effect to public interest, rather than be obliged to ensure consistent treatment to individuals. They might argue that fairness to the individual may lead to discrimination and partial treatment of groups. By contrast from this perspective the rights based approach is discriminatory, because fairness is always to be towards the persons or groups affected.¹⁶ A rights based approach sees the public interest as secondary to individual's interests. The imperium model is fundamentally different, because it assumes that parliament decides what is in the public's interest, whereas the community rights based approach assumes that the courts have a greater role. In general terms it is desirable for public authorities to do what they have declared they will do. That assists citizens to plan their affairs and fosters trust and confidence in the administrative authorities'. The fundamental problem however, as we saw in chapter four is not so simplistic, given the ongoing need for public bodies to be able to respond to change when complex and often contradictory demands are made upon them by a multi-cultural society where issues are often polycentric. Sedley J (as he then was)¹⁷ upheld the argument that a policy or practice could create legitimate expectations that are protectable by administrative law. He emphasised that there

¹⁶ Philip Sales (ALBA 7th March 2006) 4, Sales captures the practical essence of administrative benefits that consistent decision-making brings

¹⁷ *R v Ministry for Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries* [1995] 2 All ER 714, this case concerned change of existing policy regards issue of fishing licences Tax cases seem to have fared better than the prison case law. There is a line of authority which casts doubt on the application of substantive legitimate expectation in such circumstances as illustrated by Findlay and Hargreaves (24) cited with approval in *R v Gaming Board ex p Kingsley* [1996] COD 241, 242. It may be that in cases involving challenges of legitimate expectation in prisoner case that the public interest factor weighs heavier in judicial thinking than in private tax litigation

Steve Foster, Legitimate Expectation and prisoner Rights; the right to get what you are given' 60(5) MLR 727 states; 'There is little primary legislation guaranteeing prisoner rights who have to rely on either secondary legislation in the form of Prison Rules, or on administrative regulations.' Steve Foster, Legitimate Expectation and prisoner Rights; the right to get what you are given' 60(5) MLR 727

must be quality of a settled practice and enumerated some essential characteristics which would guide the court when considering the creation of legitimate expectations. The test he used was not bare irrationality, but Sedley J said that the courts could intervene if in all the circumstances of the case, the expectation ‘has a legitimacy which in fairness outcrops the policy choice’.¹⁸

Consistency is therefore a value of great importance for bureaucratic institutions and agencies, but as a value it needs to be balanced against other competing values, and in particular, administrative flexibility and efficiency.¹⁹ Thus consistency must not be applied for its own sake or by rote, which approach ultimately could lead to unfairness, not fairness. It is vital to note that this ambiguity is not necessarily present in equity, for example the settlor is not concerned as such with the public interest but the interests of the trust’s beneficiaries.

Changes of, and departures from, general policies

Coughlan straddles both a personalised assurance and a variation or total change in policy and there is often such a spill over.²⁰ One such case was the Liverpool Taxis

¹⁸ *ibid*, 731

¹⁹ Yoav Dotan, ‘Why Administrators should be Bound by their Policies’ (1997) 17 OJLS 1063

²⁰ *Attorney-General (Hong Kong) v Ng Yuen Shiu* [1983] 2 AC 629 is one such case, Hong Kong had operated a ‘reached base’ policy whereby illegal immigrants were not deported if without being arrested they had reached an urban area. There was a great influx from China and the policy was changed, resulting in illegal immigrants from China being deported. Ng Yuen Shiu was an illegal immigrant from Macau who was prior to deportation given no opportunity to present a case on humanitarian grounds that the deportation discretion should be exercised in his favour. The Privy Council considered that the government had breached their undertaking when it failed to give Ng Yuen Shiu an opportunity to put his case before deportation. Their Lordships used legitimate expectation reasoning, holding that an expectation could be based on an undertaking by or on behalf of a public body that it would follow a certain procedure. ‘The justification for it is primarily that, when a public authority has promised to follow a certain procedure, it is in the interests of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty.’

Owner's Association challenge to Liverpool Corporation ²¹over reneging on its recommendation that there would be a graduated increase in the number of licensed taxi cabs. The committee chairman had given an undertaking that the increase would not take place until legislation controlling private hire cars had been passed. Due to uncertainty about the legality of such an undertaking the sub-committee met and rescinded the previous recommendation. The taxi owners were not informed that the original decision had been re-visited and withdrawn and were only given notice the day before the sub-committee proposal came up for consideration by the full council. This was clearly insufficient time to make submissions. Lord Denning said that the local authority was under a duty to act fairly and hear submissions before coming to a decision adverse to the taxi owners' interests. He recognised the principle that a corporation cannot contract itself out of its statutory duties, but said that in this case, the undertaking was compatible with their public duty.²² Dean R. Knight states:²³

Liverpool Taxis is one of the cases which can be seen to fit uncomfortably in the individualised representation class. On the one hand, it was an assurance made to a discrete group whose interests were essentially homogeneous. On the other hand, the assurance was of a broad policy nature. Equally, it could be treated as involving a general change of policy-again highlighting the limitations of the distinction

This section briefly examines the different emphasis of equity compared to the common law and the way each system has in practice dealt with promise breaking in the context of local authorities and their service users. It involves examining the private law concept of estoppel, before we proceed to review the doctrine of legitimate expectation in public law. The solution of equity is to emphasise the important binding nature of the promise itself on the conscience of the promisor, who

²¹ *R v Liverpool Corporation, ex p Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299

²² *R v Liverpool Corporation, ex p Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299, 308

²³ Dean R Knight, 'Estoppel (principles?) in public law: the substantive protection of legitimate expectations' (LLM dissertation, The University of British Columbia 2004) 20

will be estopped from breaking his promise. Once an estoppel is proved the court may grant various discretionary remedies, and is only concerned with the parties involved in the litigation. There is no need to regard the public interest. This is a very important point, as private law estoppel is not prevented from achieving individualised justice by considerations of the public interest. In public law the situation is crucially different because there is always the need for the interest of the public to be taken into account. If A argues that local authority B should keep to its promise made to him or where a policy, new or revised contains an assurance, A will be met with the argument that the local authority must have the flexibility to withdraw its promise or change its policy in regard to further public interests. As Sales and Steyn state ‘the basis for the claim must be correspondingly stronger , because he is asking for the fair balance between the general interest of the community and the individual interest to be struck more favourably to himself.’²⁴

7.2. THE DOCTRINE OF LEGITIMATE EXPECTATION

7.2.1 Scope and Nature of Legitimate Expectation

The principle of legitimate expectation in English Law is a principle of fairness in the decision-making process ²⁵

Resiling from a legitimate expectation is only one, but a very important example of application of unfairness which can amount to a public abuse of power. The doctrine of legitimate expectation in public law ²⁶ graphically illustrates the part that fairness can play where a local authority has induced a person to place their trust that the

²⁴ Philip Sales and Karen Steyn, ‘Legitimate Expectations in English Public Law: An Analysis’ (2004) PL 9.

²⁵ *R v Secretary for State for the Home Department ex parte Ahmed* [1999] Imm AR 22 (CA) (Hobhouse LJ)

²⁶ There are two classes of legitimate expectation i. procedural and ii. substantive

decision maker will not break lawful promises made. Two types of substantive expectation were identified by Simon Brown LJ²⁷ when referring to two cases involving the Home Office^{28 29} in which clear and unambiguous representations were made and a preference expressed for the use of a language of ‘rights’. He said ‘Then the administrator or public body will be held in fairness by the representation.’

Scope

As the Rt Hon Lord Woolf, Jeffrey Jowell QC and Professor Le Sueur state the scope of legitimate expectation has been the subject of intensive discussion, both judicially and academically and is still in the process of evolution.³⁰ For purposes of this chapter it is sufficient to adopt a brief description of the two classes of legitimate expectation, namely (a) procedural³¹ and (b) substantive.³² A substantive legitimate expectation protects a person or body’s interest in a substantive right, the best known example being the *Coughlan* case which will be analysed in detail. There are two types of procedural legitimate expectation. These protect:

²⁷ *R v Devon CC ex parte Baker* [1984] 1 WLR 1337

²⁸ *R v Secretary of State for the Home Department ex parte Khan* [1984] 1 WLR 1337 cited with approval in *Chundawa v Immigration Appeal Tribunal* [1988] Imm AR 161

²⁹ *R v Secretary of State for the Home Department, ex parte Ruddock* [1987] 1 WLR 1482

See also, ‘Legitimate expectations: an overview’ 15(4) JR 388

Soren Schonberg, *Legitimate Expectations in Administrative Law* (Oxford University Press 2000). This book begins by explaining why administrative law should protect expectations at all, by linking expectations to fairness, trust in administration and the rule of law with its requirements of legal certainty and formal equality

C J S Knight, ‘Expectations in transit; recent developments in legitimate expectation’ [2009] PL 15

³⁰ See, Woolf, Jowell and Le Sueur et al, (eds), ‘*De Smith’s Judicial Review*’ (7th ed, Sweet & Maxwell 2015) 294 (fn 86), where extensive literature reference is made by the authors in support of their statement

³¹ See, Robert E Riggs, ‘Legitimate Expectation and Procedural Fairness in English Law’ (1988) 36(3) Am J Comp L 395

³² In *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755, Laws LJ drew a distinction between procedural legitimate expectations and substantive legitimate expectations

- a) 'an interest in the continuance or acquisition of a benefit; the law requires a public body to adopt a fair procedure before making a decision about such a benefit;
- b) an expectation that a particular procedure which has been followed in the past, or promised for the future will be followed.'³³

Both types of representation directly engage issues of equity and fairness. It can be argued that the doctrine of legitimate expectation provides greater fairness than the private law doctrine of estoppel, with which it is often compared, because it can apply in a broader mandate to prevent abuse of power. For example, unlike estoppel it does not insist on reliance upon the representation. This may be, fairer, not least to someone who through no fault of their own is unaware that a representation has been thwarted or even made. There are of course similarities with the estoppel doctrine, such as the making of a clear unambiguous promise by one party to another, who then relies and acts upon that promise to their detriment. There are however differences and in the context of public law the justification for the enforcement of legitimate expectations may be a broader principle of fairness and the prevention of abuse of power by public bodies. The concept of legitimate expectation, in both forms, acts as a protection to the public from unfairness by a public body of which the public may have been unaware.

The doctrine has a functional aspect. It operates as a control over the exercise of discretionary power conferred upon a public body and in that sense is part of a imperium negative approach; it stops public bodies breaking their promises, (unless they can justify their actions in the courts) whereas a rights theorist may consider it positive, enabling the courts to coerce the public body to be more circumspect of a citizen's rights and put in proper procedures to prevent future breaches of trust

³³ Elizabeth Laing QC, 'Legitimate Expectation' (2013) JR 159

occurring-a positive approach. In *GCHQ* Lord Roskill described legitimate expectation as a ‘manifestation of the duty to act fairly’.³⁴

7.2.2 Discovering the underlying rationale

Case law initially appears to show that the principles behind the concept of substantive legitimate expectation are rooted in *trust* and *protection*. However, when subjected to deeper analysis valuable academic work has shown that this viewpoint may need correction. There is of course trust by the recipient in the assurance made by a public body or its official and the law affords protection from breach of that promise. Observance of promises is good for society and fosters interaction between the State and its organs of change, such as councils with its local inhabitants and service users. Professor Forsyth conducted a thorough review of legitimate expectation and found to his surprise that there were other stronger candidates than trust for its core principle.

The doctrine seeks to resolve the basic conflict between the desire to protect the individual’s confidence and reliance in expectations raised by administrative conduct and the need for administrators to be able to get on with their job in pursuing declared policy objectives.³⁵ Promises and expectations are inexplicably linked. A

³⁴ Roskill LJ and Sir Gordon Willmer treated the Council’s representation (in the Liverpool Taxi’s case [1972] 2 QB 299, 311 and 313) as going to the council’s duty to act fairly

³⁵ Robert Thomas, ‘*Legitimate Expectations and Proportionality in Administrative Law*’, (Hart Publishing 2000) 42

In respect of the qualities of trust and the courts protection of this virtue it is interesting to note the similarity, between legitimate expectation and principles of fiduciary obligation which civil obligation this thesis argues should be a major prism in judicial review through which the relationship between a local authority and its service users is perceived by the judiciary

promise creates an expectation. Why people or public bodies keep their promises has engendered diverse views which are outside of this thesis.³⁶

Contribution of Professors C. Forsyth and Mark Elliott

In '*Legitimate Expectations Revisited*'³⁷ Professor Forsyth who first wrote a previous article some 23 years earlier³⁸ identified the simple idea (yet profound in practice and consequence) that the law should protect expectations on the basis of the trust reposed in a promise made by a public official. He states: 'Good government depends upon trust between the governed and the governor. Unless that trust is sustained and protected, officials will not be believed and individuals will not order their affairs on that assumption. Good government becomes a choice between chaos and coercion.'³⁹

Under this approach good governance is identified as a key feature. For Forsyth, the doctrine's central roots are derived from a positive practical approach of principles of good administration. Trust as a general principle would be rarely contested as being of a considerable aid to individual relationships and society as a whole but, how can it be protected in the context of specific local authority administrative decisions? The trust we are talking about has two applications: specific, trust in one's local council or its official(s), not trust in a local authority that is located miles away from where we live and work and with whom we have no contact and in a general sense trust in the national government.

³⁶ See, Florian Ederer and Alexander Stremitzer, 'Promises and Expectations' (Yale University, Cowles Foundation Discussion Paper No: 1931, December 2013, updated September 2014) where it is suggested three main reasons apply 1. existence of a third party mechanism, 2. reputational concerns and 3. the moral force of promise keeping.

³⁷ ALBA BEG, paper May 2011

³⁸ Christopher Forsyth, 'The Provenance and Protection of Legitimate Expectation' (1998) 47 CLJ 238

³⁹ *ibid*

Forsyth explored his central theme of trust as an essence of legitimate expectation, but found little in case law to support his view. This author's view is that trust is fundamental to the doctrine of legitimate expectation and is not negated by the advancement of good administration argument. On the contrary, this author like Forsyth found that the protective nature of the concept came from a variety of principles derived from an overarching concept of 'fairness' namely,

a) advancement of 'good administration'

This is a practical consequence of legitimate expectation that was championed by Laws LJ⁴⁰ presumably on the basis that honouring one's promises is good sound administrative practice. His lordship concluded that it stemmed from the broader one, 'grounded in fairness' and that public bodies should deal straightforwardly with the public. Laws L J further said: 'Generally speaking the discipline of reasons and fairness which the law imposes on public decision-makers obliges them to apply a stated policy to those whom it is directed.'⁴¹

This author supports that approach. Honouring assurances, promises and commitments whatever form they take is a facet of good administration and will lead, not only to practices of due diligence in the administrative sphere, but also makes a valuable contribution to the well-being of relationships in society.

b. 'abuse of power'

This phrase was used in *R v Secretary for State for Education ex p Begbie*.⁴² Professor Forsyth points out correctly 'it is commonplace for a judge to ask whether the dashing of a legitimate expectation was 'so unfair' as to amount to an abuse of

⁴⁰ *Abdi v Secretary of State for the Home Department* [2005] EWCA Civ 1363

⁴¹ *ibid*, [38]

⁴² [2000] 1 WLR (CA) 1115, 1129

power. Abuse of power is now an accepted administrative law principle.’ Reference to abuse of power was referred to in a similar vein by Lord Carswell who said;⁴³ ‘The basis of the jurisdiction (to protect legitimate expectation) is abuse of power and unfairness to the citizen on the part of a public authority.’ Notions of unfairness and abuse of power are linked. It should be noted that in successful court challenges the word ‘unfair’ is often prefaced by the adjective ‘so’. When used in such a way the dictionary meaning is ‘to such an extent’, thus indicating that there must be a very high level of unfairness before there is a finding of abuse of power.

In his short, but detailed analysis of the search of a core principle of the doctrine of legitimate expectation, Dr Elliott (now Professor Elliott)⁴⁴ considers the way the phrase is often used in contradictory ways. Sometimes, as a form of comfort blanket that gives legitimacy to a decision that does not fit tightly within any concept of legitimate expectation, whilst in others simply as a weighting factor, where the court takes the view that on balance the justification advanced by the public authority is insufficient to outweigh the detriment occasioned to the claimant or lastly, used as an ex post tool for justifying a decision that seems instinctively correct. Elliott’s conclusion, like this author’s is that there is still no certainty of the relationship between concepts of reasonableness, fairness, breach of legitimate expectation and abuse of power and asks the question whether they are distinct or interchangeable.

⁴³ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs No 2* [2008] UKHL 61, 135

⁴⁴ Professor Mark Elliott, ‘Legitimate Expectation and the Search for the Principle: Reflections on *Abdi and Nararajah*’ (2006) 11 JR pp.281-288

See, *R v (Abdi & Nararajah) v Secretary of State for the Home Department* [2005] EWCA 1363. (no protection) and statement by Laws LJ ‘principle is not in my judgment supplied by the call to arms of abuse of power. Abuse of power is a name for any act of a public authority that is not legally justified. It is a useful name, for it catches the moral impetus of the rule of law. It may be, as I ventured to put it in *Begbie*, ‘the root concept which governs and conditions our general principles of public law’. But it goes no distance to tell you, case by case, what is lawful and what is not.’

Case law on substantive legitimate expectation also illustrates divergent judicial opinion on the subject. For example Pill LJ in *Rashid*⁴⁵ viewed the claimant's case as one of unfairness amounting to abuse of power; Munby J (as he then was)⁴⁶ said abuse of power was 'the overriding test'; Laws LJ observed in *Coughlan*⁴⁷ that: 'an abiding principle which underpins the legitimate expectation doctrine is the courts insistence that public power should not be abused.'

⁴⁸For sake of clarity it must be stated that Laws LJ was keen in advancing the proportionality test in all matters of legitimate expectation whether founded on procedural or substantive grounds. In the author's view the term 'abuse of power' is a nebulous concept and seems to add little to the doctrinal tools available to the court when reviewing administrative decision, and operates purely as a form of umbrella device, under which it is convenient to summarise a decision. The words of Carnwath L J seem apt 'abuse of power is however not 'a magic ingredient able to achieve remedial results which other forms of illegality cannot match.'⁴⁹

⁴⁵ *R (Rashid) v Secretary of State for the Home Department* [2005] EWCA Civ 744; [2005] Imm AR 608. Here the Home Office had refused an Iraqi Kurd's application for asylum on the ground that he might safely relocate to the Kurdish Autonomous Zone. (Discussed by Professor Mark Elliott, 2005 10 JR 281)

cf *R v Secretary of State for the Home Department, ex parte Urmaza* (The Times, 23 July 1996)

⁴⁶ *R (Parents of Legal Action Limited) v Northumberland County Council* [2006] EWHC 1081 (Admin), 68, consideration of the consultation process embarked upon by a local authority adopting a revised tier of schooling

⁴⁷ *R v North East Devon Health Authority, ex parte Coughlan* [2000] 3 All ER 850; 2 WLR 622, abuse of power is much relied on in this case 'a distinct application of the concept of power'

⁴⁸ Ibid

⁴⁹ *R (S) v Secretary of State for the Home Department* [2007] EWCA 546, 68

7.3 Unconscionability - Relationship with private law doctrine of estoppel

This author considers that there is a third rationale for the legitimate expectation doctrine. Are there links with equitable concepts? Robert Thomas⁵⁰ remarks:

Lord Templeman has stated that unfairness by a public authority would amount to an abuse of power if it were equivalent to a breach of contract or a breach of representation',⁵¹ while Stuart-Smith LJ has remarked that the principle of legitimate expectations has many similarities with the private law principle of estoppel⁵²

This author argues that the essence of legitimate expectation is the notion of unconscionability - not keeping ones promises. Fifteenth century equity enforced promise keeping, so far as this accorded with 'reason and conscience.'⁵³

Both common law and equity have developed estoppel doctrines to give effect to not keeping a promise. Estoppel is an equitable concept that emphasises equity's core nature of concentrating on conscience. The public law doctrine of legitimate expectations undoubtedly has correlations with the private law doctrine of estoppel. This author considers that a different language of description does not alter the basic root of both doctrines, which is to prevent unconscionability. An unfair or abusive promise has no legitimacy and therefore is not to be respected.

The origin of legitimate expectation in English Law may appear to be unclear, but it may assist in helping to understand the true essence of the legitimate expectation doctrine to briefly explore the origins of the doctrine. Many have attributed the concept of legitimate expectation in English jurisprudence, particularly

⁵⁰ Robert Thomas, *'Legitimate Expectations and Proportionality in Administrative Law'* (Hart Publishing, 2000)

⁵¹ *In Re Preston* [1985] AC 835, 866H-7A

⁵² *R v Jockey Club, ex parte RAM Racecourses Ltd* [1993] 2 All ER 225, 236h-j

⁵³ Paul Vinogradoff, *'Reason and Conscience in Sixteenth-century Jurisprudence'* (Stevens & Sons 1908)

to Lord Denning, whereas Forsyth refers to the German concept of Vertrauensschutz⁵⁴ and its emphasis on the protection of trust and felt that its use in English administrative law was a good example of cross fertilisation between different legal systems. The doctrine of legitimate expectation can be seen as the outcome of synthesis between the administrative principles of administrative fairness (a component of the principles of natural justice) and the rule of estoppel. It has paved the way for the development of a broader and more flexible doctrine of fairness. Attribution to Lord Denning is disputed by some⁵⁵. However, whether the origins of the concept of legitimate expectation came from the fertile legal mind of Lord Denning in *Schmidt*⁵⁶ or a continental source, what is important is that the concept is rooted in principles of trust, and has great potential to protect the rights of vulnerable citizens, especially in the field of public law, which touches many aspects of human rights and social law.

There are of course major limitations of applying private law estoppel reasoning in public law litigation acknowledged by the fact that an estoppel could not

⁵⁴ This concept seeks to ensure that everyone who trusts the legality of public administrative decision making should be protected

See further, George Notte, 'General Principles of German and European Administrative Law - A comparison in Historical Perspective' (1994) 57 MLR 191, 195 and 203

⁵⁵ See, Sir Thomas Bingham when writing extra-judicially considered that the *Schmidt* case may not amount to parentage of the legitimate expectation doctrine. Sir John Laws was of like opinion 'the *Schmidt* case cannot be said to have established the doctrine in England.' In fact upon reference to the *Schmidt* judgment there appears no authority stated concerning legitimate expectation, whether judicial, or otherwise upon which the doctrine could be founded

Robert Thomas comments, 'The passing reference to the phrase 'legitimate expectation' shines out from the judgment. It had not been mentioned in argument before the court and no authority was cited in support of it.' Robert Thomas, *Legitimate Expectations and Proportionality in Administrative Law*, (Hart Publishing, 2000) 47

⁵⁶ *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149

Two US citizens had travelled to the UK for study purposes. The time limit on their permits had expired and an extension was refused by the Home Secretary without affording them a hearing and to make representations. The Court of Appeal held that it was unnecessary for a hearing to have been given. During his judgment Lord Denning referred to 'some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.'

be raised to hinder the performance of a statutory duty.⁵⁷ Estoppels were said by Professor Margaret Allars to offend the rule against fettering discretion.⁵⁸ This rule goes back to an 1883 English case⁵⁹ that established that an administrator cannot enter into an agreement or give an undertaking that fetters the future exercise of a discretionary power or the performance of a statutory duty. This author terms this the ‘traditional’ approach whereby local authorities must exercise a statutory power for the public’s benefit and not an individual’s benefit. To do so would force a public body by estoppel to exercise a power for the benefit of the person asserting the estoppel, rather than the general public, and this is impermissible.⁶⁰ The ambit of this traditional approach is seen in *Southend-on-Sea Corporation v Hodgson (Wickford) Ltd*.⁶¹ The author agrees with Joshua Thomson who states: ‘If the traditional rule is given full credit, then it suffocates all estoppel by representation in public law. However, such authority as exists seems to indicate that public law estoppel extends upon or is analogous to private law estoppel.’⁶²

⁵⁷ See, *Maritime Electric Co Ltd v General Dairies Limited* [1937] AC 610; *Minster of Agriculture and Fisheries v Mathews* [1950] 1 KB 148; *Southend-on-Sea Corporation v Hodgson (Wickford) Ltd* [1962] 1 QB 416; *Cambridgeshire and Isle of Ely County Council v Rust* [1972] 2 QB 426

⁵⁸ Margaret Allars, *Introduction to Australian Administrative Law*, (Butterworths 1990) 206

⁵⁹ *Ayr Harbour Trustees v Oswald* [1883] 8 App Cas 623

The statutory duty of the trustees was to acquire land to be used as the need arose for the construction of works on the coastline of the harbour. In order to save money on a compulsory purchase acquisition they agreed a perpetual covenant not to construct their works on the land acquired, so as to cut off the seller from access to the harbour waters. Lord Blackburn held the covenant to be void as ultra vires. He stated ‘whether that body be one which is seeking to make a profit from shareholders, or, as in the present case, a body of trustees acting solely for the public good ... a contract purporting to bind them and their successors not to use their powers was void.’

See further, *York Corporation v Henry Leatham & Sons* [1924] 1 Ch 557 where a fixed annual sum to carry traffic was held ultra vires - it tied the hands of successors

⁶⁰ *Laker Airways Ltd v Department of Trade* [1977] 1 QB 643, 707 (Lord Denning MR)

⁶¹ [1962] 1 QB 417

⁶² Joshua Thomson, ‘Estoppel by Representation in Administrative Law’ (1998), 26 Federal Law Review 88

Thompson quotes in support the implicit assumption of the extension of private law estoppel by representation to public law by some Commonwealth cases including the English case of *Robertson v Minster of Pensions* [1949] 1 KB 227, 231 (Denning J)

In *Capital Care Services UK Ltd v The Secretary of State for the Home Department*⁶³ the appellants, as part of their argument referred to the doctrines of estoppel by representation and estoppel by convention, to which Laws LJ replied: ‘whatever the scope of application of these doctrines to the exercise of public functions by public authorities, they cannot confer any greater rights on the appellants than they might enjoy by force of the public law principles of legitimate expectation.’⁶⁴

There has however been no attempt (thus far) to draw out a general principle from the various forms of private law estoppel that can itself be applied directly and independently in public law. Lord Denning⁶⁵ spoke of the estoppel doctrine, as one with many rooms and that ‘each room is used differently from the others’. This author’s opinion is that there is a clear link however between estoppel and legitimate expectation on the basis that the bedrock of the principle is that it would be unconscionable or inequitable for the representor to go back on his word and deny what he has represented or agreed. Whether it is a private law or public law action it is basically unfair to break promises, albeit that unfairness may be justified by strict proof of public interest considerations. Under English law estoppel can be used as a

⁶³ [2012] EWCA Civ 1151 (Laws and Toulson LJ and Sir Robin Jacob)

The case concerned revocation by the Secretary of State of the appellant’s licence to operate as a sponsor under Tier 2 of the points based system (operated by the UK border Agency) for migrant health workers and argument that there had been legitimate expectations given in literature.

⁶⁴ *ibid*, (Laws LJ) [15]

⁶⁵ *McIlkenny v Chief Constable of the West Midlands* [1980] 2 QB 283, 316-317, (estoppel per rem judicatum)

Also see, S Atrill, ‘The End of Estoppel in Public Law’ (2003) 42 CLJ 3; M Purdue, ‘The end of Estoppel in public law’ [2002] JPL 509; N Bamford, ‘Legitimate Expectation and Estoppel’ (1998) JR 196

basis for a cause of action, provided the factors found by Michael Spence⁶⁶ are present. Those determinates differ little from what is required to launch a challenge based on substantive legitimate expectation.

It is argued that there is nothing inherent in the nature of estoppel that should tie it exclusively to a private law function, and that public law estoppel must be based on analogous private law principles and not on some unique public law doctrine. In fact private law estoppel by representation is based on considerations of justice and fairness; such considerations are as equally valid in public law, unless as we shall see public policy or the interest of the public necessitates adjustment. The basic purpose of private law estoppel is to prevent a person unconsciously departing from a representation upon which another had relied, where departure from this representation would cause detriment to the other party. It is however acknowledged that the focus in private law is on protecting the individual from unconscionable conduct, whereas in public law it is, after a judicial balancing exercise, ultimately to protect the public interest.

A ‘balancing view’ of estoppel balances the harm to the public against the harm to the individual. It has been suggested⁶⁷ that estoppel can be allowed to fetter the exercise of a ‘public’ power, where to do so would occasion little harm to the

⁶⁶ Michael Spence, ‘*Protecting reliance: the Emergent Doctrine of Equitable Estoppel*’ (Hart 1999) 60-66

- How the promise/reliance was induced
- The content of the promise
- Parties relevant interest in the subject of the reliance
- Nature, context and history of the parties relationship
- Parties relative strength of position
- Steps taken (if any) taken by the promisor to prevent harm.

⁶⁷ *Laker Airways Ltd v Department of Trade* [1977] 1 QB 643 (Lord Denning), 707, who considered that an administrative body, and therefore local authorities, can be estopped ‘when it is not properly exercising its powers, but is misusing them; and it does misuse them in circumstances which work injustice or unfairness to the individual without any countervailing benefit for the public.’ There is also supportive dicta for this approach in *Attorney-General (NSW) v Quin* [1990] 170 CLR 18 (Mason CJ)

public interest, and not to allow estoppel would cause greater detriment to the individual. This approach obviously has potential problems as highlighted by Thomson:

the balancing view involves the court engaging in policy judgments. The court would have to weigh the harm caused to an individual if estoppel were not allowed, against the public detriment if it were allowed. A court is ill equipped to do this. It would have to make a decision without being aware of the full extent of the injustice estoppel would cause to the public; because the public would not, and probably could not, be heard by the court. This is a practical reason against the balancing approach⁶⁸

This author understands the merit of this argument but, does not consider producing evidence of the effect on the public insurmountable, especially where individual rights are concerned. It may be that it is incorrect to weigh a private expectation against the public interest in legal certainty in the overall pursuit of fairness. Paul Reynolds states; ‘we are balancing the representee’s trust against legal certainty, and we will be aware that deciding against substantive protection may mean that trust gets damaged.’⁶⁹

However, it is acknowledge that its application in public law suffered a severe blow in the *Reprotech* case.⁷⁰ That case was a clear recognition that acting in the wider public interest is not unconscionable or unfair. In planning applications to a local authority there are often multi layered interests involved and replies (oral and

⁶⁸ Joshua Thomson, ‘Estoppel by Representation in Administrative Law’ (1998), 26 Federal Law Review 88, 98

⁶⁹ Paul Reynolds, ‘Legal Expectations and the Protection of Trust in Public Officials’ [2011] PL 330, See particularly section headed the trust conception of the doctrine, at 347.

⁷⁰ *R v East Sussex CC, ex parte Reprotech (Pebsham) Ltd* [2002] 4 All ER 58 where it was observed that public law had absorbed what moral values underpinned the private law of estoppel and that it was now time for it to stand on its own feet

See Professor Mark Elliott, ‘Unlawful representations, legitimate expectations and estoppel in public law’ (2003) 8(2) JR 71. This article discusses the implication of this House of Lords decision. The Sweet & Maxwell journal note states ‘He reviews the extent to which legality has traditionally determined the limits of legitimacy, policy arguments supporting the protection of certain expectations raised by unlawful representations and the role of estoppel in balancing legality with fairness.’

written) given by planning officers in the course of the planning process may constitute a substantive legitimate expectation arising. This area has generated a lot of litigation against local authorities.⁷¹

We might now legitimately ask whether we have arrived at a conclusion, where, as Steele puts it: ‘this concocted legitimate expectation expands the doctrines boundaries to the point where it simply collapses into an unrestricted principle of fairness: the doctrine ceases to add anything in its own right - it is denuded...of any utility.’⁷²

In other words the continuum is distorted. Does the court’s adjudication in some substantive legitimate expectation (including human rights) claims mean that we are moving towards a merits review approach, leaving the decision-maker no (or little) margin of appreciation or discretion on matters of fact or public policy? The answer is in general no; Judges are not free to second-guess administrators on the merits of their policies. The respective roles of judges and administrators in a democratic society, and their competences are fundamentally distinct. Stricter scrutiny and the suggested abandonment of the *Wednesbury* principle need not mean that the courts will be entitled to ignore the limitations in competence of their own role.

⁷¹ See, Paul Brown QC, *Legitimate Expectation, Consultation & Fairness in Planning Law* (Landmark Chambers, 18 September 2013), reviews in section B a range of latest planning cases against local authorities and the Secretary of State for Communities and Local Government

⁷² Iain Steele, ‘Substantive Legitimate Expectations: Striking the Right Balance?’ (2005)12 LQR 300, 309

7.4 SUBSTANTIVE UNFAIRNESS ⁷³

In terms of exploring the issue of fairness in this chapter, more potential may lie in the expansion of notions of fairness to include substantive unfairness. Sedley J identified perhaps a different approach applied to procedural fairness and substantive fairness in public law when he stated: ‘It is difficult to see why it is any less unfair to frustrate a legitimate expectation that something will or will not be done by the decision-maker than it is to frustrate a legitimate expectation that the applicant will be listened to before the decision-maker decides whether to take a particular step.’ ⁷⁴

In administrative cases the traditional public law grounds are normally sufficient to allow a court to make a decision, but where a substantive legitimate expectation challenge is made the court is drawn into a more detailed examination of the competing interests of certainty and fairness to the individual as against the public interest in allowing public bodies to exercise their discretion as they see fit. Recognition of the public interest and its potential to defeat a substantive legitimate expectation claim will be dealt with later in this chapter. It may be that we are incorrect to weigh a private expectation against the public interest in legal certainty in the overall pursuit of fairness. Paul Reynolds states ⁷⁵ ‘we are balancing the

⁷³ For general academic comment see, J McLachlan, ‘Substantive Unfairness: Elephantine Review or Guiding Concept?’ (1991) 2 PLR 12; J McLachlan, ‘Part II PLR’ (1991) 2 PLR 109; A Abadee, ‘Keeping Government Accountable for its Promises: The Role of Administrative Law’ (1998) 5 AJAL 191; R Cooke, ‘Fairness’ (1989) 19 VUWLR 421. See also, P Finn, and K J Smith, ‘The Citizen, the Government and Reasonable Expectations’ (1992) 66 ALJ 139

⁷⁴ *R v Secretary of State, ex p Hamble (offshore) Fisheries Ltd* [1999] 2 All ER 714, 729

⁷⁵ Paul Reynolds, ‘Legitimate Expectation and the Protection of Trust in Public Officials,’ (2011) PL 330

representee's trust against legal certainty, and we will be aware that deciding against substantive protection may mean that trust gets damaged.'

7.4.1 The essential Ingredients of a Substantive Legitimate Expectation

It is acknowledged that not every expectation can be met in legal term and fairness by the public body if one recognises the amount and levels of administrative decisions local authorities have to take each day - this factor dictates that some boundaries to the doctrine must apply. One such delineation is that the law will only protect those expectations which have arisen through administrative conduct, and not those which have arisen as a result of an individual's subjective hopes. As Professor Kuklin states: 'they are to be distinguished from conative inclinations such as desire, hope, want and wish.'⁷⁶ Administrative law 'is concerned with upholding trust in the administration, rather than protecting expectations which the individual has decided to entertain at his own risk.'⁷⁷

A pious hope, even leading to a moral obligation, cannot amount to a legitimate expectation. Conceptualising 'lawful' promises is therefore essential. The courts have therefore decided that a representation must have a 'character of a contract' about it. What do the Courts mean by this expression? They mean that the expectation must be legitimate and therefore do not cover ultra vires representations.

If consideration is required clearly none was provided in *Coughlan*, unless one includes suffering detriment, under that term, although in this respect Lord Woolf writing extra judicially with Jeffrey Jowell⁷⁸ have argued that substantive unfairness

⁷⁶ Bailey H Kuklin, 'The Plausibility of Legally Protecting Reasonable Expectations' (1997) 32 Valparaiso University L R 22

⁷⁷ *ibid*

⁷⁸ Lord Woolf, Jowell Jeffrey, Andrew Le Sueur, 'De Smith's Judicial Review' (6th ed Sweet & Maxwell 2007), 609-650 'Legitimate Expectation'

doctrine does not require proof of detriment, but rather its presence proves additional evidence as to the nature of the representation. Stuart-Smith J in a recent case⁷⁹ quoting Lord Hoffman in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No: 2)*⁸⁰ confirmed what now seems to be the accepted position of the necessity of a contractual type representation: ‘where a person asserts a legitimate expectation to enforce what amounts to a substantive right based upon a promise or assurance by a public authority, the authority’s statement must be clear, unambiguous and devoid of relevant qualification.’⁸¹

In *Zequiri v Secretary of State*⁸² Lord Hoffman articulated that a representations’ clarity must be considered in the context in which it is made. The author considers this to be a much fairer approach than insisting upon a very rigid formalistic approach that requires a neatly packaged contractual law framework. *Zequiri* illustrated a move away from this rigid requirement suggested in *R v Board of Inland Revenue ex p MFK Underwriting Agencies Ltd (‘MFK’)*⁸³ that an expectation based on an individual promise must originate in a clear and unambiguous way, although one may confine this to the context of a tax case. Lord Hoffman said:’ The question is not whether it would have founded an estoppel in private law, but the broader question of whethera public authority acting contrary to the

⁷⁹ *R v (on the application of Alansi) v Newham London Borough Council* [2013] EWHC 3722 (Admin)

In this housing allocation case the applicant lost her home seeking priority status as a result of a change of policy. The representation made by Newham Council was clear, unambiguous and unconditional, but it was proportional and therefore not an abuse of power. 400 households were made the same assurance - all householders on the list were affected by movement on the housing ladder.

⁸⁰ [2008] UKHL 61; [2009] AC 443, 60

See also authorities collected in ‘*Fordham’s Judicial Review Handbook*’, 6th ed, para 41.2.7.

⁸¹ [2000] UKHL 3; [2002] Imm AR 296 Lord Hoffman

⁸² [2000] UKHL 3; [2002] Imm AR 296

⁸³ [1990] 1 All ER 91

representation would be acting with conspicuous unfairness and in that sense be abusing power.’

Munby J in *R (Charlton) v Secretary of State*⁸⁴ made the same point that a representation for the purposes of a legitimate expectation claim need not be of the same ‘high degree’ of clarity contemplated by Bingham LJ in *MFK*.⁸⁵ Justice Munby’s remarks may however be considered obiter, since the court held that there was no clear or unequivocal statement that the relevant policy (about adopting children from Cambodia) would not be suspended.

7.4.1.1 Promises

An unlawful representation in public law will not bind the local authority.⁸⁶ Unlike private estoppel law there is no room to save the representation on the basis of an agency argument of actual, implied or ostensible authority. Promises or assurances are of course very much part of a contractual set up. Charles Fried,⁸⁷ argued that a promisor was morally bound to keep his promise and by extension his contract

⁸⁴ [2005] EWHC 1378 (Admin)

See Zahir Chowdhury, ‘The Doctrine of legitimate expectation and the concepts of fairness and abuse of power in immigration cases’ (2010) 16(1) ILD 15, where he discusses the doctrine itself, abuse of power as a feature of legitimate expectation and leading case law within the framework of immigration law

⁸⁵ *R v Inland Revenue commissioners, ex parte MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, [156]

⁸⁶ For example, *Shinowa Mosekari v The London Borough of Lewisham* [2014] EWHC 3617 (Admin),

This case involved a school science teacher who had not completed his statutory induction period, but had been employed successfully by the council at the same school for eleven years. On his application for a teaching post outside of that borough the absence of the error came to light. Dr Mosekari applied for judicial review of the council’s decision not to grant such an exemption from the requirement. One of the claimant’s arguments was based on legitimate expectation in that he was led to believe that the required statutory induction period had been met. This was rejected by The Hon Mrs Justice McGowan on the basis that the council had no statutory discretion in the matter and therefore followed that there could be no legitimate expectation created to grant something which was not within the Borough’s power.

⁸⁷ Charles Fried, ‘*Contract as Promise*’: a Theory of Contractual Obligations’, Harvard University Press, (1982) 16

because he has ‘intentionally invoked a convention whose function is to give grounds-moral grounds-for another to expect the promised performance.’

For the doctrine of substantive legitimate expectation to be triggered there must be some form of promise or undertaking. The promise may take different forms,⁸⁸ but it must contain a clear and unequivocal statement. This is an area of great uncertainty. Court judgments place emphasis on the need to look at the whole of the communication, whether a letter, circular or internal guidance memos in construing the assurance.⁸⁹ Guidance may be from an internal or external source. Construing promises in internal guidance also illustrates a similar lack of uniformity in judicial approach, as illustrated by two cases in 2011. In *The Queen (on the application of Elayathamb) v The Secretary of State for the Home Department*⁹⁰ Sales J construed a Home office circular as giving general guidance as to how the system works, rather than creating specific expectations.⁹¹ As Daniel Kolinsky states ‘The relevant issue may be whether the guidance contains a prescriptive

⁸⁸ Either or a combination of an express assurance, a public announcement, policy guidelines, explanatory leaflets or settled working practices

⁸⁹ For example, Lord Wilson expressing a majority view in a tax case *R (Davies) v Revenue and Customs Commissioner* [2012] 1 ALL E R 1048 involving UK residence for tax purposes, *stated* that the tax booklet must be construed ‘in the light of all relevant statements in the booklet when they are read as a whole....’

⁹⁰ [2011] EWHC 2182 (Admin) [29]

The claimant had relied on a statement in the Secretary of State’s mandate refugees policy which stated that if a mandate refugee made an application for resettlement in the UK his claim had to be considered under the 1951 UN Convention on the Status of Refugees. The claimant contended that in accordance with the statement in the mandate refugee policy, he was entitled to have his asylum claim considered. This was rejected.

⁹¹ Compare, *R (Jackson) v DEFRA* [2011] EWHC 956 (Admin) [67]-[69], where McCombe J held that an internal instruction to staff not to mix samples did give rise to a legitimate expectation on the basis that ‘the public might reasonably expect, that to apply the principles of good administration, an instruction requiring them not to mix samples, expressly stated as being for the avoidance of possible contamination, would be observed unless good reason to the contrary exists.’

Samarkand Film Partnership No 3 v Revenue and Customs Commissioners [2015] UKUT 211 (TCC) (UT (TAX))

See, Jeanette Zaman and Owen Williams, ‘Samarkand: illegitimate expectations?’ [2015] Tax J 1263, 8-9, which considers whether published HMRC guidance could found a legitimate expectation for tax relief

instruction as opposed to a general explanation. But much will depend on how the judge in question characterises the statement.’⁹²

Often the recipient of the ‘promise’ by local authorities falls within a socially deprived class and involves, for example, welfare and housing benefits. This type of beneficiary is vulnerable to excessive state power and we shall observe that the doctrine of substantive legitimate expectation can offer protection to such deprived sections of a community, with the acknowledged caveat that the judging of social rights is often a contentious exercise. For local authorities, therefore what they say in their communications is of paramount importance, if litigation is to be avoided on the grounds of the promise of a substantive benefit. Information to service users must be presented in a clear and unambiguous way⁹³. Dissemination of information must be done in such a way that the widest service user audience is reached, including those who may suffer some form of disability, which presents them receiving such knowledge.

The courts insistence on a ‘clear and unambiguous representation’ has received scholarly criticism by Jack Watson. The motive of the representor is not a

⁹² Daniel Kolinsky (ALBA Seminar 18th January 2012)

⁹³ See, [2008] EWHC 630 (Admin); [2009] HLR 1 (QBD)

During the council’s voluntary large scale disposal of its properties, usually to registered social landlords various representations were made in consultation documents, newsletters, press releases and resolutions that the net capital receipts from the house sales would be used to address the housing needs of North Somerset. The Council decided that it would only earmark around 8 million of the total received of £22 million for housing purposes. Mrs Bath was a secure tenant of the local authority, who maintained that she and other voters all voted support for the proposals on the basis of those representations, which had generated a substantive legitimate expectation that all the net sale proceeds would be used in a specific way. Sir Robin Auld dismissed her claim concluding the statements did not amount to unequivocal representations. He said ‘Neither the Council’s decision of November 18th 2003 to embark on the transfer process nor the 2004/2005 consultation document amounted to a clear or firm representation to anyone that all, or indeed any of the anticipated net capital receipt would be spent on housing.’ He further considered that the nature of the decision was very much at the ‘macro’ end of the political spectrum. This case is significant for this thesis on at least three counts. 1/ it involved a local authority, 2/ the extent of the beneficiary class and 3/ how careful local authorities must be in the way they present material in their communication process

material factor - what counts is the reaction of the promisee. Jack Watson⁹⁴ argues that the underlying principle is the voluntary assumption of responsibility that comes from analysing a promise as a social convention, presumably, on the basis that keeping one's promises is good for society in general and not just on a personal level. Whilst promises and their construction are important they are not the end of the matter in a substantive legitimate expectation challenge for it is clear that the size of the beneficiary class to whom the assurance is directed is also of major importance.

7.4.1.2 Size of the beneficiary class

Case law indicates that in the context of decision making in public law the size of class/beneficiary numbers appears to be extremely important factor, since it raises the question whether a statement contained in council literature could ever be relied upon by a group class of council tax payers/service users or will the class be considered too large? On strict moral grounds it is hard to see why there should be any such distinction, if the core of the concept of legitimate expectation is considered to be trust and protection of persons from public bodies relying on their promises. More to the point from a legal aspect the breadth of the class affected by a decision, arguably, is not necessarily correlated to the question whether the public body has abused its powers when making the decision. Indeed, if the courts are concerned with abuse of public power then surely the wider the class adversely affected the more serious is the abuse. *Coughlan* however indicated that the class size is a highly relevant factor in

⁹⁴ Jack Watson, 'Clarity and ambiguity: a new approach to the test of legitimacy in the law of legitimate expectations' (2010) 30(4) *Legal Studies* 633 (Lord Brown SCJ in *Paponette & Ors v Attorney General of Trinidad and Tobago* [2010] UKPC 32; 3 WLR 2019; [2012] 1 AC 1 [61] expressed approval of this article). Watson argues that the current 'clear unambiguous representation' test is insufficiently certain and instead advocates a three-stage test centred around the courts ability to make an order, the objective construction of the promise and the decision makers intent'. This test it is argued, explains the decided cases, as well as providing a robust structure for future decisions

English law, where substantive legitimate expectation challenges are made. Laws LJ said in *Niazi*⁹⁵ ‘the number of beneficiaries of a promise for the purpose of such an expectation, in reality it is likely to be small, if the court is to make the expectation good.’

Why this limitation applies from an equitable perspective is difficult to understand outside of line drawing by the courts. Whilst this statement may be correct in a large number of actions, there is precedent for class numbers to be significantly high. In *Shui*⁹⁶ the size of the group affected played a role (discussed by scholars)⁹⁷ where the Privy Council acknowledged that a statement which is published can enable the benefit to be claimed by the class of people specifically affected by the statement, albeit large in number. The Courts do seem to view class size as a form of concept boundary control in their adjudication process. It appears you are less likely to win your case if the class size is too large, despite there being some contrary precedents.⁹⁸ This enables the court to draw a distinction between traditional public law approach and a rights based one.

That size of class matters seems to indicate that the distinction is not about fairness as such, otherwise the bigger the class the greater the unfairness. On an equitable rationale, if unconscionability is the core of legitimate expectation doctrine

⁹⁵ *R (Niazi) v The Secretary of State for the Home Department* [2008] EWCA Civ 755, [46]

⁹⁶ *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 A representation made to the population of Hong Kong. See further *Ng Siu Tong v Director of Immigration* (Unreported, 10 January 2002) where the Hong Kong Court of Appeal decided that a successful claim could be made by over 1000 claimants who had relied on pro forma replies from the Legal aid Board

See also, *Laker Airways Ltd v Department of Trade* [1977] QB 643 (representation made via a statute that an airways licence would not be withdrawn)

⁹⁷ Professor C. Forsyth and Williams, (2002) *Asia Pacific Review*, 29

⁹⁸ In *R (Bibi) v Newham LBC* [2001] EWCA Civ 607; [2002] 1 WLR 237, 37, the Court was aware of polycentric issues concerning allocation of suitable housing accommodation because it was a scarce resource and by fulfilling the claimants legitimate expectation might involve denying permanent housing to someone else

then the extent of the number of persons affected should not be a consideration, unless line drawing and public interest factors demand attention. Further, concentrating on the number of individuals affected by the expectation is in the author's opinion a very uncertain yardstick.

An additional factor is the constitutional position of the courts, who must comply with the boundaries between the roles of the legislature, executive and judiciary. This overlap was recognised in *R (Bibi) v Newham LBC*⁹⁹ where Lord Justice Schiemann stated:

The court, even where it finds that the applicant has a legitimate expectation of some benefit, will not order the authority to honour its promise where to do so would be to assume the powers of the executive. Once the court has established....an abuse of power in the sense of a failure to consider a legitimate expectation it may ask the decision maker to take the legitimate expectation properly into account in the decision making process

It is this aspect of deference, the courts not assuming the powers of the executive that has received increasing disapproval. *Bibi* is difficult to reconcile with precedent and an approach based on the balancing test, because it implies that all that is required by a local authority is to consider the expectation before deciding to frustrate it.¹⁰⁰

The paradigm case¹⁰¹ involves a clear and unambiguous lawful promise relating to a defined and limited subject matter that is directed to a limited and

⁹⁹ [2001] EWCA Civ 607

The defendant council had promised the claimants permanent housing, which did not materialise. The Court of Appeal held that 'the law requires that any legitimate expectations be properly taken into account in the decision making process and that it had not been in the present case and therefore Newham BC had acted unlawfully.

¹⁰⁰ See Professor Mark Elliot, 'From Heresy to Orthodoxy: Substantive Legitimate Expectations in the United Kingdom' in Mathew Groves and Greg Weeks (eds), *Legitimate Expectation in the Common Law World* (Hart Publishing 2017) chapter 10, pp.217-244

¹⁰¹ See, Jason N E Varuhas, 'In search of a doctrine: Mapping the Law of Legitimate Expectations' in Groves and Weeks (eds) *Legitimate Expectations in the Common Law World* (Hart Publishing 2017) chapter 2, pp.17-52

identifiable class of persons, who are directly and peculiarly affected by the subject matter of that promise, having relied upon that promise to their detriment.

7.5.1 Reneging on individualised assurances

The author agrees with Professor Lorne Sossin¹⁰² who suggests that administrative law in general has been focussed on elaborating the rule of law and the corresponding jurisdictional boundaries of public decision making that has had a profound effect of overshadowing the development of public law duties based on equitable principles. The *Coughlan* case is used as a pivotal focus, to explore whether the doctrine's operation in public law has identifiable roots in equity jurisprudence or whether it rests purely on common law principles. This author supports re-visitation of seminal cases.¹⁰³ *Coughlan* is of jurisprudential value for a number of reasons, including its discussion of general administrative law and open acknowledgement of substantive legitimate expectation as a ground of judicial review. The case also illustrates the way a personal assurance can be intertwined with policy change or revision by a public body.

7.5.2 R v North & East Devon Health Authority ex parte Coughlan¹⁰⁴

In *Coughlan* the Court of Appeal for the first time accepted that a substantive legitimate expectation could be established in English law; this was a radical development, although key elements of the doctrine had been developed by the House of Lords in the tax case of *Re Preston* ('*Preston*').¹⁰⁵ The words of Lord Templeman

¹⁰² Professor Lorne Sossin, 'Public Fiduciary Obligations, Political Trusts and the Equitable Duty of Reasonableness in Administrative Law', 66 *Saskatchewan Law Review*, 129

¹⁰³ For example, the analysis in chapter five of the 1925 *Poplar* case- seminal case re-visitation is also a theme of Jeff King

¹⁰⁴ [2001] QB 213 (CA)

¹⁰⁵ [1985] A.C. 835, 866

are crucial, because they illustrate the way judges in the early development of the doctrine viewed representations, as being equivalent to a breach of contract, with such breach in administrative law elevated to the status of an ‘abuse of power’;-

in principle I can see no reason why the appellant should not be entitled to judicial review...if the decision is *unfair* to the taxpayer because the conduct of the commissioners is equivalent to a breach of contract or a breach of representation such a decision falls within the ambit of an abuse of power. I consider that the taxpayer is entitled to relief by way of judicial review for ‘*unfairness*’ amounting to an abuse of power.¹⁰⁶ (Emphasis added)

Preston is important from a fairness perspective, since their lordships placed no reliance upon the requirements of natural justice, which suggest that they saw ‘fairness’ as something quite distinct from natural justice. Other tax cases raised issues of the operation of executive discretion and the creation of legitimate expectations through the issue of written guidance.¹⁰⁷

Preston is one of a number of tax cases dealing with substantive legitimate expectation claims where the courts seem to take a non-imperium approach to their judicial review function and focus more on the individual and his rights. Arguments may be put forward that tax cases involving substantive benefits are treated differently but such a study is outside the remit of this thesis save with reference to aspects of fairness.

¹⁰⁶ *ibid*, 866

¹⁰⁷ *R (on the application of Davies and another) v HMRC; R (on the application of Gaines-Cooper) v HMRC* [2011] UKSC 47; [2011] 1 WLR 2625

A useful article is Judith Freeman and John Vella, ‘Revenue Guidance: The Limits of Discretion and Legitimate Expectations’ (2012) 128 LQR 192

See, *R v Inland Revenue Commissioners, ex p Matrix Securities Ltd* [1994] 1 WLR 334, where the House of Lords accepted that in certain circumstances a legitimate expectation can give rise to substantive protection and that it may be an abuse of power for the Revenue Authorities to seek to extract tax contrary to an advance clearing given by them.

See generally, *R v Inland Revenue Commissioners, ex parte Unilever Plc* [1996] STC 681.

This case is now recognised as one of the foundation stones of the doctrine of substantive legitimate expectation; see for example the Court of Appeal’s reliance, on *ex parte Unilever in Coughlan*, [78]-[81]

Unilever [76]-[78] was applied in the recent case of *R (on the application of City Shoes Wholesale Ltd v Revenue & Customs Commissioners* [2016] EWHC 107 (Admin), where it was held that HMR had not acted unfairly in inviting taxpayers operating employee benefit trust schemes to participate in a special disclosure facility, but later changing its policy to limit the benefits available, where the taxpayers had applied under the facility but had not been registered

Prior to the *Coughlan* case which will now be discussed in depth, substantive legitimate expectations was sometimes doubted or openly disapproved.¹⁰⁸ Whilst *Preston* was important, it was not until *Coughlan* that the courts accepted the possibility of a substantive legitimate expectation. *Coughlan* is a highly useful precedent for the theme of this thesis, since it addresses a number of important issues, including the circumstances in which substantive legitimate expectations may arise; equity and the public interest come face to face and questions of judicial boundary setting.

Miss Pamela Coughlan had been rendered tetraplegic by a severe road accident. She lived in a care facility operated by the NHS acting through the Exeter Health authority. She and a small group (a significant factor as we shall see later in substantive challenges) had agreed to move from their current home in Newcourt Hospital, Exeter (where she had lived for 21 years) to Mardon House, which was a purpose built facility for disabled persons on the basis of a number of direct specific representations by senior officials of the local health authority that they could live at Mardon House 'for as long as they chose.' The health authority eventually decided to close Mardon House for practical, clinical and financial reasons and sell it and to move the patients into community care facilities. The decisions were made against the backdrop of a new care policy that preferred to move patients away from institutional care and into community care. She sought a review of the decision to close Mardon House and succeeded. The Court of Appeal in a unanimous judgment to which all members contributed,¹⁰⁹ upheld Miss Coughlan's challenge.

¹⁰⁸ For example, see *R v Secretary of State for Transport; Ex parte Richmond upon Thames London Borough Council* [1994] 1 All ER 577, 596 (Laws LJ) and *R v Secretary of State for the Home Department; ex parte Hargreaves* [1997] 1 All ER 397, 412 (Hirst LJ)

¹⁰⁹ Lord Woolf MR and Mummery and Sedley LJ

The court noted that the health authority had failed to appreciate the essence of the expectation Miss Coughlan had relied upon, which was not the continuing funding aspect, but rather to be able to stay at Mardon House, as a home for life. The authority had commissioned a report which acknowledged the existence of the assurances given and thus this promise factor was weighed by them in their decision-making process, alongside their other legitimate considerations.

Hidden J, at first instance based his decision on the fact that the health authority had treated its undertaking merely as a promise to provide care, whereas he construed it as a specific promise to provide care specifically at Mardon House. *Coughlan* illustrates both the importance of the precise terms of the ‘promise’, to whom it is made and the context within which it is made. These elements are of paramount significance:-

- i. the importance of the content of the promise to Miss Coughlan
- ii. the particular promise was limited to a few people only
- iii. keeping to their promise only involved the health authority in fiscal aspects.

Professor Christopher Forsyth considers ground iii suspect.¹¹⁰ The essence of the judgment was that the local health authority had not established an overriding public interest to justify thwarting the promise. Their failure to do so constituted unfairness amounting to an abuse of power.

The counter public interest argument being that an assurance to a small number of residents should not be allowed to inhibit sensible and lawful adjustments

¹¹⁰ Professor Christopher Forsyth, ‘Legitimate Expectations Revisited’ (ALBA/BEG Paper) 2011, ‘the consequences were not ‘financial only’ for those other residents of North and East Devon whose treatment was denied or delayed as a result of the money that had to be expended fulfilling Miss Coughlan’s substantive expectation.’

to welfare provision, if new service ideas or financial stringency made that necessary. This is a powerful argument regards local authority service delivery and questions of resource allocation, especially today where alternative business models are formulated to alleviate serious cuts to services and reductions in funding revenue.

The Court of Appeal, in *Coughlan* gave a clear signal that it was judicially permissible to weigh public and private interests in a way which could open up illegitimate infringement of the separation of powers principle. This case undoubtedly pushed the boundaries of the substantive legitimate expectation concept, because it drew the court directly toward the final stage of decision-making and therefore its substance. Deciding the degree or level of unfairness and a tipping point is a difficult exercise. Once the claimant establishes the legality of the expectation a local authority must identify any overriding interests on which it can rely to frustrate that expectation. The court will then weigh the requirements of fairness against the overriding interest (s) and demand objective justification that the measures used were proportionate in the circumstances. Counsel, Robert Gordon structured his argument on the basis that fairness is not merely aspirational, but operates as a clear limit on executive action. The court will show deference where the local authority provides evidence that its refusal or failure to honour the expectation was justified in the public interest and that it had carefully considered both the substance of the issue and fairness concerns as high relevant factors in its decision-making process.

7.5.3 Post Coughlan developments

Professor Elliott may be correct to remark that:

The Court in *Coughlan* thus overreached by taking upon itself to determine a highly polycentric matter concerning the allocation of scarce financial resources whilst failing to acknowledge either its institutional capacity (not least on account of its ignorance of the many knock-on effects that would ensue if public funds were

diverted in order to uphold the claimant's expectation) or pertinent constitutional inhibitions (given that measuring the relative worth of upholding the expectation and spending money on other things required the balancing of two incommensurable values)¹¹¹

Notwithstanding Professor Elliott's comments, *Coughlan's* value as a precedent has been acknowledged by the House of Lords. Lord Hobhouse has described the reasoning in *Coughlan* as 'valuable'¹¹² and it has also been mentioned in other instances by the House of Lords either with tacit approval or without adverse comment.¹¹³ *Coughlan* has also been discussed, but not applied in a case involving similar phrases, such as 'at least you know that they will never have to move again', and words 'homes for life' were used on huge presentation boards by a health authority at consultation meetings.¹¹⁴

¹¹¹ Professor Mark Elliott, *From Heresy to Orthodoxy: Substantive Legitimate Expectations in English Public Law* (University of Cambridge Legal Research Paper No 5/2016, January 2016) 9

¹¹² *R v Secretary of State for the Home Department, ex parte Hindley* [2001] AC 410, 421

¹¹³ See, *R v Minister of Defence, ex parte Walker* [2000] All ER 917, 924 (Lord Slynn); *R v East Sussex County Council, ex parte Reprotech (Pebsham) Ltd* [2002] 4 All ER (Lord Hoffman); *R (Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1, 48 (Lord Steyn); *YL v Birmingham City Council* [2008] 1 AC 95, 139-140 (Lord Mance)

¹¹⁴ cf. *R (on the application of Collins) v Lincolnshire HA* [2001] EWHC Admin 685

Katie, a 35 year old woman with severe learning difficulties caused by cerebral palsy brought proceedings through her mother and litigation friend. She challenged the decision of the Lincolnshire Health authority to cease to provide long stay care for her at Long Leys. The authority proposed that Katie and 14 other long term patients living at Long Leys should live in the community. One of the grounds of challenge was that the authority had breached a promise that she and the other residents at Long Leys would have a home for life. Katie's counsel argued unsuccessfully that resiling on the promise was an abuse of power and an abuse of Katie's human rights. The hearing was before Mr David Pannick QC who distinguished *Coughlan* in the following terms: 'There is in my judgment, a fundamental difference between this case and Miss Coughlan's case. Here the authority is not acting for financial reasons in relation to someone who continues to require health care. Here the authority is acting in what it properly regards as the best interests of Katie, supported by the general thrust of the policy guidance ... that it is desirable to move persons with learning difficulties out of care and into the community where there are no health reasons for them to live in NHS accommodation'.

7.5.4. Re-visiting Coughlan - An equitable perspective

This author suggests applying an equitable perspective to *Coughlan* by application of a fiduciary duty in the circumstances of the relationship between the health authority and Miss Coughlan and her colleagues. Sossin compares by contrast the fiduciary model that begins with the premise that an equitable relationship exists between a decision maker and vulnerable groups affected by their decisions. He states: ‘Questions such as fairness, reasonableness and justice are more properly viewed through the prism of this relationship, than through the one dimensional lens of legality.’¹¹⁵

Before this author sets out an alternative equitable approach to the *Coughlan* judgment from an equitable perspective and argues for greater use of fiduciary duty in substantive legitimate expectation challenges, it is helpful to present the latest academic thinking on the development of substantive legitimate expectation with reference to *Coughlan* and others. The focus is primarily on a recent article by Professor Mark Elliott.¹¹⁶ In that article he charts the development of the doctrine over the last 20 years and uses as his focus the cases of *Hamble Fisheries* and *Coughlan*. Whilst he does not mention equity, his object is to show that *Coughlan* can ‘be understood in terms more subtle and less uncompromising than those implied in *Coughlan*, such that the doctrine can be conceptualised in a form that is more palatable from an orthodox perspective.’¹¹⁷ Elliott considers that the development of substantive legitimate expectation reflects the journey of administrative law itself, especially the struggle mainly involved with the protection of rights, as opposed to an

¹¹⁵ ‘Public Fiduciary Obligations, Political Trusts and the Equitable Duty of Reasonableness in Administrative Law’, 66 Saskatchewan Law Review, 131 [50]

¹¹⁶ Professor Mark Elliott, *From Heresy to Orthodoxy: Substantive Legitimate Expectations in English Public Law* (University of Cambridge Paper No. 5/2016, January 2016)

¹¹⁷ *ibid*, 1

imperium approach. The purpose of this chapter is not to enter that affray, save that the author considers that equity brings to the table a more nuanced and contextual approach.

Elliott's approach is to dismantle rigid distinctions and replace them with more subtle tools for the purposes of calibrating the nature and intensity of administrative review.¹¹⁸ This author's retort is that equity has those subtle tools, such as fiduciary principles, albeit different, that are flexible enough to be applied in contextual situations found in public law. The challenge is to blend equitable and common law principles to achieve outcomes of justice.

This author considers that *Coughlan* can be approached from an equitable perspective. This approach has a number of advantages. Firstly, by the courts examining the legal relationship between Miss Coughlan and her health authority, leading on to an acknowledgment in the early stages of the adjudication process that the health authority was in a fiduciary relationship with its service users, including the small promissory group of which Miss Coughlan was one. We saw in chapter two that judges and academics use a number of relational indicators to determine whether a fiduciary relationship arises in any given situation, including entrustment, power imbalance and vulnerability. All these factors were present in the relationship between the health authority and Miss Coughlan and her residence group. Secondly, applying a fiduciary context provides a safer and sounder jurisprudential conceptual understanding than the public law approach taken in *Coughlan*, and further would offer the judges a sounder basis for their reasoning process, because it would enable judges to point to a specific obligation that has been broken, rather than resorting to

¹¹⁸ Professor Mark Elliott, *From Heresy to Orthodoxy: Substantive Legitimate Expectations in English Public Law* (University of Cambridge Paper No. 5/2016, January 2016).20

general notions of fairness, expressed in equally difficult and widely definable terms as ‘abuse of power’ or ‘conspicuous abuse of power’. It is an example of equity being employed in defined contextual circumstances. The Court as we saw in chapter three would then proceed to stage two and examine the content of the fiduciary obligation and whether the health authority had breached that duty. Thirdly, a finding of breach of a fiduciary duty may be seen as more satisfactory compliance with certainty principles of the rule of law, rather than as Cameron Stewart states ‘to treat it as a case of public law estoppel.’¹¹⁹ He refers to the work of others where it is said that the idea of public law estoppel is directly analogous to the private law concept of estoppel by representation and the findings in *Coughlan* bear this out.¹²⁰

Are there however, serious limitations to applying a fiduciary context to cases like *Coughlan*? Do aspects of loyalty, which we saw in chapter 3 was the core characteristic of fiduciary duty, rear their head again where there are multiplicity of interests involved? As a fiduciary the health authority owed a duty of loyalty and trust not only to Miss Coughlan, but also the wider users of the local health authority. We had seen that using fiduciary obligations in a public law setting presented real problems because of applying loyalty norms over a wide beneficiary class.¹²¹

¹¹⁹ Cameron Stewart, ‘Substantive Unfairness: A New Species of Abuse of Power’ 28 Federal Law Review 627

¹²⁰ Joshua Thomson, ‘Estoppel by Representation in Administrative Law’ (1998) 26 FL Rev 83, 88-89

¹²¹ See, *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 (CA) (Sir John Laws) where he specifically identifies a range of factors that are significant in substantive legitimate expectation challenges, including, the extent to which questions of policy are involved, whether there are any interests of those not represented before the court, and the number of person’s affected by the promise at p1130. He further commented that *Coughlan* was played out ‘on a much smaller stage, with far fewer players.’ p.1131

The wider concerns of the health authority is implicitly acknowledged by Professor C Forsyth¹²² ‘The money that would be saved by the closure of Mardon House was not to be frittered away on a fact finding trip to the Caribbean for the members of the authority or something similar; it was to be spent on the health needs of others in the East and North Devon Health Authority.’¹²³ The decision to move the patients concerned was driven by many considerations and finance was only one. Seen in the context of fiduciary duty the health authority had a duty of loyalty not only to Miss Coughlan and her small group of colleagues, but also the wider local health service users - keeping their promises was only one aspect of that fiduciary relationship. That relational approach maintains a balanced focus by treating legitimate expectations as one consideration, perhaps among many, rather than as a sole determinate factor.

7.5.5 Polycentric issues-Coughlan and Bibi

From a polycentric perspective it is valuable to compare the *Coughlan* and *Bibi* case¹²⁴. As Elliott states: ‘the court in *Bibi* appeared to be alive – in a way that the Court in *Coughlan* was not—to the polycentric nature of the issue facing it.’¹²⁵

Bibi involved a promise by a local authority to the claimant that permanent housing would be available. That promise was broken and the matter went to judicial review on the ground that a substantive legitimate expectation was generated. The court was aware that if they fulfilled their promise to the claimant it may mean that

¹²² Professor Christopher Forsyth, (ALBA BEG paper, May 2011) 32

¹²³ *ibid*, 10

¹²⁴ *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607; [2002] 1 WLR 237

¹²⁵ Mark Elliott, ‘From Heresy to Orthodoxy: Substantive Legitimate Expectation in English Law’ in Mathew Groves and Greg Weeks (eds), ‘*Legitimate Expectations in the Common Law World*’ (Hart 2016) (forthcoming)

others on the housing waiting list would be disappointed.¹²⁶ There was recognition that residential housing in inner London borough was scarce.¹²⁷ Notwithstanding, Newham was held to have acted unlawfully because they had not, as required by law taken into account the legitimate expectation in their decision making process.¹²⁸ This author agrees with Professor Elliott who states ‘since this case was decided nearly two years after *Coughlan*, the Court of Appeal might have been expected to hold that permanent accommodation had to be supplied absent an overriding policy justification.’¹²⁹ In this author’s view, if all that is required from a local authority is to provide evidence to the court that it included consideration of any promise made in its decision making process, then the value of substantive legitimate expectation as a ground of challenge to an individual who has suffered detriment is significantly watered down and of less value.¹³⁰

7.6 The Overriding Public Interest

7.6.1 A countervailing public interest

Lord Denning stated:

The underlying principle is that the Crown cannot be estopped from exercising its powers...when it is doing so in the proper exercise of its duty to act for the public good, even though this may work some injustice or unfairness to the private individual...it can however be estopped when it is not properly exercising its powers, but in misusing them; and it does misuse them if it exercises them in circumstances

¹²⁶ *ibid*, 37

¹²⁷ *ibid*, 53, the court also noted that giving monies to some may divert scarce financial resources from others

¹²⁸ See also the judgment of Jackson J in *R v Merton, Sutton & Wandsworth Health Authority ex parte Perry* (2001) *Lloyds Law Reports Medical* 73, in which *Coughlan* was applied. In that case the authority had failed to have regard to the promise which it made not to close the relevant home

¹²⁹ Mark Elliott, ‘From Heresy to Orthodoxy: Substantive Legitimate Expectation in English Law’ in Mathew Groves and Greg Weeks (eds), ‘*Legitimate Expectations in the Common Law World*’ (Hart 2016) (forthcoming).¹²

¹³⁰ See, Professor Mark Elliott, (note 127) 13. ‘The effect is to render *review* essentially non-substantive, the substantive nature of the *expectation* notwithstanding. (original italics)

which work injustice or unfairness to the individual without any countervailing benefit for the public¹³¹

Lord Denning's quote emphasises not only the balancing role of the court, but also the tension between protecting individual rights and the protection of the public interest.

A fundamental principle of public law is that the public interest be protected in the realm of discretionary decision making by public bodies. Decision makers must pay heed to the public interest. Local authorities, unlike private parties are entitled to weigh up the public interest against that of the individual. This leads Sales and Steyn to conclude that: 'there is no scope for the simple transposition of private law estoppel rules into the public law field.'¹³²

If a public body can successfully plead the public interest then it will trump any legitimate expectation claim whether procedural or substantive. This effectively limits the roving commission of equity, for even where a legitimate expectation arises, it can always be defeated by the public interest. There are however limitations placed on the use of justification of the public interest in not keeping promises made by a public body. In *Niazi/Bhatt Murphy*¹³³ Laws LJ delivered the leading opinion in the Court's judgment and stated that whilst a court will recognise and respect the right of a public body (thus including a local authority) to override whichever type of legitimate expectation may exist in the public interest, nevertheless in exercising that prerogative a public body must respect the requirement of proportionality. By proportionality Laws L J meant that a public body had to give 'a proportionate

¹³¹ *Laker Airways v Department of Trade* [1977] 2 WLR 234, 252 (Lord Denning)

¹³² Philip Sales and Karen Steyn, 'Legitimate expectations in English public law: an analysis' [2004] PL 2004 4

¹³³ *R (Niazi) v Secretary of State for the Home Department* [2008] EWCA Civ 755

response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest'.¹³⁴

The concept of 'public interest' at general law is an amorphous concept, wide ranging and expansive. Its overriding effect is graphically illustrated by its operation in legitimate expectation claims, where it has the power to defeat even a legitimate expectation. The administration acts in the public interest and the law must recognise its purposes. As Robert Thomas states quoting Maxime Letourneur, a former member of the *Conseil d'Etat*, 'administrative law is by its very nature, an unequal law; for the general interest must be accorded supremacy over private rights.'¹³⁵ The underlying purpose of judicial control of the administration is to recognise the different needs of the state and the individual, and to balance them accordingly.¹³⁶

As Robert Thomas states:¹³⁷

In general, the public interest represented by respect for legality prevails; the only exception is where the administrative decision so interferes with private interests that the public interest cannot justify the incursion. The purpose of the balancing exercise is therefore to ensure that in the exercise of its powers a local authority does not act arbitrarily towards individuals

The use of the notion of the public interest concept evokes several important and challenging questions that are not easy to answer definitively.

- i. what do we mean by the public interest?
- ii. what guidance can the courts give to administrative decision makers and the citizen on how the public interest factor will be assessed?

The following can be said with certainty:-

¹³⁴ *Abdi & Nadarajah*, [68], Laws LJ went on to say 'The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances.'

¹³⁵ Robert Thomas, 'The Concept of Equity in French Public Law' in R A Newman (ed), *Equity in the Worlds Legal systems: A Comparative Study* (Brussels 1973) 261-262

¹³⁶ Robert Thomas, *Legitimate Expectations and Proportionality in Administrative Law*, (Oxford: Oxford University Press 2000) 13

¹³⁷ *ibid*, 13

- Categories of what come within the term ‘public interest’ are not closed.¹³⁸
This approach allows flexibility and is intentional on the part of the judges, because it recognises that legislatures and policy makers have to deal with changes over time and according to the circumstances in each situation- society’s perception of what is in the public interest changes.
- The term does not mean that which gratifies curiosity or merely provided information or amusement.¹³⁹ Similarly, ‘there is a world of difference between what is in the public interest and what is of interest to know.’ Griffiths LJ stated: “The public interest is a term embracing matters ,among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the wellbeing of its members.’¹⁴⁰
- The Privy Council held in *Paponette*¹⁴¹ that once a legitimate expectation has been established by a claimant then the burden of proving that the expectation should be defeated by reference to the overriding public interest shifts to the defendant. The court will examine the public interest argument, which must be presented succinctly and accurately. In the absence of any cogent reasons it is unlikely that the public body’s position will prevail.

According to Advocate-General Lagrange it forms ‘one of the fundamental concepts of administrative law, and is ...without doubt the chief justification for the

¹³⁸ Lord Hailsham’s classic dictum in *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, 230

¹³⁹ *R v Inhabitants of the County of Bedfordshire* [1855] LJQB 84 (Lord Campbell LJ)
See similar comments by Lord Wilberforce ‘There is a wide difference between what is interesting to the public and what it is in the public interest to make known.’ *British Steel Corporation v Granada Television Ltd* [1981]AC 1096 , p 1168

¹⁴⁰ *Lion Laboratories Ltd v Evans* [1985] QB 526,553

¹⁴¹ *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32

very existence of administrative courts',¹⁴² The courts have made it clear that a public authority can resile from what has been a procedural or substantive legitimate expectation (It would seem harder to resile from a procedural legitimate expectation than a substantive one), but there must be 'a sufficient overriding interest' that 'outweighs' the representation relied upon or which justifies a new or reversal of established policy. Sedley L.J. stated 'relevant and overriding policy imperatives',¹⁴³ and his lordship again in *Niazi*¹⁴⁴ 'sufficiently powerful supervening factors.'

This begs the question of what is meant by the 'public interest?' Is it easily definable or can it have different meanings within a different factual context? The term 'public interest' is an amorphous concept and its inability to resist tight definition gives it an intentional flexibility. Legislators, policy makers and judges have all recognised that the conception of what is in the public interest will change over time and according to the circumstances of each situation. In the same way, the law does not try to define categorically what is 'reasonable'. Jonathan Moffett¹⁴⁵ states 'Plainly by importing concepts such as 'overriding' and 'outweighing', the court abrogates to itself at least an element of the decision-making function that is normally the preserve of the public authority'. This theme also impregnates the views of J. A G. Griffith who states, 'judges differ in their view of where the public interest lies.'¹⁴⁶

¹⁴² Case 14/61 *Koninklijke Nederlandsche Hoogovens en Staalfabrieken NV v High Authority of the European Coal and Steel Community* [1962] ECR 283

¹⁴³ *R v Ministry for Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries* [1995] 2 All ER 714 [73]

¹⁴⁴ *R (Niazi) v Secretary of State for the Home Department* [2008] EWHC Civ 755, [69]

¹⁴⁵ Jonathan Moffett, 'Resiling from legitimate expectations' Counsel's note 4-5 Gray's Inn Square Chambers, ALBA lecture, July 2008, 9 & 10.

¹⁴⁶ J A G Griffith, 'The Brave New World of Sir John Laws', (2000) 63(2) MLR 159
¹⁴⁷ [2005] FCAFC 142, [142]

Tamberlin J ¹⁴⁷ in *McKinnon v Secretary, Department of Treasury* in the author's view succinctly summaries the judicial process when public interest concerns are raised. He states:

This ultimate evaluation of the public interest will involve a determination of what are the relevant facets of the public interest that are competing and the comparative importance that ought to be given to them so that 'the public interest' can be ascertained and served. In some circumstances, one or more considerations will be of such overriding significance that they will prevail over all others. In other circumstances, the competing considerations will be more finely balanced so that the outcome is not so clearly predictable. For example, in some contexts, interests such as public health, national security, risks of serious sexual or elderly persons' abuse, anti-terrorism or international obligations may be of overriding significance when compared with other considerations

This authors conclusion is that the more a local authority can show that it has acted carefully in weighing up its decision to override the expectation by considering the substance of the issue and considerations of fairness, and it satisfies the test of proportionality the more likely that the court will uphold the local authority's decision to override the legitimate expectation.

*R (Cheshire East Borough and others) v Secretary of State for the Environment, Food and Rural Affairs*¹⁴⁸ provides a recent example where the public authority succeeded in frustrating the legitimate expectation on grounds of overriding public interest. The claimant local authority lost its judicial review application against the defendant Secretary of State that Private Finance Initiative (PFI) funding would be provided for their waste diversion project. The Executive Board of the Waste Infrastructure Delivery Programme were broadly sympathetic to proposals and set aside £30 million PFI credits, but later changed its methodology and did not make the grant available. During negotiations it had been stated by the Department for the Environment, Food and Rural Affairs (DEFRA) who were also involved that the issue

¹⁴⁸ [2001] EWHC 1975 (Admin)

of the PFI credits were not guaranteed, and remained subject to approval of a final business plan. The challenge was on the basis of breach of both procedural and substantive legitimate expectation. Each ground failed. Langstaff J held that there was an overriding public interest that would have frustrated any legitimate expectation. He considered that a broad approach to selecting projects to secure the savings was permissible. His comments are very important for local authorities and their service users in a period of economic restraint and what has been said about the nature of a fiduciary obligation to council tax payers, Langstaff J stated:

The Government decided on a macro-political and macro-economic basis that spending had to be cut significantly and quickly. A plan for deficit reduction was to be set out in an emergency budget within 50 days. The Spending Review itself recorded that the Government saw it as an urgent priority to secure economic stability. Choices were required, as a result of which departmental budgets were to be cut by ‘an average of 19 % over four years’. In that context, I accept that a decision maker in an individual department of State must be accorded a very wide margin of appreciation, and a court must be reluctant to interfere with technical expert judgments such as are in issue here: as Lord Millett said in *Southwark LBC v Mills* (2001) 1 A.C. 1 at 26, priority in the allocation of resources must be resolved by the democratic process, national and local, and the Courts are ill-equipped to resolve such issues¹⁴⁹

This author considers that a major difference between public law adjudication and that of equity is that English courts have recognised that ‘public administration extends not to a single case but the management of a continuing regime.’¹⁵⁰ As Robert Thomas states ‘they have not adequately considered whether their own task extends merely to the single case or to the management of a continuing regime.’¹⁵¹ Thomas rightly concludes ‘how can the courts effectively protect expectations if they maintain the distinction between adjudication and administration?’¹⁵²

¹⁴⁹ *ibid*, per Langstaff J para 90

¹⁵⁰ *R v Secretary of State for Education, ex parte London Borough of Southwark* [1995] 1 ELR 308, 320

¹⁵¹ Robert Thomas, ‘*Legitimate Expectations and Proportionality in Administrative Law*’, (Hart Publishing 2000)

¹⁵² *ibid*, 72

7.7 Conclusion

It seems we have reached a stage where we can safely say that fairness does play a role in public law, but mainly the emphasis is on procedural illegality and rarely on the merits of the case. The *Coughlan* case and others dealing with substantive legitimate expectations claims will always draw the court into a review of merits, and by implication issues of fairness. However, unfairness has to be such a high degree that it warrants adjectives of ‘conspicuous’ or ‘super unfairness’ and leads to court adjudication of abuse of power by a public body.

We must however not lose sight of the fact that local authorities, whether we like it or not, do not always have to be fair. A famous statement of the distillation governing standards of fairness was made by Lord Mustill and his endorsement of fairness is still a powerful one¹⁵³ and can be illustrated by the fact that even councils do not have to be fair to each other.¹⁵⁴ Paul Reynolds has stated there has not been enough research on the underlying principles of the doctrine of legitimate expectation¹⁵⁵ ‘there has been a lack of conceptual exploration of the doctrine: it has been assimilated into administrative law without any real attempt to explain its purpose and to sufficiently identify principles which underpin this purpose’. This may be a correct perspective of the nature of the doctrine itself, but there is certainly no argument over the protective rationale behind the doctrine which can summarised as protection against public abuse of power’ (Laws L J in *Begbie*¹⁵⁶), protection

¹⁵³ *Doody v Secretary of State for the Home Department* [1994] 1 A.C. 560, D-G

¹⁵⁴ *Buckinghamshire County Council v Kingston Royal Borough Council* [2011] EWHC 457; PT 5R 854

Kingston was not under any duty to act fairly towards Buckinghamshire County Council in the placing of a vulnerable adult.

¹⁵⁵ Paul Reynolds, ‘Legitimate Expectations and the Protection of Trust in Public Officials’ (2011) PL 330

¹⁵⁶ *R v Secretary of State for Education & Employment, ex parte Begbie* [2000] 1 WLR 1115

allowing individuals to plan their life with legal certainty and protection of trust that the citizen has reposed in promises of a public body that such assurances will be kept.

Substantive legitimate expectation remains uncertain in its scope and application. This was touched upon by Laws L J in *Niazi*¹⁵⁷ where he suggested that the doctrine might benefit from having what he termed ‘sharper edges.’ Despite this lack of a detailed analytical framework within which to assess claims of substantive legitimate expectation the doctrine has emerged over recent years as a significant feature of a public authority’s duty of fairness. Development has taken place incrementally on a case-by-case basis. Case law graphically represents the tension, on the one hand, of the need for public authorities to have the flexibility to formulate and change their policies (and the bar on fettering their discretion) and, on the other hand, the degree of certainty inherent in the fair exercise of public authority power. This tension makes the real-world application of the doctrine of substantive legitimate expectation often a complex and uncertain task.

Judith Farbey QC¹⁵⁸ asks rhetorically ‘what then, of the future development of the doctrine? Case outcomes are likely to remain fact-sensitive and dependent on context: while legitimate expectation is not co-extensive with fairness in public law, it is likely that outcomes will continue to be driven by judicial conceptions of what is fair in the circumstances and context of a particular case.’ We are still left with the dilemma of the relationship (if any) of notions of fairness and ‘abuse of power’. While public authorities are required to adopt fair procedures and actions, what will be considered to be fair in each case will depend on the circumstances and the range

¹⁵⁷ *R (Niazi) v Secretary for State for the Home Department* [2008] EWCA Civ 755, [110]

¹⁵⁸ Judith Farbey and Ben Silverstone, *Promises promises : The scope of legitimate expectation in judicial review* (Doughty Street Chambers, 11 October 2011)

of conflicting interests which the authority has to balance, including the public interest.

This chapter has demonstrated that judges have seen the utility of promoting fairness in public law adjudication, both in a procedural and substantive sense. The use of the doctrine of legitimate expectation that is clearly rooted in fairness is an example of that approach. That approach however is undoubtedly restricted, for as Robert Thomas states, ‘courts cannot allow themselves to be seen to be openly making new law for fear of offending the democratic arm of government.’¹⁵⁹ Further, some judges have suggested that the doctrine has a limited role in providing a sufficient interest to challenge a decision of a public body.¹⁶⁰

What would equity have achieved in *Coughlan* that the common law did not? After all, Miss Coughlan did ultimately receive fairness. Principles of equity could have been considered, either on grounds of fiduciary duty or a public trust concept, based on an ethic of stewardship. Their Lordships could have viewed the relationship between the Area Health Authority and Miss Coughlan as fiduciary, with its core content of loyalty. Loyalty would have been easier to have applied, as Miss Coughlan and her colleagues were small in number. By holding breach of fiduciary duty would have avoided a journey into questions of substantive legitimate expectation, particularly the critical area of the vexed question of courts trespassing outside their constitutional domain into executive decision making. This reasoning however, has a fundamental flaw, since rightfully understood Miss Coughlan and her group were not the only ‘beneficiaries’ - there were the wider users of the health authority to

¹⁵⁹ Robert Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (Hart Publishing 2000) 51

¹⁶⁰ See, *O’Reilly v Mackman* [1983] 2 AC 237, 275E; *Findlay v Secretary for State of the Home Department* [1985] AC 318, 338D

consider. Certainly *Coughlan* was played out ‘on a much smaller stage with far fewer players.’¹⁶¹ Equitably based arguments would have confronted similar issues of polycentricism, which are an often a feature of local authority challenges. With reference to *Coughlan*, Professor Elliott states: ‘the balancing test was applied in a way that was insufficiently sensitive to the polycentric value-laden nature of the issues at stake and the limits of the Court’s capacity to assess such matters.’¹⁶²

The failures of the health authority were considered to amount to unfairness and an abuse of power and as such are compatible with this thesis argument in relation to stewardship, although this concept was not expressly referred to. It is possible to view *Coughlan* from a stewardship lens, particularly stewardship of person, as the health authority had not identified an alternative placement for Miss Coughlan and her seven colleagues - their stewardship of person based on an ethic of care was absent.

The ultimate conclusion drawn from examining fairness and the role of equity in public law is that equity does not have complete freedom to act. Its roving commission to bring justice is thwarted. It becomes a limited instrument. This conclusion is due in part to three major reasons. First, the countervailing public law doctrines of ultra vires jurisdiction¹⁶³ and second, that a statutory duty or discretion should not be fettered. A public body will be absolved from giving effect to a legitimate expectation if it is required by statute to act contrary to the legitimate

¹⁶¹ *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] WLR 1115 (CA), 1131

¹⁶² Professor Mark Elliott, *From Heresy to Orthodoxy: Substantive Legitimate Expectations in English Public Law* (University of Cambridge Legal Studies Research Paper No 5/2016) 20

¹⁶³ Professor Mark Elliott, ‘when the rule of law and separation of powers doctrines are viewed through the lens of parliamentary sovereignty, they take on particular complexions that, in turn, have implications for the extent of substantive review’s perceived legitimacy.’ Mark Elliott, ‘From Heresy to Orthodoxy; Substantive Legitimate Expectations in English Public Law’ in Professor Mathew Groves and Greg weeks (eds), *Legitimate Expectations in the Common Law World* (Hart 2016), 15 (forthcoming)

expectation.¹⁶⁴ This rule has, however, been the subject of judicial criticism.¹⁶⁵ Third, the very nature of equity itself acts as an inhibitor. Equity operates on ‘conscience’. This element is difficult to apply in a public law setting. This chapter has demonstrated and reaffirmed conclusions drawn in earlier chapters, that if we attribute a core element of loyalty in fiduciary duty, it prevents it having effect, where the class size is wide and involves conflicting polycentric interests, which is usually the decision making environment in local government. It may be that the moral basis of fiduciary relationships needs to be re-emphasised regards aspects of trust, especially where there is marked power dependency and vulnerability between the parties, as is the case between local authorities and their service users.¹⁶⁶ It is certainly difficult on the current state of case law to justify a different judicial approach where it may be ‘that where a promise is made to a category of individuals who have the same interest (for example *Coughlan*¹⁶⁷, *Liverpool Taxis* case¹⁶⁸ - my case insertion) it is more likely to be considered to have binding effect than a promise which is made generally or to a diverse class, when the interests of those to whom the promise is made may differ, or indeed conflict.’¹⁶⁹ It would however, be hard to justify such a distinction between policy promises and direct personal assurances, especially on the grounds of fairness.

¹⁶⁴ See, *R (X) v Head Teacher & Governors of Y School* [2008] 1 All ER 249, [115] (Silber J).

¹⁶⁵ *Rowlands v Environment Agency* [2003] EWCA Civ 1885; [2005] Ch 1 (CA) para 103, 114-120 (May LJ)

¹⁶⁶ See noted philosopher Professor Robert Goodin, (1985) who concludes that vulnerability and dependency, rather than promises or other self-assumed obligations ‘plays the crucial role in generating special responsibilities’ and thus serves as the basis for fiduciary duty in various trust based relationships

¹⁶⁷ *R v North & East Devon Health Authority, ex parte Coughlin* [1999] [2001] QB 213 (CA)

¹⁶⁸ *R v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators’ Association* [1972] 2 QB 299

¹⁶⁹ Helen Fenwick and Gavin Phillipson, ‘*Text, Cases & Materials on Public Law & Human Rights*’ (Routledge 2013) 740

CHAPTER EIGHT

CONCLUSION

This chapter concludes this thesis by providing an overview of the thesis, an analysis of its main research findings and suggestions for further research.

Equity does continue to have a roving commission, but in respect of public law this is limited. The limitation is due in part to the inherent nature of these two bodies of law. Whilst both strive for fairness, there are fundamental differences. Equity emphasises personal obligations based on conscience, whereas public law is concerned with abuse of power by public bodies, such as local authorities. Placing a lens over the relationship between local authorities and their service users emphasises these differences. It is, therefore not a simple exercise to translate private law equitable principles over to the public sphere. For example, local authorities are not fiduciaries per se, but may in very limited circumstances be a sui generis fiduciary of the public. For a fiduciary relationship to arise there must be a degree of direct control over a person's or group's interests, for example a local authority appointed guardian. In such a situation a local authority has a form of representative power similar to that of a private fiduciary - both hold that power for and on behalf of another and in their interests alone. Apart from such instances local authorities will not be in a fiduciary relationship with their service users, otherwise they would be unable to carry out their day to day decision making, serving a diverse group with complex needs. It is the polycentric nature of local authority's administrative duties that prevent a fiduciary obligation being triggered, with its core emphasis on beneficiary loyalty. The beneficiary class is constantly shifting and impossible to identify with precision, which further means that a cardinal principle of private trust law, of certainty of objects, is missing. These very real obstacles to translating equitable principles of trust and fiduciary duty to public law meant that a search was necessary for a concept which was a better fit for the relationship between local authorities and their service users - a principle of stewardship, based on an ethic of care was advanced. A stewardship

concept better identified the status and functions of local authorities as primarily one of service to their local community.

8.1 An Overview

This thesis has argued that Equity and its principles continues to be alive and relevant in English law today, albeit that it is limited in some instances when applied to the sphere of public law. These limitations were explored with particular reference to the relationship between local authorities and their service users. This is an area where little research has been carried out to determine the exact legal status of that relationship. This thesis reaffirms the general conclusion that Equity is concerned with individuals and their rights, whereas public law's emphasis is on combatting abuse or misuse of public power by public bodies, including local authorities, when exercising administrative decisions. Obviously, if in judicial review proceedings a local authority's decision is quashed or a declaration of unlawfulness is made, an individual or group may ultimately benefit, but conferring rights to individuals is not the central aim of public law.

Equity is not concerned, nor does it have to be with issues of the public interest; in comparison the public interest is central to the character of a local authority as a public corporation, where the interest of the public is paramount. The public interest factor must be part of any local authority's decision making process. In Equity, and particularly obligations of a fiduciary or trust nature the fiduciary, trustee or settlor is not concerned with public interest considerations (save making sure that any trust terms do not offend public policy, otherwise they would be void),¹ but it is a fundamental rule of trust law that the sole interests of the beneficiary(s) are paramount in complying with the fiduciary mandate or trust terms.

¹ See, *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC.38, discusses anti-deprivation rules, where a clause is worded to switch a property interest to another on that person's bankruptcy - those clauses are void on grounds of public policy. Reference is made to Sir William Page Wood VC's statement in *Holmes v Penney* [1863] 3 K&J 90, 102: 'a trader cannot, even for valuable consideration, *settle his own property* in

Thus the role of Equity was particularly focussed in this thesis on the institutional relationship between local authorities and their service users. This author regarded this relational enquiry as relevant and current, on a number of grounds. Local authorities have immense administrative power, over a diverse range of subject matter, from care for the elderly, infirm and vulnerable, to road maintenance and refuse collection. Local authorities also play a prominent part in the economy and are responsible for large budgets, consisting of revenue not only from council tax payers (domestic and commercial), but also from government grants and subsidies. They deal with a variety of stakeholders, including the private sector and voluntary bodies, and also collaborative working agreements with other local authorities. These factors combine to make administrative decision making a complex task, especially now where the focus is on trimming service budgets in a fragile economic climate. The political pressure for privatisation of government services over several decades has created an entirely new field of public contracting and has spawned significant evolution of non-profit and for-profit public delivery-service organisations. Decision-making often involves complex polycentric issues with no easy solutions: for example, if budgets were reduced on a local drug/alcohol dependency unit there would be more money to apply elsewhere, perhaps on play group provision; however, such savings could lead to increased costs elsewhere such as in relation to homelessness or adult care. Decision making also has to recognise the diversity of its service user group. This is not only comprised of persons and groups from different, racial, cultural, ethnic, political, educational, economic and social backgrounds, but also persons who live in a local authority area and, those persons who come to work or , visit or use leisure facilities in the area, including those who find themselves in the area as seeking protection and asylum.

Local authorities then, are not just political institutions, but have a major economic and social role to play in their own localities: the needs and well-being of which will differ. A town in a prosperous area will have needs different to those in a locality suffering from past

such a manner as that he should take an interest in it until his bankruptcy, and afterwards, it should be held in trust for his wife and children' (emphasis in original case)

or present economic decline. The challenge of this thesis was to identify the legal status that could be applied to the relationship between a local authorities and the diversity of their service users (whether the organisation was a county council, district council or metropolitan borough council).

It is tempting to answer this question of identification by simply categorising the relationship between local authorities and their service users in terms of contract or tort. This would solve the problem in situations where a service user is a tenant of a local authority and, under contract, pays monthly rent or where an inhabitant or visitor has tripped over a pavement flagstone, and allegations of negligence are made. This categorisation is however, too simplistic and in some instances does not fit the situation. For example, a local authority may wish to take part of a village school playing field to build low cost affordable houses to meet housing demand. This decision will no doubt be highly contentious, complex and polycentric. Many persons and groups will wish to comment - there is clearly no contractual nexus between the parties or issues of tortious liability, yet those persons have a right to challenge the decision making process of their local authority. Some may argue there have been procedural defects, claiming that they have had no opportunity to be heard, whilst others may contend that the local authority had promised that the school playing fields would always be maintained for educational and/or recreational use. In such circumstances, both groups would feel that their trust in the local administration has been breached, one for procedural and the other for substantive reasons. Given that, in such cases, neither contract nor tort provides ready solutions, those aggrieved may turn to public law by way of judicial review. Yet public law as indicated will not concentrate on individual rights and may offer only limited opportunity for individuals to have their grievances addressed. The core question on this thesis is whether equity can be of assistance in meeting the deficiencies of the common law in particular in judicial review proceedings.

8.2 Main Research Findings

This thesis looked at various models by which the relationship between local authorities and their service users may be conceptualised from the perspective of equity. A starting point was to address whether this relationship could give rise to an equitable fiduciary relationship. Chapter two was therefore devoted to examining the various theories advanced by judges and academics to determine whether a fiduciary relationship existed. This involved, exploring a wide range of ‘signposts’ or indicia, used to establish whether the relationship under review was fiduciary or not.

This author applied each relational indicator to the local authority service user relationship to test whether any or all of the theories were appropriate. Undoubtedly, power, dependency and vulnerability resonated with some non-economic services, such as youth offending counselling schemes, but were not present in all aspects of the relationship between local authorities and their services users. As scholars before have concluded, this thesis confirmed that, just because a particular relationship between a local authority and their service users is fiduciary in one context, does not automatically mean that all relationships entered into by a local authority are thereafter fiduciary in nature.

The concept of entrustment, as espoused by Professor Tamar Frankel, appeared both in a number of court judgments and academic literature. This relational element was particularly relevant to the relationship of local authorities and their service users. Entrustment occurred on a number of levels. There was institutional entrustment between Parliament and local authorities on the basis that local authorities would abide by their delegated statutory duties and powers and not abuse such power. There was also entrustment by the local electorate, in exercising their democratic local voting right to elect their local council. The entrustment was on the implied understanding that the local authority would act for the economic, social and environmental, ‘well-being’ of their locality. Fiduciary relationships were based on a substitutionary principle - the fiduciary was empowered to act

for the beneficiary. Nearly all fiduciaries (including agents, doctors, lawyers, partners and trustees) acquire their authority through a consensual delegation from dependants such as, principals, patients, clients, co-partners and beneficiaries. There are of course instances where there cannot be ordinary or consensual delegation, for example where a minor or someone suffering mental illness is involved. In such circumstances the courts will superimpose the fiduciary concept (Court of Protection procedure), for the beneficiary's protection.

A broad classification of fiduciary relationships, between fiduciary relationships per se (doctor/patient, trustee/beneficiary, principal /agent) or a contextual approach was helpful in part. Judicial reasoning was applied on an analogical or contextual basis. It was clear that if the relationship between local authorities and their service users was to be categorised as 'fiduciary', then it could only be on the basis of a 'sui-generis' categorisation. This author concluded that the relationship between local authorities and their service user falls within a grey area, leading some legal scholars to contend that fiduciary government offers a false promise² ; because the concept is too incoherent and uncertain to be workable. The importance of taking seriously the objections raised to translating fiduciary principles to administrative law was recognised in chapter four.

Apart from difficulties in fixing a firm categorisation of 'fiduciary' to the relationship under review, there was the added problem of determining the scope of the fiduciary duty. This thesis demonstrated that there is an ongoing dispute as to whether fiduciary duty is proscriptive, prescriptive, or both. This author considered that the proscriptive view of fiduciary duty better accorded with the historical genesis of the fiduciary concept, because it focuses on the prophylactic and deterrent nature of fiduciary duty, and acts to prevent conflicts of interest. In this author's opinion a proscriptive approach better reflects the traditional moral role of fiduciary obligation, but does not however, fully adapt to the relationship between local authorities' and their service users, because it is negative in outlook-its function is to prevent 'conflicts of interest'. The prescriptive approach is positive

² Professor Seth Davis, 'The False Promise of Fiduciary Government' (2014) 89(3) Notre Dame Law Review

and therefore, better applies to the activity of a local authority. This author acknowledged the practical value of the prescriptive approach of fiduciary obligation, where it could be easily applied, as was seen in land disposal by local authorities under section 123 of the Local Government Act 1972.

The ongoing debate over whether fiduciary duties are proscriptive or prescriptive only takes us so far in exploring the relationship between local authorities and their service users. What is needed is an analysis of the core content of fiduciary obligation and this was addressed in Chapter two. The purpose here was to see whether; and, if so, what extent, a concept of fiduciary obligations could be applied in a local government context. Two major candidates for the root of fiduciary duty emerged, that of loyalty and of trust. Fiduciary duty clearly had associations with good administration and conscionability, but the consensus of judicial and academic opinion was that loyalty occupied the central position. Other contenders, such as good faith and duty of care were put forward, but this author considers that they are stand-alone principles, and only apply in fiduciary law as part or component of a general fiduciary duty of loyalty: to contend otherwise weakens fiduciary duty.

Identifying loyalty as a central core of fiduciary doctrine, however, causes problems in the context of a local authority. With such a diverse grouping of service users, often of a shifting nature, it is extremely difficult to identify at any given time the beneficiary class involved, and therefore to whom loyalty is owed. In any event loyalty to one person or group would inevitably mean disloyalty to the other. There was also, of course, loyalty to the public interest, (including loyalty to the authority's statutory purpose) which may have been unrepresented in court. It was seen that using notions of loyalty in the decision-making framework of a local authority presents significant challenges. The nature of the duty of loyalty suggests that loyalty must take the form of fairness in settings where beneficiaries have competing claims against the same fiduciary, as is the case between service users and their local authorities.

Mindful of such difficulties, this author explored private trust concepts. Chapter four specifically examined what type of trust (if any) would be appropriate, and considered that a discretionary trust model resembled the relationship under review. There were, however a number of identifiable problems of validity under basic private trust law. Further, the traditional division of trust property between legal and equitable interests does not easily 'fit' the local authority context. It was difficult to pinpoint any beneficial interest that could be claimed by service users, even local tax or ratepayers: individuals may pay their council tax, but they do so in consideration for services received. Further, there were other stakeholders who could lawfully claim to beneficially 'own' part of a local authority's assets, including the national taxpayer and central government itself who fund grants and subsidies to local authorities.

This analysis clearly showed that the private trust model could not apply to the relationship between local authorities and their service users in general, and that an answer might lie in a wider public trust concept, such as that used in respect of the turnpike trust might provide an adequate framework. Historically, the turnpike trust represented a form of community public trust, and an early example of localism. The public trust doctrine is, however, difficult to define; case law illustrates that a property-centred approach is taken.

It became clear that what was needed was a new legal duty that is not tied to existing models of trust, and fiduciary obligation, and yet was able to embody the service ethic that is so much a part of those concepts. This author, therefore, presented as an alternative a stewardship model based on an ethic of care. Its essence is service to others. In this way it echoes fiduciary duty, but is not restricted by considerations of loyalty. From an historical perspective as stewards for trust beneficiaries, trustees were expected to manage assets or perform other services in a conscientious manner, manifesting unqualified fidelity to their beneficiary's interests. The stewardship model accepts common law legal ownership by the trustee, but regards it as against conscience for that trustee to exercise legal ownership other than for the benefit of the *cestui que trust*-equity engrafts an equitable obligation upon him.

An aim of this author was to complement the theoretical analysis of equitable principles with a practical approach, advocating that equity is not outdated or sterile, rather, it can have a utilitarian function, even in the complexity of modern arrangements, whether domestically, in the commercial world or the relationship between local authorities and their service users. A stewardship concept was therefore identified as the most appropriate vehicle to use for the relationship of local authorities and their service users. From this, a number of advantages accrue: public administration stands to gain because it adds diversity to the forms of law at its disposal. It thereby increases the stock of tools and practices needed by public administrators to make wise and lawful decisions at all stages of policy development, as well as adding to the judicial tool bag. Thus, chapter four explored the four dimensions of stewardship; stewardship of person, place, property and purpose. Practical expression of stewardship was specifically explored (see chapter six) by reference to the statutory power of disposal of land or interests therein by local authorities and applications of an overriding duty of a fiduciary nature superimposed over the duty to obtain ‘best consideration.’

Judicial views on the relationship between local authorities and their service users were considered highly important, and it was with this purpose in mind that chapter 5 specifically dealt with three seminal cases, involving challenge to administrative decisions made against three local authorities. Whilst stewardship was only mentioned by one judge, namely Sumner L J in the *Poplar* case, it was evident in other judgments that as well as having abided by the terms of their statutory authority local authorities are accountable for the management and control of property belonging to others and must deal with such property responsibly: such assets were not their own. A stewardship theme was clearly present, as further illustrated in *Pickwell*³ and the need for Camden council to balance the interests and well-being of all its inhabitants and visitors to the area with potential health hazards looming, where the employees’ strike had caused rubbish to pile up in the streets, bodies remained

³ *Pickwell v Camden LBC* [1983] QB 1, 962

unburied and fellow council workers housed in unheated buildings; financial stewardship was only one aspect. *Pickwell* demonstrates that stewardship must be exercised in context.⁴

Changes in local government service delivery and the range of services now offered together with the number of parties in the delivery chain raise further issues. A current theme is to encourage development of bigger local authorities with regional assemblies on the agenda.⁵ These are of course political decisions, but issues of a legal nature also arise. The ‘rights’ of the service user can be in danger of being overlooked in matters of institutional design. It is essential therefore that a public service ethic is not lost, but is protected. Having notions of ethical principles of stewardship on the agenda will ensure that ‘commodification’ does not swamp dialogue and that instances of abuse or misuse of power do not go undetected.

Benefits of applying stewardship principles

Stewardship better reflects the ethical dimension of the service element which is central to the relationship between local authorities and their service users than concepts associated with fiduciary duties and trusteeship. Stewardship principles are

⁴ *ibid*, 995 See evidence of Mr Unwin the Director of Social Services who stated: ‘The withdrawal of services precipitated by the strike caused dismay (to Camden’s disabled and elderly residents) that a life-line had been cut. The under-provision was at a serious level and people having to contend with severe handicaps were placed at risk.’

⁵ The basic idea behind regional assemblies is that government in England is too centralised. People who support regional assemblies believe the regions of England differ in terms of what they want and need. A regional assembly would be elected by people in the area. In order to take on significant powers from central government, it is generally agreed that these regions would need to be quite large. For example, for Assembly North, the region that is normally suggested is the whole of Yorkshire. The population of Yorkshire and the Humber in 2011 was 5.3 million people – the same as the population of Scotland. There are many options for the powers that a regional assembly could have. The overall goal of such proposals is to bring politics closer to the people, tailor policy decisions to fit local needs and wishes, and encourage regional development. The regional assembly would appoint a First Minister and a cabinet who would be responsible for devising a policy programme and putting it into effect. The assembly would form committees to represent local interests and policy areas and hold the cabinet to account. The regional assemblies would sit below central government and above local councils. There are two main criticisms – firstly, they would create another layer of government, with more politicians and more bureaucracy; secondly, it would diminish the importance of common standards for services across the country, rather than different standards depending on where you happen to live,

wide enough to embrace issues that are not confined to a fiscal subject matter. By asking questions of the decision maker whether stewardship, whether of person, property, place or purpose was achieved in their outcome enables a thorough review of the evidence and submissions presented before the court. Stewardship also provides a structured substantive judicial review test, robust enough to provide effective practical supervision of local authority action.

Application of stewardship principles also acknowledges as Lord Diplock said in *Secretary of State for Education and Science v Tameside M B C* that ‘the very concept of administrative discretion involves a right to choose between more than one possible courses of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred.’⁶

The role of local authorities and their relationship to their service users is, as we have seen, in certain respects analogous to the relationship of a trustee and beneficiary in private law. Fundamentally local authorities manage assets, as would the steward of old. The stewardship label better identifies, than does the trustee model, both the practical and ethical relationship between local authorities and the wide service using public with its uncertain reach..

Adopting a principle of stewardship would improve the way administrative decisions by local authorities are assessed – particularly with reference to substantive review. It can be another tool in the substantive judicial review toolbag. Stewardship is a generic standard and can operate as an umbrella concept - as a standard of governance and can apply whether the standards of review used is the old *Wednesbury* test or the increasingly used proportionality test. Stewardship principles enable the court to concentrate on what has gone wrong with a decision- is it over or

⁶ [1977] AC 1014

under inclusive? bizarre and illogical? A stewardship focus is not tied down to either a rationality test or proportionality standard of review, which seems to be the present approach in judicial review proceedings.

A stewardship approach fits in with a contextual approach when substantive review takes place. By ‘contextualism’ this author means the notion that the standard of review should vary according to the circumstances of the case. The author agrees with Professor Mark Elliott, who states: ‘that substantive judicial review is to be understood as a contextualist endeavour that cannot be undertaken by reference to crude distinctions.’⁷ There are of course risks to adopting a contextualist approach which can ‘produce a chaotic regime of single instances that render substantive review little more than a vehicle for dispensing palm – tree justice in an unpredictable fashion.’⁸ This risk can only be overcome by judges applying wisdom as to when the extent of intrusiveness of substantive review is moderated by recourse to deference.

Within a stewardship approach there is room for both *Wednesbury* and proportionality substantive review tests - the ultimate goal is to root out abuse of power. Assistant Professor Rebecca Williams in a recent article⁹ notes that ‘what is vital across substantive review, is not categorical distinctions between proportionality and *Wednesbury*, or a final duel of the two before the Supreme Court, but rather the recognition that in all instances it is necessary to specify the content of the substantive review.’ The current tests may be insufficient and stewardship adds additional freedom to the judges and provides a clearer basis for substantive review of local authority decisions.

⁷ Professor Mark Elliott, Proportionality and contextualism in common – law review: The Supreme Court’s judgment in *Pham*, blog 17th April 2015, publiclawforeveryone.com

⁸ *ibid*

⁹ Structuring Substantive Review , Public Law 2017, pp.105-122, p.122

Substantive review has suffered from rigid distinctions, particularly regards the *Wednesbury* and proportionality tests: they are often seen as distinct. The recent case of *Pham*¹⁰ has changed the judicial landscape because as Professor Elliott states it: ‘reconceives the way in which the toolbox is organised-it rejects compartmentalism - according to which *Wednesbury* and proportionality are viewed as rigidly separate.’¹¹ *Pham* further eschews rigid distinctions between ‘domestic’ and ‘European’ cases, and between ‘rights’ and ‘non-rights’ cases.

This author firmly believes that a stewardship principle belongs in the administrative substantive review tool box, and can be extremely useful where local authority decisions are under challenge.

Different case outcomes

It is relevant to ask what difference application of a stewardship model would have made to the decisions in previous case law. This author tested his stewardship theory on the cases referred to in this thesis, with the result that it was possible to interpret those case outcomes in the light of a stewardship review standard. For example, in *Poplar*¹², the local authority clearly exercised poor stewardship of public funds by paying wages without regard to the standards generally used when fixing wage levels – i.e. above the national average at a time when the cost of living index was going down. A stewardship approach would have avoided the criticisms met that the judges were overstepping the mark and impinging on the autonomy of local authorities to make their own discretionary decisions. Similar reasoning can be applied to

¹⁰ *Pham v Secretary of State for the Home Department* [2015] UKSC 19

¹¹ Professor Mark Elliott ‘Proportionality and contextualism in common – law review: The Supreme Court’s judgment in *Pham*,

¹² *Roberts v Hopwood* [1925]A.C 578

*Bromley*¹³ where it was hardly financial stewardship to lower fares which triggered a grant loss and meant increased local taxation on out of London boroughs. An alternative stewardship argument is possible on the grounds of the public interest by arguing environmental benefits – better air quality - as a result of potentially less cars/vehicles being used if a subsidised transport system was in place. *Hazell*¹⁴, the swaps case was a clear example of a breach of cardinal trustee principles of not putting ‘all ones eggs in the same basket.’

*Pickwell*¹⁵, represents the use of practical stewardship by the local authority concerned in a number of ways, because whilst at face value to settle at a wage level with its employees at a figure above that agreed with the national union concerned seemed irresponsible and in today’s substantive review terms disproportionate. However, applying a stewardship lens takes cognisance of the situations developing in Camden at the time (the winter of discontent), including public welfare concerns for the elderly and infirm and major health hazards with rubbish piling up in the streets having been uncollected for weeks due to the strike.

*Prescott*¹⁶ represents a set of facts, where it is hard to justify the decision if one applies a stewardship lens. It was true that the cost of subsidising the elderly who would receive free travel was a costly exercise nevertheless, it can be strongly argued that Birmingham Corporation was displaying stewardship to a vulnerable and needy section of their local population and that financial considerations were only one side of the coin. The local authority was later justified by an Act of Parliament allowing

¹³ *Bromley LB v GLC* [1983] A.C 768

¹⁴ *Hazell v Hammersmith & Fulham LBC* [1982] A.C 1 (HL)

¹⁵ *Pickwell v Camden LBC and Others* [1983] QB 1 962

¹⁶ *Prescott v Birmingham Corporation* [1955] 1 Ch 210 (CA)

concessionary fare structures to the elderly, infirm and school children within a locality.

It is acknowledged that by applying a stewardship substantive standard of review the outcome arrived at in some of these decisions may have been the same: - in other different. Nevertheless, the major advantage of applying a stewardship test is preferable, because it provides a clearer and more transparent approach which may help to protect judges from criticism that unelected judges are making executive decisions, and thus exceeding their constitutional powers under the separation of powers. This is the central criticism of substantive review in legitimate expectation challenges. Those cases as we saw draw the courts into a merits review, as exemplified by *Coughlan*.¹⁷

Coughlan is extremely important, for it shows that even if a public body (including local authorities) evidentially demonstrate that it has complied with its stewardship obligations, none the less if their decision making process involves a promise that satisfies certain defined judicial criteria then reneging without proper justification from that definite promise will be an abuse of power and thus override any considerations of stewardship. Fairness is a principle that overrides other considerations, and depending on the degree of unfairness involved, even the public interest. For example, in *Coughlan* the health authority wanted to improve the provision of reablement services and considered that the mix of a long - stay residential service and a reablement service at Mardon House was inappropriate and detrimental to the interests of both users of the service. The acute reablement service could not be supported without an uneconomic investment which would have produced a second class reablement service. The health authority tendered evidence

¹⁷ *R v North & East Devon Health Authority, ex parte Coughlan* [2001] QB 213

that Mardon House had contrary to expectations become a prohibitively expensive white elephant and its continued operation did not represent value for money and left fewer resources for other services.

It would seem that the health authority in *Coughlan* would have passed both the rationality test and a stewardship test. This author however, submits that the *Coughlan* outcome will rarely arise in the future due to the boundaries placed around the substantive legitimate expectation doctrine. This conclusion is borne out by the few successful substantive legitimate expectation challenges since *Coughlan*.

Judicial Review deficiencies-Wednesbury and proportionality

Substantive review continues to provoke much debate, both within the courts¹⁸ and amongst academics¹⁹, especially whether *Wednesbury* review should be consigned to the dustbin of legal history and replaced with a proportionality doctrine.

The *Wednesbury* doctrine has had its critics. Lord Cooke in *Daly*²⁰ said *Wednesbury* was an ‘unfortunately retrogressive decision in English administrative law.’ In *ABCIFER*²¹ Dyson LJ (as he then was) had ‘difficulty in seeing what justification there is now for retaining the *Wednesbury* test’, and felt that it was for the House of Lords, not the Court of Appeal to perform ‘its burial rites’.

¹⁸ *R (on the application of Keyu) v Secretary of State for foreign and Commonwealth Affairs* [2015] UKSC 69

¹⁹ For example, J King, ‘Proportionality: a Halfway House’ (2010) *New Zealand Law Review* 327; J Goodwin ‘The Last Defence of *Wednesbury*’ 2012 *PL* 445; P Daly, ‘*Wednesbury*’s reasons and structure, 2016 *PL* 238; Mark Elliott, ‘Proportionality and deference: the importance of a structured approach in’ in F Forsyth (ed) *Effective Judicial Review: A Cornerstone of Good Governance*, Oxford: Oxford University Press, 2016, chapter 16; M Elliott and H Wilberg (eds), ‘*The Scope and Intensity of Substantive Review*’ Oxford, Hart Publishing 2015.

²⁰ *R (Daly) v Secretary of State* [2001] 1 AC 532.

²¹ *R (Association of British Civilian Internees (Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473

Lord Carnwath states: ‘By 2000 the courts recognised the concept of a ‘sliding scale’ of rationality review depending on the nature and gravity of the case. At the same time the Human rights Act 1998 required judges to apply a test of ‘proportionality’, derived from the European Court of Human Rights. There is now little to choose between the two principles. The actual decision in *Wednesbury* would be difficult to justify under the modern law, and its days as an authority may be numbered.’²² At the end of his lecture his Lordship again commenting on the end of his future judicial tenure states: ‘I will be interested to see whether by the end of that period we have not finally consigned *Wednesbury* to history.’²³ Laws L J has also criticised the rationality test, stating as unacceptable ‘monolithic’, equating it with ‘a crude duty not to emulate the brute beasts that have no understanding.’²⁴

It is however, possible to produce evidence for the view that the rationality test is still useful. For example, Professor Andrew Le Sueur, found that out of 41 judicial review cases between January 2000 and July 2003 the success rate on challenges on grounds of unreasonableness was 18 out of 41.²⁵ Importantly, *Wednesbury* has not been overruled.

Lord Carnwath stated: ‘Thus in *Begbie*²⁶ Laws L J redefined the *Wednesbury* principle as ‘a sliding scale of review more or less intrusive according to the nature and gravity of what is at stake.’

²² Lord Carnwath, From Rationality to Proportionality In the Modern Law , 14th April 2014 at the joint UCL-HKU conference ‘Judicial Review in a Changing Society’ at Hong Kong University, p.1

²³ *ibid* p.17

²⁴ Is the High Court the Guardian of Fundamental Constitutional Rights? (1993) PL 59,69,74

²⁵ Professor Andrew L Sueur, The Rise and Ruin of Reasonableness? (2004)

<http://www.adminlaw.org.uk/docs/ALBA>

²⁶ *R v Department of Education ex p Begbie* [2000] 1 WLR 111, at 1130

The problem with sliding scales

This author finds agreement with Lord Carnwath when he states: ‘Sliding ²⁷scales only work if one has measurable standards to which they can be applied; otherwise it is a matter less of sliding scales than (to quote Professor Le Sueur once more) of ‘slithering about in grey areas.’²⁸

This author argues that there is considerable merit in having a range of judicial review tools - a spectrum of substantive review standards, none more so than keeping the *Wednesbury* and proportionality tests, which can operate alongside a stewardship test: neither cancels each other out and each have merit in being able to apply in a different situation. For example, the proportionality test has been proven to be of value in human rights cases, where a proportionality test insists that any restriction must be a proportionate response, and be no more than is necessary to accomplish the legitimate purpose in question. Mike Taggart’s²⁹ bifurcation thesis argued that proportionality should be reserved for rights – based challenges with low intensity review being used in non – rights based cases. Professor Paul Craig maintains a different position to bifurcation insisting that bifurcation should be resisted ³⁰and that proportionality should be a general head of judicial review

Rebecca Williams when dealing with the difference between *Wednesbury* and proportionality states: There is an obvious contrast in that *Wednesbury* simply asks about the ‘unreasonableness’ of the decision, while proportionality asks more specifically about, whether the decision was suitable, necessary or proportionate in

²⁷ Supra 22, p.12

²⁸ Supra 25

²⁹ Proportionality, Deference, *Wednesbury* (2008) NZ L Rev 423

³⁰ Professor Craig is joined in this camp by Murray Hunt and Philip Joseph

the sense of striking a ‘fair balance’ overall (proportionality ‘stricto sensus’).³¹ Thus the proportionality test is considered more structured than common law rationality review-a conclusion confirmed by the cases of *Kennedy*³² and *Pham*.³³ It is extremely important has pointed out by Lord Mance in *Pham* and supported by this author and the work of Mark Elliott that the intensity of proportionality is not determined by its structure ,but by the degree of judicial restraint produced by applying it.

There is no doubt that proportionality will continue to be used as a substantive review tool. This author argues that it can operate alongside principles of stewardship. A recent Court of appeal case involving *Wandsworth LBC*³⁴ illustrates this point. It concerned an unmarried person and a condition in the Housing Act 1985 s. 87(b) which required, up until 1st April 2012 that the long – term partner of a secure tenant had to have resided with the secure tenant throughout the 12 – month period prior to the secure tenant’s death. She fell within the definition of a ‘family member’ but could not satisfy the 12 – month rule. It was held that even if the situations of common law spouses and married or civil partnership spouses were analogous for the purposes of ECHR art.14, the difference in treatment between them was justified and proportionate. The imposition of the 12- month rule was the best available objective demonstration that a relationship had the necessary permanence and constancy required by the legislation. In the judgment reference was made to local authority secure tenancies and whilst their lordships did not specifically use the phrase ‘stewardship, it was clear that this was what they had in mind when they stated:

³¹ Supra 4 p 100

³² *Kennedy v Information Commissioner* [2014] UKSC 20

³³ *Pham v Secretary of State for the Home Department* [2015] UKSC 19

³⁴ *R (on the application of Turley) v Wandsworth LBC* [2017] EWCA Civ 189

‘Although it had long been policy to grant a limited right of succession to family members for whom the property had also been their home, regard had also to be had to the interests of those on the waiting list and of local authorities in *making the best use of housing stock.*’ (*Emphasis added*)

In conclusion it is suggested that stewardship as a substantive review tool would aid decision making both from the aspect of day to day practical decision making by local authorities at the ‘coal face’ in their relationship with service users, but also in judicial review proceedings. Old doctrinal structures, such as *Wednesbury* need not be abandoned: application of stewardship principles provide a tool that can be used alongside *Wednesbury* and newer forms of proportionality review (if the context demands) and does not expose itself to a specific accusation of opening the door to unprincipled and unpredictable decision making.

The term equity in its wider application has come to be associated with justice and fairness. A central aim of this thesis was therefore to explore the bigger picture of fairness in the context of administrative law, and to consider whether fairness in this context is in anyway different from its application in equity. It was abundantly clear that equity does not have a monopoly on fairness in the adjudication process. There are plenty of examples of a fairness approach in administrative law, such as natural justice and procedural rules, as well as in public law principles themselves. There was, however the issue of substantive justice - those times when the administrative court considers itself compelled in effect to examine the merits of a case. This enquiry inevitably led to considering the emerging doctrine of substantive legitimate expectation in chapter seven. The seminal *Coughlan* case (see section 7.3) was selected (because, while that case involved a health authority and not a local authority, the issue of keeping promises by a public body was present) and provided a platform from which an analysis of equitable estoppel could be compared with legitimate expectations in administrative law- pre and post the decision.

It was useful to compare the equitable doctrine of promissory estoppel with the doctrine of legitimate expectation in order to continue to explore if, and to what extent equity could be of use in public law. There were however, major differences, none more so than that estoppel was based on a 'right', whereas legitimate expectation was, as the name conveys a mere 'expectation', albeit that it had to be lawful. As Jonathan Moffatt identified, early legitimate expectation cases recognised the fact that legitimate expectations fall short of 'private law' - rights, identifying them more as 'moral obligations'³⁵. As a result, public law struggles with this concept, and unfairness can seem to result when a local authority resiles from a promise it has made. Research showed that in some instances administrative law extended beyond equity, to cover a situation where a local authority had a policy and a promise had been made to an individual even if he was totally unaware of it.³⁶

On grounds of practical rationality local authorities must of course be allowed to get on with local administration, by amending policies or introducing new ones - a necessary consequence of good stewardship, tailoring and attending to changing needs in a local environment. The court may consider that although a local authority has triggered a legitimate expectation, nevertheless cogent evidence of the weight of the public interest factor outbids the individual's interest. A straight transition of estoppel rules from equity to administrative law would not help the aggrieved promisee.

The development of principles relating to substantive legitimate expectations generated by a local authority is an example of an area which owes much to equity. These principles include a mix of common law and equity and equity continues to add significant distinctive features which strengthen legal accountability. This author considers that a successful outcome, as in *Coughlan* will be rare; but that a clear distinction should be drawn

³⁵ Jonathan Moffatt, 'Resiling from Legitimate Expectations' (Counsel's note, 23 July, 2008)

³⁶ See, *Ahmed v Secretary of State for the Home Department* [1999] Imm AR 22, 40 (Hobhouse LJ); *R (S) v Secretary for State for the Home Department* [2007] EWCA Civ 546, [34] (Carnwath LJ); *R (Niazi) v Secretary for State of the Home Office* [2008] EWCA Civ 755 [30] (Laws LJ). cf, *R v Ministry of Defence, ex parte Walker* [2000] 1 WLR 813, 806 (Lord Slynn)

between promises made in the context of changes of general policy and promises of a direct personal nature of the quality of the promise made to Miss Coughlan. Such an approach would soften the blow to the claimant where hardship has been suffered and new remedies developed.

8.3 Methodology

This thesis has used a mixed methodology drawing on traditional doctrinal analysis, together with historical and, philosophical approaches. Traditional doctrinal analysis has helped us to identify the current state of the law on private trusts and fiduciary obligations-and to draw out how judges have approached the potential benefits of applying equitable concepts to administrative law, and the challenges presented by doing so. The interaction between local authorities and their service users was the central focus.

The historical approach was applied in two instances. Firstly, an historical perspective on the origin, development and composition of the tollgate trusts (see chapter four, section 4.3) demonstrated that there was an early workable form of community public trust. Secondly, re-visiting three seminal public law cases (see Chapter five), spanning a fifty year period, demonstrated that there was continuity of judicial thought of a stewardship concept applied to local authorities and the way they deal with and should be accountable for their use of public funds and assets. Those cases demonstrated an underlying tension shown throughout by this research of the difficult task faced by local authorities of balancing a range of conflicting interests.

The philosophical approach asked a basic, but a very important question: what is the nature of 'loyalty' and how (if at all) can it be applied in the context of local authorities and their service users? This thesis demonstrated that loyalty is a

major obstacle to transposing concepts of fiduciary duty to the public sphere. This is because the core nature of fiduciary obligation is loyalty between fiduciary and beneficiary and therefore by the very nature of the diverse homogenous nature of local authority service users presents problems. This thesis found that fiduciary duty could have a role where loyalty was applied to the statutory purpose and not directly towards specific individuals.

8.4 Limitations of Research

This research has been limited by the nature of the methodology used, which was based on reference to a number of sources of case law, judicial and academic works, rather than the product of empirical research conducted by this author. Such empirical research would have centred on the significance of the fiduciary nature of local government and the practical relevance of public law remedies, such as declaratory relief for the aggrieved service user, and recognition (or otherwise) of those at the front line of local service delivery of ethics, such as stewardship. Such empirical research was considered to be of limited value, unless conducted to a greater length and over a longer research period, and is suggested for further research below.

8.5 Areas for further research

It is clear that equity in relation to administrative law is a neglected research area. This section suggests a few areas for further research.

8.5.1 Remedial questions

One of the grounds of opposition used by those scholars who oppose the transition of fiduciary - like principles to government is that present private law remedies, such as damages or an account for profits, do not easily 'fit' the sphere of administrative law.

There is no reason however, when considering cases of a local authority resiling from a promise made and injustice caused, for example in legitimate expectation challenges that the debate be widened to include some form of new relief, such as equitable damages. It is acknowledged that this is a controversial area, but future research could explore the use of a ‘benefit exercise of discretion’ adopted by May LJ³⁷, and building on the ‘theory of entitlement’ presented by D Cohen and J Smith³⁸ and the extent to which a compensatory damages award is feasible.

8.5.2 Joint collaboration working agreements

The changing face of local authority service delivery with its greater emphasis on collaborative working, not only with the private sector, but also between local authorities is an area that would greatly benefit from further research. It is extremely important that the arrangements made between local authorities are properly classified and are not left whether there is a contractual nexus, but only mere declarations of intent between parties. A pertinent question is whether such collaborative arrangements lead to a fiduciary relationship and if so what will the fiduciary duties comprise? This area of research is all the more pressing since there have been recent government announcements concerning local government devolution and suggestions of county councils merging with each other or their own district councils.³⁹ It is a mistake not to include discussions about the legal

³⁷ *Rowland v Environment Agency* [2003] EWCA Civ 1885; [2005] Ch 1

³⁸ D Cohen and J Smith, ‘Entitlement and the Body Politic: Rethinking Negligence in Public Law’ (1986) 64 Can Bar Rev 1, 30. See further, M Fordham, ‘Monetary Awards in Judicial Review’ [2009] PL1; Law Commission, *Administrative Redress; Public Bodies and the Citizen* (Law Com Consultation Paper No 187, 2008); P Hogg, ‘Compensation for Damage Caused by Government’ (1995) 6 NJCL 7

³⁹ For example, seven councils in North Yorkshire have spoken out against proposals to merge them into a single authority. North Yorkshire council have voted in favour of merger with their seven district councils. Instead of district councils running some services and the county council controlling others, it would mean just one authority doing everything. But, the district councils have said the move would create a body ‘too big to deliver the local services

relationship between proposed larger councils and their service users. The stewardship principle based on an ethic of care should not be obscured in the search for greater economies of scale.

8.5.3 Identifying Equity's social role and contribution to a changing local government landscape

Finally, and in the author's opinion, perhaps the most important area for future research is the need to map the social role of equity. Equity has proved a flexible device able to deal with many problems in society ranging from disputes about ownership of the family home to large complex commercial disputes. The author considers that equity is a necessary part of a legal system to achieve social goals and to protect the rights of the individual, to ensure fairness through conscionable behaviour. The challenge for future research is to frame coherent legal concepts in order to achieve this objective, a task that is all the more urgent because of the change in the *modus operandi* of public administration toward 'contracting out'.

One powerful reason in favour of extending the application of equity in schemes of public governance, as John Fitzgerald states is because of 'the absence from our legal system of prescribed standards of ethical behaviour unique or peculiar to public officials.'⁴⁰ This author would include public institutions, such as local authorities.

people expect.' Hambleton district Council Leader Arthur Baker speaking on behalf of the affected district authorities, said: We do not believe this is the best way forward. It will create remote government not local government.' North Yorkshire - at over 3,000 square miles in size and with over 580,000 residents - is simply too big to be managed by one authority-it would not be able to reflect communities and their individual needs.'

⁴⁰ John Fitzgerald, 'The Role of Equity in Public Law' in John McMillan (ed), '*Administrative Law in the Coalition government*' (Australian Institute of Administrative Law Inc 1997) 188-197. He discusses the relationship between a child who is a ward of the

The way that administrative courts deal with the conflict between the interests of the public body in exercising its discretionary power and the interests of citizens when a local authority has resiled on its promise, is worthy of greater research. This is particularly important, not only because of the frequency and ease with which such substantive expectations may be generated, but also because failing to uphold a lawful expectation can create questions of the law's legitimacy. Case law illustrates that often these substantive issues involve social rights, such as welfare and housing benefits and difficult polycentric issues of resource allocation. Such research could be conducted through the lens of equity, and whether equitable principles would provide a greater measure of fairness of outcome, particularly drawing coherent lines between policy assurances and those of a direct personalised nature, as in *Coughlan*, and the nature of expectations as opposed to rights. Keeping promises is good stewardship and governance.

Greater emphasis of research could be applied to the historical foundations of equity, founded on 'conscience' and its relation to early common law, when the Curia Regis or Aula Regis ('King's Court') administered both law and equity. If we are to conclude that equity has a place in administrative law, then greater research into the precise origin and inherent nature of equity needs to be undertaken, rather than simply relying on a common perspective of equity as discretionary or a 'gap filler.'⁴¹

state and the agency which is considered the guardian to which fiduciary responsibilities apply

⁴¹ See, Dr P G Turner, Equity and Administration chapter 1 in *'Equity and Administration'* (Cambridge University Press 2016), pp.6-15 where an excellent summary of perspectives of modern equity are provided, including equity as discretionary, as an alibi or subterfuge, equity as obscurity and compulsory

8.5.4 The nature of a statutory corporation

There is an identifiable need to define with accuracy what is meant by a statutory corporation, such as a local authority, because there is uncertainty whether the entity is purely service orientated or affected by commercial considerations, and if so, to what extent. Such a definition would assist local authorities in polycentric decision making, where often economic and social welfare considerations clash. Statutory provisions do not help. In fact it can be robustly argued that the power of competence granted to local authorities by the Localism Act⁴² has muddied the water.

8.5.5 A stewardship concept based on an ethic of care

Research on application of a stewardship principle in public law would benefit from further analysis of how the three tests of *Wednesbury*, proportionality and stewardship would work and relate in practice, especially when each would be used. This research would incorporate whether another substantive review test would only add to concerns of additional complexity.

8.6 A Final reflection

To echo Professor Tamar Frankel, Equity brings values and ethical standards without which society, its institutions and relationships cannot survive, let alone flourish. Such a reflection equally applies to the relationship between local authorities and their service users. This author calls for a system of law that is richer and stronger by

⁴² The General Power of Competence under the Localism Act 2011 allows local authorities to expand their trading activities into areas not related to their existing functions, and removes geographical boundaries. It is now possible for local authorities to set up a trading company anywhere in the UK or elsewhere. Under previous legislation, the Local Government Act 2003 local authorities are allowed to establish trading companies (LATCS) particularly for income generation. This must be done by a separate trading company limited by shares, a company limited by guarantee or an industrial provident society

blending principles of equity, common law and statute in its legislative, judicial and administrative decision making processes.

Equity still has a roving commission in English law and never more so than in public law. The challenge is to identify those situations and extent that such equitable principles could contribute to combating abuse of power that can occur in the often complex and diverse decision making relationship between local authorities and their service users.

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APPENDICES**DIAGRAMS**

A. Council rates and receipts of council tax and non-domestic rates in England 2015-2016	403
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DIAGRAM A

Chart C: Council tax: amount collected in year: England 2015-16

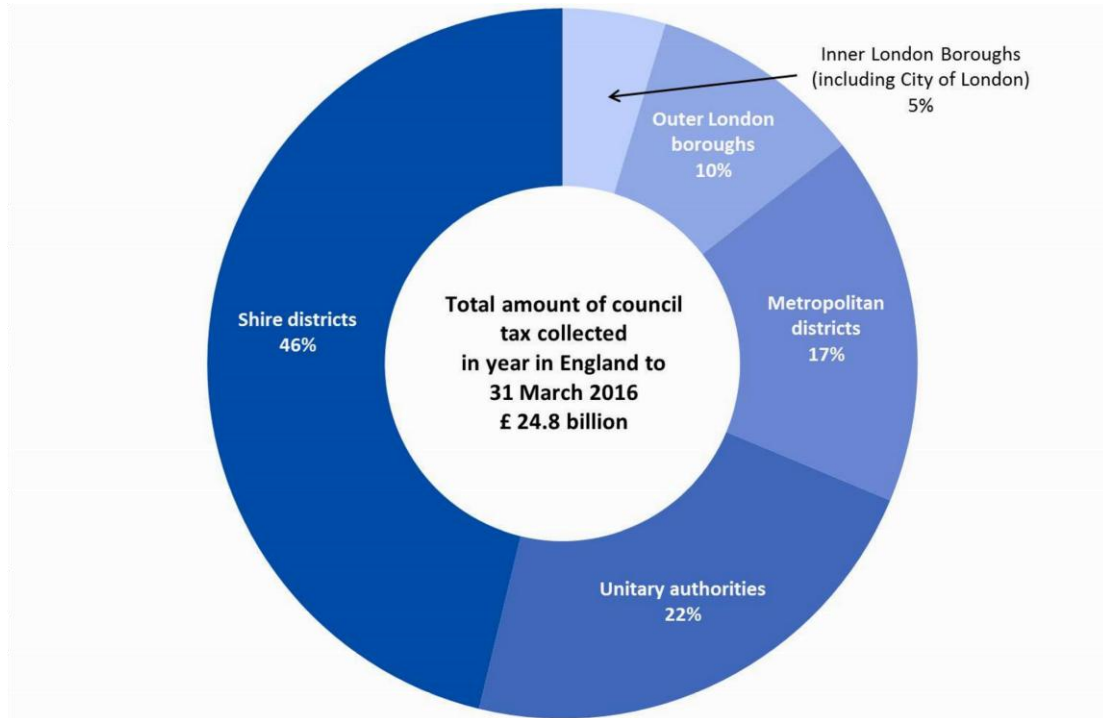


Chart D: Non-domestic rates: amount collected in year: England 2015-16

Collection rates and receipts of council tax and non-domestic rates in England 2015-16, Statistical Release 9

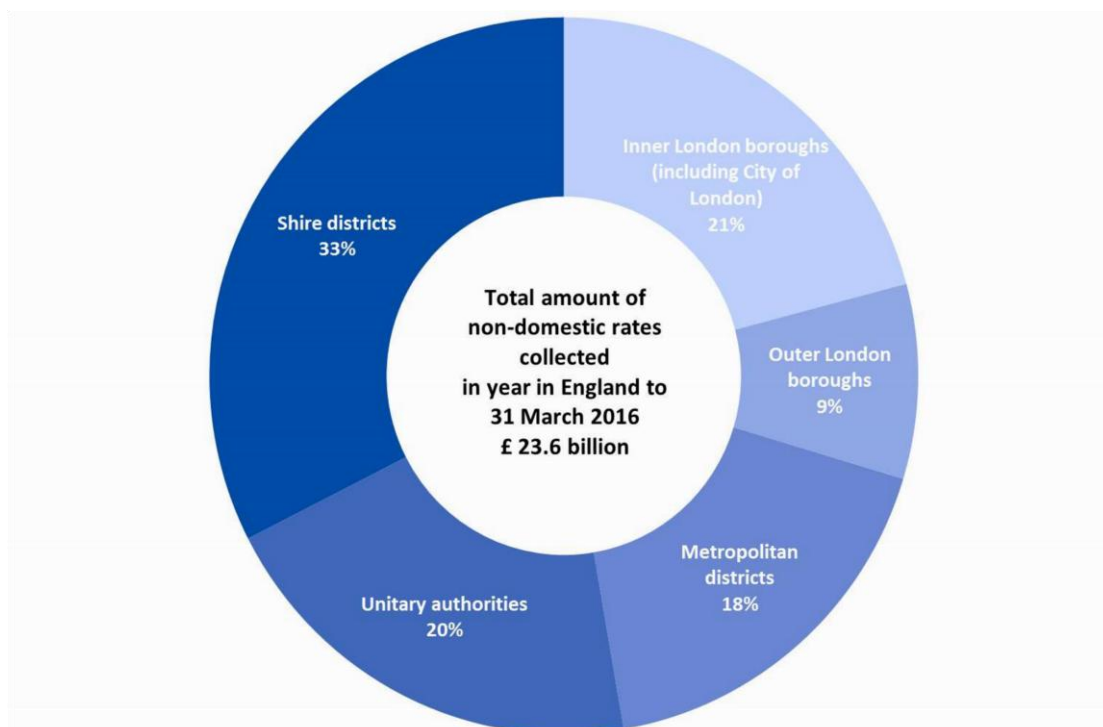


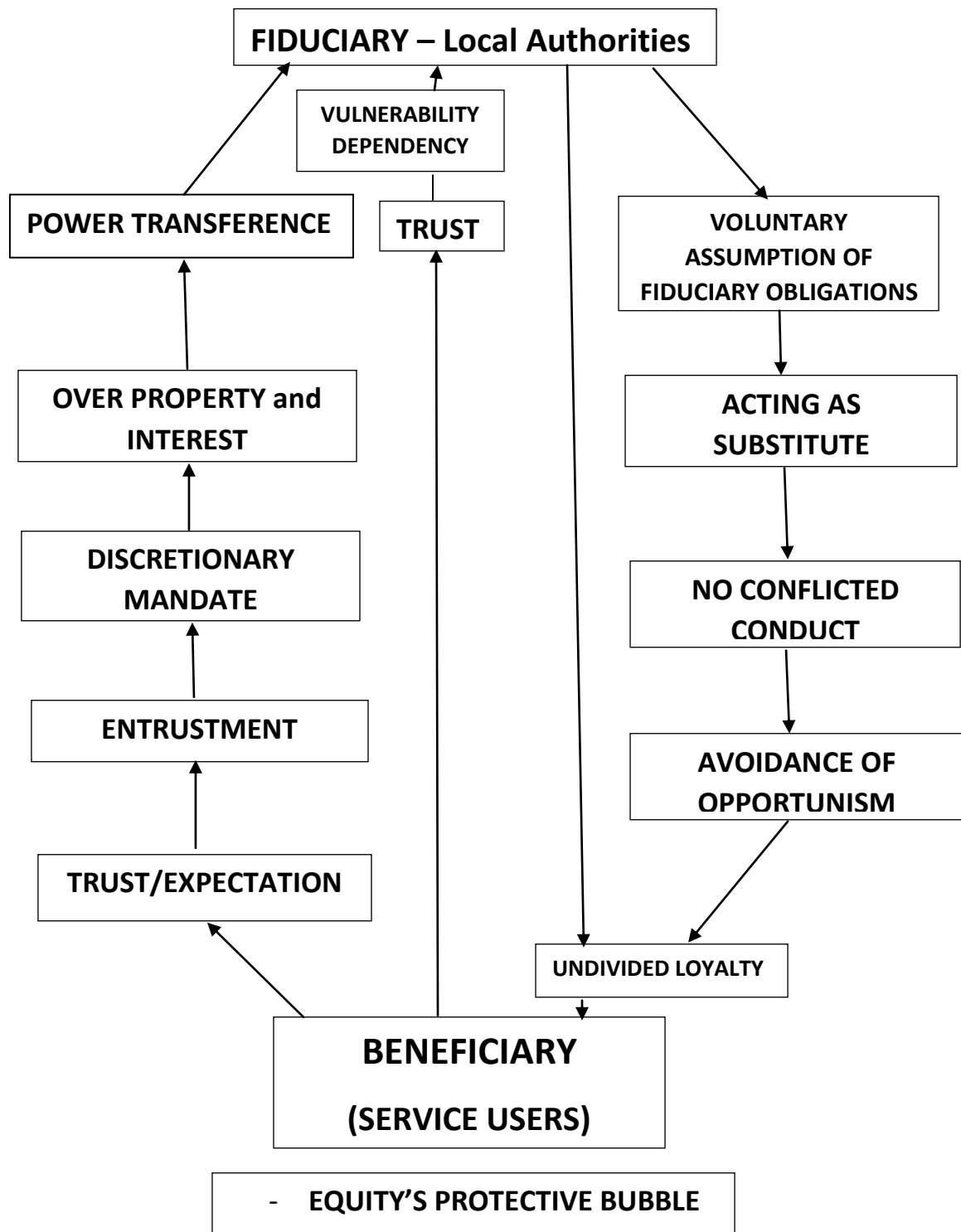
DIAGRAM B**FIDUCIARY RELATIONSHIPS****(Context of Local Authorities and their service users)****RELATIONAL INDICATORS Chapter Two**

DIAGRAM C

TRANSLATING FIDUCIARY PRINCIPLES INTO PUBLIC LAW

TRANSLATION OBSTACLES

(Chapter Four)

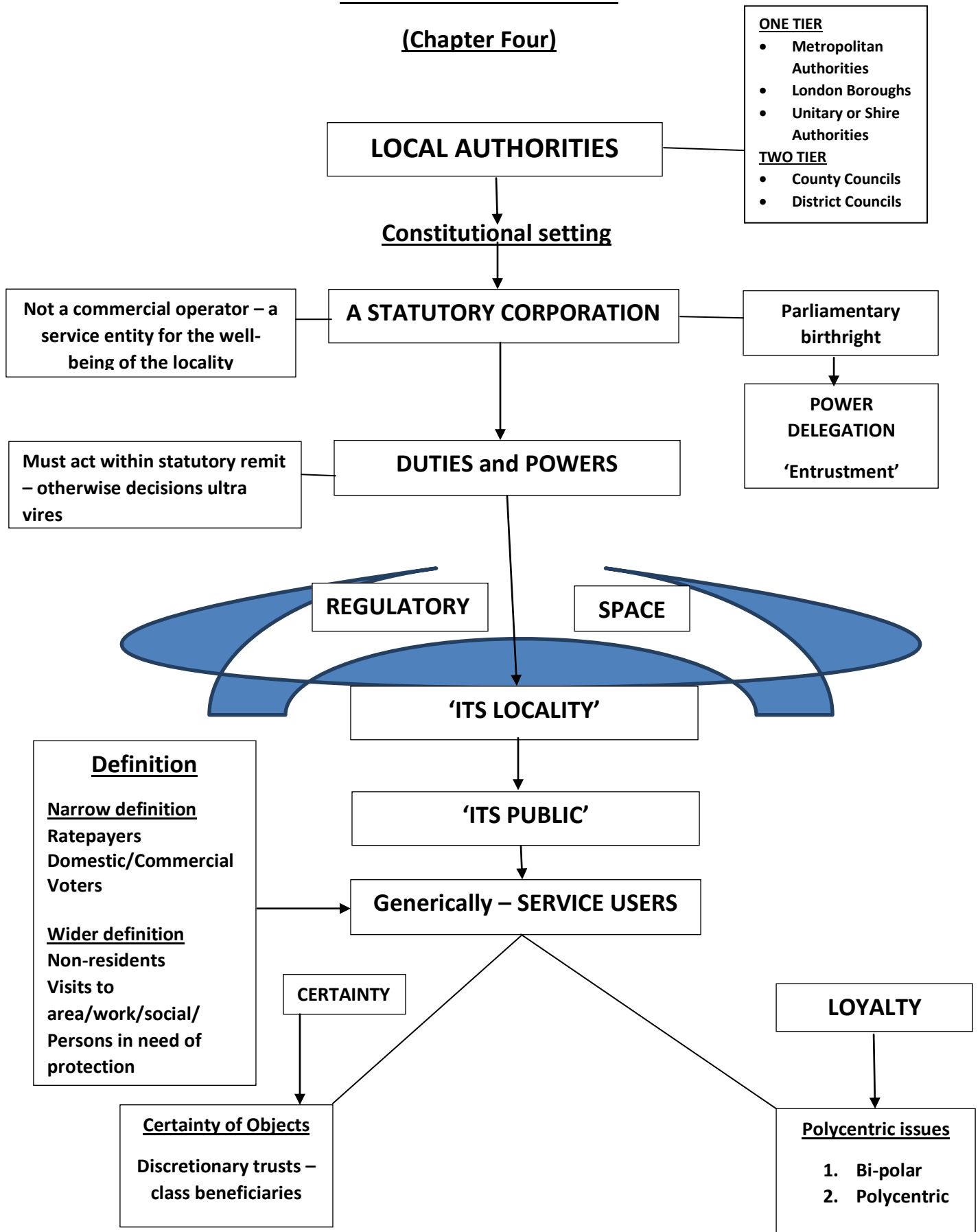


DIAGRAM D
Chapter Seven

Equitable principles – fiduciary government
Promotes fairness

Types

1. PROCEDURAL – procedural based/Natural Justice
2. SUBSTANTIVE – Merits approach

LEGITIMATE EXPECTATION

WEDNESBURY
Q. Consider whether unreasonableness in the Wednesbury sense, also involves judicial consideration of the substance of administrative decisions

CREATION (How it arises)

1. POLICIES
2. PROMISES
3. Public statements/representatives
4. Regular practice adoptions

WIDER ISSUES

1. Public/Private law divide – can private law concepts be used in public law with any theoretical coherence
2. Procedure v Outcomes (substance)

EXPECTATIONS
Nature – Contract like/characteristics crystallising expectations into ‘Rights’

Facilitative role of SLE doctrine provides a bridge to new terrain

LEGALITY AND MERITS
Distinctions between ‘The twilight zone’

RELIANCE

1. Must there be reliance to succeed?
2. Is the reliance test subjective or objective?

CONSTITUTIONAL ISSUES
Role of courts in Constitutional model – Review not appeal function
Separation of Powers – trespassing on the executive role

CASE REVIEW
Coughlan, tax, prisoner cases

PUBLIC INTEREST - is there an overriding public interest?
The Public good v Private rights

