

## JUSTIFYING EQUITY'S CONTROL OF POWER - STATUS AND BEYOND

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### PART I INTRODUCTION

Generally speaking, a legal power allows its holder to make and pursue decisions by taking action(s) that affect change to another's legal relations in some way. Some power-holders, such as agents, express trustees, personal representatives or corporate directors, for example, are subject to equitable principles that prescribe the changes a power-holder may affect, the purposes she may pursue, and the circumstances in which she is permitted to exercise her power. An execution that fails to satisfy one or more of these principles may impugn the effectiveness of the exercise of power and/or render the power-holder, and sometimes third-parties, liable to various equitable remedies. Although this is not true for all power-holders. Others will be able to use their power as they wish and for the pursuits of their choosing. Further, there are a range of discrete equitable principles and not all power-holders are controlled in the same way.

Equity's control of power is vital to the integrity and function of the range of relationships and institutions that rely on the devolution of power for their function. It is an important legal phenomenon to explain and justify. A power-holder's status is the juridical justification or legal reason given in some cases and theoretical scholarship as to *when and why* equity controls some power-holders, and not others. Status is considered justificatory in and of itself, denoting particular normative values that justify equity's controls, including fraud on a power and fiduciary loyalty.

This chapter examines the relevance and limits of status as a juridical justification for equity's control of power. Some of the problems with status have been pointed out before, particularly in relation to fiduciary loyalty.<sup>1</sup> This chapter makes the broader argument that status should not be relied upon to justify equity's control of power *generally*, including but not limited to, fiduciary loyalty. Status is a convenient analytical short-cut or by-pass to what is the (real) justification for this phenomenon; equity's commitment to the terms on which a power is held. The chapter goes on to consider how equity's commitment to the terms may, in the future, help to answer some of the questions that status has previously been relied upon to answer, such as equity's role in controlling contractual powers and the normative value(s) underpinnings fiduciary loyalty.

The analysis in this chapter will proceed as follows: Part II.A explains what a legal power is, and Part II.B gives a brief overview of some types of equitable controls. Part III explores the juridical justifications for equity's control, the limits to status, and equity's commitment to the terms. Part IV concludes by considering the future relevance of equity's commitment to answering some of the questions that status has previously been relied upon to answer.

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<sup>1</sup> A small sample includes: *Guerin v Canada* [1984] 2 SCR 335, 341 (Dickson CJ); *Breen v Williams* (1996) 186 CLR 71, 137-138 (Gummow J); *Bristol and West Building Society v Mothew* [1998] Ch 1, 18 (Millet LJ); L Sealy, 'Fiduciary Relationships' [1962] CLJ 69, 73; P Finn, *Fiduciary Obligations* (LawBook Co 1977), 2; J Edelman, 'When Do Fiduciary Duties Arise?' (2010) 126 LQR 302, 302; J Edelman 'The Role of Status in the Law of Obligations' in A Gold and P Miller (eds), *Philosophical Foundations of Fiduciary Law* (OUP, 2014), 21, 37; P Miller, 'The Idea of Status in Fiduciary Law' in P Miller and A Gold (eds) *Contract, Status and Fiduciary Law* (2016, OUP) ch 1.

## PART II EQUITY'S CONTROL OF LEGAL POWERS

### A. Legal Powers

*Power* can be defined in different ways,<sup>2</sup> and there are a range of taxonomies for understanding various powers.<sup>3</sup> This chapter is not concerned with any and all forms of power, only with a power-holder's ability intentionally to change an object's legal status. This type of power can be captured by Professor Hohfeld's concept of a *legal power*,<sup>4</sup> and includes an agent's power to transfer the principal's title to property to a third party or a trustee's power to vary the trust terms. This type of power is a legal construct in that it is conferred on a legal person by or under the law, such as a constitution, statute, common law or equitable principle(s).<sup>5</sup> The law defines the existence and scope of a power by prescribing the intentional actions that a power-holder must take to affect a change to the legal status of another, as well as the consequences or change(s) that apply in response to execution.

A titleholder's power to deal with her title to specific property, for example, is defined by the relevant principles of law, equity and statute that determine the assignability of the subject property.<sup>6</sup> Further, there are the principles of law that define the consequences of those actions, such as the principles of property law and tort law defining the transferee's various legal entitlements held as an incident of her title. Similar comments can be made about the law's creation of other legal powers. A board of directors' power to issue shares on behalf of its company is defined by the relevant company's legislation, general law and articles of association, which determine when and how shares can be issued or their terms varied,<sup>7</sup> and the legal consequences of those actions.<sup>8</sup> A trustee's power to vary the terms according to which they hold title to the trust property is defined by the relevant principles of equity and, in some instances, statute(s), that provide for when and how that power may be exercised effectively, and the consequences of those actions.<sup>9</sup> These are just a few examples demonstrating the variety of juridical sources that determine various legal powers.

The legal rules that define the existence and scope of a power vary as to the precise actions that must be taken to exercise these and other legal powers. However, the requirement that the power-holder's actions in execution must be intentional or volitional is common to all. Execution thus presupposes some prior decision or choice having been made by the power-holder to affect some change(s) by taking action(s) as necessary to exercise the power. In this way, a legal power allows its holder to make decisions or choices to pursue certain end(s) by changing the legal status of another. Those ends might be in furtherance of personal goals and values, or execution of an office, such as that held by a public

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<sup>2</sup> See generally, S Lukes, *Power: A Radical View* 2<sup>nd</sup> edn (London, Palgrave Macmillan, 2005); G Thomas, *Thomas on Powers* (OUP, 2012), [1.01]-[1.07], noting that the term takes up six pages in the *Oxford English Dictionary* (2<sup>nd</sup> edn, 1989) Vol XII, 259-264.

<sup>3</sup> For examples of different taxonomies of legal powers, see eg *In Re D'Angibau* (1880) 15 Ch D 228, 232; *Mettoy v Evans* [1990] 1 WLR 1587, 1613-1614.

<sup>4</sup> W Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16, 44-46. See also, C Essert, 'Legal Powers in Private Law' (2015) 21 LT 136. A legal power is also referred to as a 'formal power' in P Finn 'Controlling the Exercise of Power' (1996) 7 PLR 86.

<sup>5</sup> See further Finn 'Controlling the Exercise of Power' (n 4).

<sup>6</sup> Eg, the scope of a power to deal with: title to land is set out in the *Land Registration Act* 2002, Pt 3; a chose in action in the *Law of Property Act* 1925, s 136; *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454, 462; *Corin v Patton* (1990) 169 CLR 525, 556-59 (Mason CJ and McHugh J); *Law of Property Act* 1925, s 53(1)(c).

<sup>7</sup> As in: *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821; *Eclairs Group Ltd v JKX Oil & Gas plc* [2015] UKSC 71.

<sup>8</sup> Which, for example, might define a shareholder's rights, powers, liabilities and duties viz a viz the company.

<sup>9</sup> See, eg, *Maundrell v Maundrell* (1805) 10 Ves Jun 246, 252; *Re Ackerley* [1913] 1 Ch 510; *Fischer v Nemeske Pty Ltd* [2016] HCA 11, (2016) 257 CLR 615 [32], [50]-[54].

official, company director or express trustee. As we will see in Part II.B below, equity controls the power-holder in relation to the change affected by execution, as well as the prior decision or choice made by the power-holder. This analysis below interrogates some of the reasons for some of these controls, although it is first necessary to distinguish a legal power from other forms of power that also fall within equity's remit, and to explain this chapter's focus.

A legal power can be distinguished from other forms of power that arise from social facts, such as an ascendant party's ability to influence the decision-making of a weaker party, sometimes referred to as a factual power.<sup>10</sup> The ascendant party's power is not conferred by law. The weaker party retains the legal power to vary her legal status, and the ascendant party cannot contract for the weaker party nor deal with her property, for example. The social facts concerning the relationship between the parties may, however, mean that the ascendant party has some influence over how the weaker party will exercise its own legal power, so that it is '*as if*' the ascendant party had a legal power.<sup>11</sup> This chapter will refer to this sense of power as a *factual power* to distinguish it from a legal power. Equity is still interested in factual powers, as seen by the application of undue influence,<sup>12</sup> as well as fiduciary loyalty, to factual powers.<sup>13</sup> There are important things to be said about equity's remit in controlling these other powers, and we can observe a similar theme of reliance upon status as well.<sup>14</sup> This chapter has, however, confined its scope of inquiry to legal powers, on the basis that factual and legal powers are conferred and exercised in different ways, and have different effects such that the nature of and justification(s) for equitable control may be different.

Finally, there is the distinction sometimes drawn between a private power and a public power. An example of a private power is one held by a private individual and conferred on her via the operation of some private law doctrine, such as a contractual power, or one held as an incident of title to property. An example of a public power is one held by a public body or person occupying a public office, and which might be conferred by a statute, or regulation. The public-private divide is not perfect. It can be drawn according to different parameters, such as the status of the power-holder, the juridical source of the power, or the nature of the applicable legal controls. All these different parameters result in different conclusions as to whether a given power is 'private' or 'public'. This chapter will not explore this distinction further, because equity's various fiduciary and non-fiduciary controls apply irrespective. The exercise of power by express trustees, company directors, agents, and executors or personal representatives, for example, must all be exercised properly and in accordance with the terms on which they are held, and sometimes with fiduciary loyalty. These same equitable controls<sup>15</sup> have been imported to the public sphere as well. This chapter is interested in the juridical justifications for these controls however the spheres of their application are conceived.

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<sup>10</sup> Also referred to as an 'informal power' and described as a 'personal capacity an individual or body possesses to affect the interests, etc. of another ...'; Finn 'Controlling the Exercise of Power' (n 4) 87.

<sup>11</sup> L Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgment on Behalf of Another' (2014) 130 LQR 608, 618-619; L Smith, 'Parenthood is a Fiduciary Relationship' (2020) 70 University of Toronto Law Journal 395, 425.

<sup>12</sup> *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773; *Thorne v Kennedy* [2017] HCA 49, (2017) 263 CLR 85.

<sup>13</sup> *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371. The application of fiduciary loyalty beyond legal powers see, L Smith, 'Parenthood' (n 11) 425; P Miller, 'Justifying Fiduciary Duties' (2013) 58 McGill Law Journal 969.

<sup>14</sup> See eg, the categories of relationship where undue influence will be presumed, *Page v Horne* (1848) 11 Beav 227, 235 (Lord Langdale MR); *Thorne* (n 12) [34] (the Court).

<sup>15</sup> As explained in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49, 194 CLR 247, 267 (Gaudron, Gummow and Kirby JJ). A notable example is *R (Miller) v Prime Minister (Lord Advocate*

## B. Equity's Controls – an overview

Equity has multiple means of controlling the exercise of *some* legal powers and this chapter's aim is to understand why equity controls some but not others. Briefly outlined, first, are some of the various types of equitable controls. At a high level of generality all these principles can be understood as defining when one or another form of equitable relief is available, either to reverse or address the consequence of an impugned exercise of power or visit personal liability upon the power-holder or a third party. As to their differences, one point of distinction is the type of power subject to control, and not all of equity's controls apply to the same powers.

Another point of distinction is the content of a control, or in other words, the conduct a control requires of the power-holder and/or the prescribed or prohibited legal effect(s) of execution. Some equitable principles control the types of change that a power-holder may affect, while other controls are concerned with the purposes or ends that a power-holder seeks to achieve via execution, irrespective of the actual change affected.<sup>16</sup> This principle conditions the lawfulness of an exercise of power on the effect to the legal status of another produced by execution to be permitted by the terms according to which the power is held. The terms on which a power is held, their significance and the important but sometimes overlooked distinction between the (separate) terms that define the scope of a power are discussed further in Part III.D.1 below.

Also relevant to the arguments in this chapter is fraud on a power (also referred to as the proper purposes rule) which requires a power to be exercised, '... with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object...'.<sup>17</sup> Despite its name, fraud on a power is not concerned with actual fraud or dishonesty. 'Fraud' refers to the power-holder exercising the power with an intention to achieve an effect or outcome that is not permitted by the terms according to which a power is held. Fraud on a power is different to the first control, because it looks past the effect of an exercise of power to the power-holder's purpose in execution, or in other words to the effect(s) that the power-holder intended to achieve.

In addition, there is fiduciary loyalty, which, broadly speaking, prescribes the circumstances in which a power-holder may exercise her power. Common law jurisdictions tend to diverge on precisely what loyalty requires and the goal or end to which a fiduciary must be loyal.<sup>18</sup> Further, there is a lack of consensus upon which equitable principles are uniquely fiduciary and can thus be understood as

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*intervening*) (*The Miler 2 case*) [2019] UKSC 41, [2020] AC 373, where the Supreme Court of the United Kingdom declared that Parliament had not been prorogued on the basis that the Prime Minister's advice to the Queen was unlawful. See generally, Sir Anthony Mason *The Place of Equity and Equitable Remedies in the Contemporary Common Law World* (1994) 110 LQR 238; M Hanbury, 'Equity in Public Law' in *Essays in Equity*, (1934) 80, 112; E Sykes, 'The Injunction in Public Law' (1954) 2 University of Queensland Law Journal 114; J Spigelman, 'The Equitable Origins of the Improper Purpose Ground' in L Pearson, C Harlow and M Taggart (Eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson*, (Hart, 2008) 147.

<sup>16</sup> *Wong v Burt* [2004] NZCA 174, [27] (the Court). See also *Youyang Pty Limited v Minter Ellison Morris Fletcher* [2003] HCA 15, (2003) 212 CLR 484 [32] (the Court).

<sup>17</sup> *Duke of Portland v Topham* (1864) 11 HL Cas 32, 54; 11 ER 1242, 1251. See also *Vatcher v Paull* [1915] AC 372, 379-380 (Lord Parker).

<sup>18</sup> Indeed, there is debate as to whether loyalty is the core of the fiduciary obligation, see S Smith, 'The Deed, Not the Motive: Fiduciary Law Without Loyalty' in P Miller and A Gold (eds) *Contract, Status and Fiduciary Law* (OUP, 2016) ch 9. Another approach is to understand fiduciary loyalty as prohibits disloyalty and manifests as a liability rather than duty in J Penner, 'Is Loyalty a Virtue and Even if it is, Does it Really Help to Explain Fiduciary Liability' in A Gold and P Miller (eds) *Philosophical Foundations of Fiduciary Law* (OUP, 2016) ch 7.

forming part of a more generally conceived obligation of fiduciary loyalty. There are 'thin' accounts, according to which there are only two proscriptive requirements that are uniquely fiduciary; the duty to avoid a profit by reason or use of position and to avoid conflicts between a fiduciary's self-interest and duty, and duties owed to multiple principals.<sup>19</sup> At the other end of the spectrum, there are 'thicker' accounts of fiduciary loyalty, according to which there are further requirements, in addition to the no profit rule and no conflicts rule, that are also uniquely fiduciary.<sup>20</sup> On some of these thicker accounts of fiduciary loyalty, a duty of care and duty of good faith,<sup>21</sup> for example, are unique to and part of fiduciary loyalty because they have a different content to the parallel duties applying under similar labels to power-holders not also subject to fiduciary loyalty.<sup>22</sup>

Without wanting to downplay the theoretical and practical importance of these issues, it is not necessary for this chapter to resolve the content of fiduciary loyalty, which duties are uniquely fiduciary, or attract the description of fiduciary status. This chapter is interested in the conceptually prior question of the juridical justification(s) for equity's controls generally, including but not limited to fiduciary loyalty, thinly or thickly conceived.

### PART III: THE JURIDICAL JUSTIFICATION(S) FOR EQUITY'S CONTROLS

The existence of a power is not, *per se*, a reason for equity's control. Not any and all legal powers are subject to control, and for example, a titleholder *can* exercise her powers held incidental of her title in any way and for the purposes of her choosing. For any given power, there is thus a critical threshold question of whether it is subject to any equitable control, which controls, and why. One juridical justification relied upon in cases and academic scholarship is the power-holder's *status*. Fraud on a power and/or fiduciary loyalty are said to apply because of the power-holder's status as a trustee, agent or fiduciary, for example. The problems with this reliance upon status are set out in Part III.C below, and discussed first is the general concept of status, Part III.A, and how it has been relied upon as a juridical justification for equity's control of power, Part III.B.

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<sup>19</sup> *Breen* (n 1), 113 (Gaudron and McHugh JJ), 135 (Gummow J); *Howard v Federal Commissioner of Taxation* (2013) 253 CLR 83, [31] (French CJ and Keane J), [56] (Hayne and Crennan JJ); M Conaglen, *Fiduciary Loyalty* (Hart Publishing, 2010), 201-203.

<sup>20</sup> *Bristol* (n 1) 18 (Millett LJ); *Lehtimäki v Cooper* [2020] UKSC 33 [44] (Lady Arden); J Getzler, 'Rumford Market and the Genesis of Fiduciary Obligations' in A Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP, 2006) 577-598; L Smith, 'Prescriptive Fiduciary Duties' (2018) 37 QULJ 261; L Smith, 'Fiduciary Relationships' (n 11).

<sup>21</sup> There are different conceptions of good faith, not all of which are unique to fiduciary loyalty, see eg, the 'Imperial duty' of good faith requiring an employer to exercise its power(s) under a pension scheme in good faith in *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589 567; a requirement for a power-holder to form a conscious and sincere commitment in execution in *Dowager Duchess of Sutherland v Duke of Sutherland* [1893] 3 Ch 169 (Ch) 191-193 (Romer J), a requirement echoed, albeit under a different label in *Turner v Turner* [1984] Ch 100, 111 (Mervyn Davies J); *Wilson v Turner* (1883) LR 22 Ch D 521, and see the discussion of these cases in *IMG Pension Plan HR Trustees Ltd v German* [2009] EWHC 2785 [218]–[220]. See further: *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* [2015] FCA 825 [1003] (Edelman J); R Nolan and M Conaglen, 'Good Faith: What does it Mean for Fiduciaries and What Does it Tell Us About Them' in E Bant and M Harding (eds) *Exploring Private Law* (CUP, 2010) ch 14; L Smith, 'Fiduciary Relationships' (n 11); C Mitchell, 'Good Faith, Self-Denial and Mandatory Trustee Duties' (2018) 32 TLI 92.

<sup>22</sup> L Smith, 'Fiduciary Relationships' (n 11); L Smith 'Aspects of Loyalty' (31 July 2017) SSRN, accessed 24 September 2018, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3009894](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009894).

## A. Status

Broadly speaking, a person's status refers to their position in some sense, such as a person's social, moral or legal status. As has been explained by Professor Miller,<sup>23</sup> the attribution of status is the product of a process of characterisation of a person's position against some pre-determined set of criteria. The analytical utility of status is that it is a convenient by-pass of the process of characterisation, and prior articulation of the relevant set of criteria. For better or for worse, status simplifies analysis and argument by encapsulating a complex assessment of a person's position into one label.

The sense of status relevant to equity's control of power is legal status. *Legal status* is a characterisation of a power-holder's position as regards her legal relations, such as rights, powers, duties, and liabilities, for example. There are different sets of legal relations, all of which can be categorised in different and overlapping ways, and a given power-holder may occupy one or more forms of status, such as being a fiduciary, as well as one or more of express trustee, agent or company director, for example.

The attribution of status is a question of law and cases and statute have articulated criteria for determining whether and when a person's legal relations can be characterised by reference to a recognised status. A prominent example is fiduciary status, which is used in various ways to denote different features of a power-holder's position. Sometimes, fiduciary status is attributed to someone when they are subject to obligations of fiduciary loyalty. The types of legal relations that have attracted this status have changed and evolved.<sup>24</sup> Fiduciary status has sometimes been applied to a power-holder subject to any equitable control, such as fraud on a power.<sup>25</sup> Although has also been understood more narrowly to identify those power-holders who are subject to particular form of equitable control, fiduciary loyalty, and which includes, at minimum, the requirements of self-denial, avoidance of conflict and profits.<sup>26</sup>

Whether or not a power-holder is subject to fiduciary loyalty, and warrants the status of fiduciary, is often determined by reference to some other form of status, such as the power-holder's status as an express trustee, agent or company director, for example. This is the second sense of 'fiduciary status', which is a general category of status made up of particular statuses that are usually subject to fiduciary loyalty, such as the express trustee, agent or company director. Fiduciary status is thus used either to refer to a power-holder who is subject to fiduciary loyalty, or a power-holder who is attributed with another form of status that usually attracts fiduciary loyalty. Either way, both senses of fiduciary status are conclusions that describe the legal status of a power-holder, and which are dependent upon some prior assessment and application of relevant criteria. This is explained by Millett LJ in *Bristol and West Building Society v Mothew*,<sup>27</sup> a person 'is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary'.

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<sup>23</sup> See further, Miller, 'The Idea of Status' (n 1) Pt II, distinguishing, as well as exploring the connections between legal, social and moral statuses.

<sup>24</sup> A Televantos, 'Losing the Fiduciary Requirement for Equitable Tracing Claims' (2017) 133 LQR 492, 492; Sealy, 'Fiduciary Relationships' (n 1) 70-72.

<sup>25</sup> See eg, *Re Somes* [1896] 1 Ch 250, 255 (Chitty J); *Re Penrose* [1933] Ch 793.

<sup>26</sup> *Bristol* (n 1) 18.

<sup>27</sup> *Bristol* (n 1) referring to Finn, *Fiduciary Obligations* (n 1) 2.



Status is not a function of the label the parties use,<sup>28</sup> and depends upon the power-holder's legal relations including the rights, powers, and duties. So, for example, the status of express trustee depends on whether the power-holder holds her title to trust property subject to an obligation to obey the trust terms in her exercise of her rights and powers held as an incident of her title.<sup>29</sup> That status will not be attributed where the putative trustee is *not* subject to an obligation to obey a set of terms in her exercise of power as titleholder.<sup>30</sup> The existence of this obligation in turn depends upon the parties' actions in satisfying the rules for the creation of an express trusts, such as the three certainties.<sup>31</sup> At this stage of inquiry, the label the parties use is relevant to ascertaining the content of their intention, but what remains determinative is whether the parties intend to create the requisite complex of legal relations.

Another example is the status of agent. Agency has different meanings for different purposes. The concept of agency status that is relevant to determining equity's control of power is someone whose actions will count for another's and thus has a power to vary the legal status of another.<sup>32</sup> Again, the attribution of the status of agent will not be determined by the label the parties use to describe their relationship.<sup>33</sup> As with the attribution of status of fiduciary and express trustee, so too is the status of agent a conclusion that is the product of various analytical processes. This point is recognised in *Scott v Davis*,<sup>34</sup> Gleeson CJ explained that 'to describe a person as the agent of another ... is to express a conclusion [about the particular legal status of another] ... rather than to state a reason for such a conclusion.'

## B. Reliance on Status to Determine Equity's Control of Power

Sometimes, a power-holder's status is the reason given to explain when and why one or more equitable controls are said to apply. Usually, the application of fraud on a power is determined by reference to the status of the power-holder. The usual starting point is to ask whether a power-holder has a particular status that fraud on a power is recognised as applying, such as an express trustee,<sup>35</sup> agent,<sup>36</sup> mortgagee,<sup>37</sup> company director,<sup>38</sup> and majority of shareholders.<sup>39</sup> A similar reliance upon status determines fiduciary loyalty. A power-holder is subject to fiduciary loyalty because they occupy a particular status that is recognised as being subject to fiduciary loyalty, such as an express trustee,

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<sup>28</sup> *National Stadium Project (Grenada) Corporation v NH International (Caribbean) Limited (Trinidad and Tobago)* [2015] UKPC 6 [36]–[38]; *Webb v Webb* [2020] UKPC 22 [78]–[89] (Lord Kitchin, Lord Carnwath, Lady Black and Lord Briggs agreeing).

<sup>29</sup> D Hayton et al, *Underhill & Hayton: The Law Relating to Trusts and Trustees* (19th edn, LexisNexis, 2016) [1.1].

<sup>30</sup> As in: *Pearson v Lehman Bros Finance SA* [2010] EWHC 2914, [275] (Briggs J); *Webb* (n 28) [78]–[89] (Lord Kitchin, Lord Carnwath, Lady Black and Lord Briggs agreeing).

<sup>31</sup> *Knight v Knight* (1840) 3 Beav 148, 172–174 (Lord Langdale MR); *Garrett v L'Estrange* (1911) 13 CLR 430, 433–34 (Griffith CJ; Barton and O'Connor JJ agreeing).

<sup>32</sup> *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* [1958] HCA 16, (1958) 100 CLR 644, 652 (the Court); W A Seavey 'The Rationale of Agency' (1919–1920) 29 Yale Law Journal 859; P Watts, *Bowstead and Reynolds on Agency*, 21st edn (2019, Sweet & Maxwell), Article 1.

<sup>33</sup> *South Sydney District Rugby League Football Club Ltd v News Ltd* [2000] FCA 1541 [131]–[136], (2000) 177 ALR 611 (Finn J).

<sup>34</sup> *Scott v Davis* [2000] HCA 52, (2000) 204 CLR 333 [4], referring to *Launchbury v Morgans* [1973] AC 127, 135 (Lord Wilberforce).

<sup>35</sup> *Duke of Portland* (n 17); *Cowan v Scargill* [1985] 1 Ch 270, 287–288 (Sir Robert Megarry VC); *Harries v Church Commissioners* [1992] 1 WLR 1241, 1247 (Sir Donald Nicholls VC).

<sup>36</sup> *Reckitt v Barnett* [1929] AC 176; *Tobin v Broadbent* (1947) 75 CLR 378.

<sup>37</sup> *Yorkshire Bank Plc v Hall* [1999] 1 WLR 1713, 1728 (Robert Walker LJ, Kay J and Mantell LJ agreeing); *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295, 315 (Lord Templeman); *Barns v Queensland National Bank Ltd* (1906) 3 CLR 925, 943 (the Court).

<sup>38</sup> *Howard Smith* (n 7) 838; *Eclair* (n 7).

<sup>39</sup> *British Equitable Assurance Co Ltd v Bailey* [1906] AC 35, 42 (Lord Lindley); *Peters' American Delicacy Co Ltd v Heath* (1939) 61 CLR 457, 511 (Dixon J); *Houghton v Immer (No 155) Pty Ltd* [1997] 44 NSWLR 46, 53 (Handley JA).

company director or officer, or agent, for example.<sup>40</sup> Power-holders who have different statuses are not subject to fiduciary loyalty, such as mortgagees, or other lenders, for example. It is only for those legal (or factual powers) arising outside defined status-based categories that it has been necessary for various 'ad hoc' or 'on the facts' approaches<sup>41</sup> to determine whether fiduciary loyalty applies, some of which are extrapolations from the characteristics of the accepted status based fiduciary relationships.

A variation of reliance upon status is when it is a power-holder's *fiduciary status*, in particular, that determines the application of equitable controls including and beyond fiduciary loyalty.<sup>42</sup> Notable examples are *Lehtimäki v Cooper*<sup>43</sup> where Lady Arden states that 'the question whether a person is a fiduciary is important because of the duties which follow' and *Eclairs Group Ltd v JKN Oil & Gas plc*, where Lord Sumption stated, '[t]he limitation of [a]... power to its proper purpose derives from its fiduciary character'.<sup>44</sup> According to these views, equitable controls apply to a power-holder because of their fiduciary status. A more extreme example of this fiduciary focus is *Braganza v BP Shipping*,<sup>45</sup> where public law principles<sup>46</sup> were assumed to be the only alternative available to prevent the 'abuse' of a contractual discretionary power because the power-holder was not a fiduciary.<sup>47</sup> The underlying assumption in this and other cases<sup>48</sup> is that fiduciary status is a, and sometimes the only, reason for equity's control of power.

The problems with this reliance upon status are outlined in the following Part III.C.

### C. The Limits to Status

Professor Paul Miller has cautioned<sup>49</sup> that 'a posture of critical awareness' should be assumed towards status as it 'reflect[s] a prevailing need or desire of society to make simplifying assumptions about the normative positions of others'.<sup>50</sup> Professor Miller, and others have criticised, in particular, the reliance upon a power-holder's fiduciary status to determine the application of fiduciary loyalty.<sup>51</sup> This chapter continues this 'posture of critical awareness' although makes the broader argument that a power-

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<sup>40</sup> *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 1 WLR 1126, 1129-1130 (Lord Wilberforce); *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96-97. There is debate about the list of accepted categories, and divergence between common law jurisdictions, see eg, L Smith, 'Parenthood' (n 1).

<sup>41</sup> A small sample of differing approaches include: *Hospital Products* (n 40) 96-97; *Breen* (n 1), 107-108 (Gaudron and McHugh JJ); *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6, [177] (the Court).

<sup>42</sup> In part, the attention paid to fiduciaries can be understood given the strategic and practical implications thought to follow from a breach of *fiduciary* duty, such as knowing receipt and knowing assistance, and the scope of these liabilities are themselves 'controversial', as recognised in *Pages Property Investments Pty Ltd v Boros* [2020] NSWSC 1270 [41] (Black J), see also *Netglory Pty Ltd v Caratti* [2013] WASC 364 [345]-[350] (Edelman J).

<sup>43</sup> *Lehtimäki* (n 20) [42], [93] (Lady Arden) 'If Dr Lehtimäki is a fiduciary, then a well-known set of rules and remedies come into play', which in this case included the court's jurisdiction to direct a fiduciary to exercise a fiduciary discretion in a particular way.

<sup>44</sup> *Eclairs* (n 7), [39] (Lord Sumption), further, [30], [37]. See also *JKN Oil & Gas Plc v Eclairs Group Ltd* [2014] EWCA Civ 640 [122] (Briggs LJ); *Howard Smith* (n 7), 834, 837-838 (Lord Wilberforce); *Hogg v Cramphorn Ltd* [1967] 1 Ch 254, 268-269 (Buckley J); *Re Hay's Settlement Trusts* [1982] 1 WLR 202, 209 (Sir Robert Megarry VC).

<sup>45</sup> *Braganza v BP Shipping Ltd* [2015] UKSC 17.

<sup>46</sup> Such as: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

<sup>47</sup> *Braganza* (n 45) [19]-[28], see also, [30] (Lady Hale), [53] (Lord Hodge).

<sup>48</sup> Such as, *Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The "Product Star")* (No 2) [1993] 1 Lloyd's Rep 397, 404 (Leggatt LJ, with whom Balcombe and Mann LJ agreed); *Paragon Finance plc v Nash* [2002] 1 WLR 685 [32]-[42] (Dyson LJ); *Socimer International Bank Ltd v Standard Chartered Bank Ltd* [2008] EWCA Civ 116 [66] (Rix LJ).

<sup>49</sup> Miller, 'The Idea of Status' (n 1) 50.

<sup>50</sup> Miller, 'The Idea of Status' (n 1) 26-27.

<sup>51</sup> See n 1 above.



holder's status should not be relied upon to explain the general phenomenon of equity's control of power, which encompasses fiduciary loyalty and other discrete controls.

Status is, in part, the product of an assessment of a power-holder's *ex ante* legal relations, including those controlling the exercise of power. That assessment is short-circuited or 'by-pass[ed]'<sup>52</sup> by status and to this extent, status may be a convenient analytical and conceptual short-cut, but no more. It cannot itself be a justification for the very legal relations that are assumed by its ascription. A power-holder's status as a fiduciary, express trustee, agent or company director, for example, all assume a prior inquiry as to when and why the relevant legal relations exist, as well as a characterisation of those relations. Status, of one form or another, describes a power-holder's legal relations and cannot explain why they arise in the first place.

The limits to status can be shown in a further two ways. First, various types of status are plagued with definitional problems. Second, status is under-determinative of equity's controls, including fiduciary loyalty. Each are discussed in turn.

### 1. Definitional problems

Status short-circuits a further analytical process, which is the evaluation of the power-holder's legal relations against some pre-determined criteria. In so doing, status conceals the analytical frailties and instabilities that inure to this process. For example, the criteria by which a power-holder's position will be evaluated as meriting one form of status or another are not always clear or fixed. As mentioned already in Part III.C, the meaning of fiduciary, and when that status will be applied has varied. Similarly, for other statuses. '[C]onsiderable terminological confusion'<sup>53</sup> has been said to surround the meaning of 'agent' and Lord Herschell in *Kennedy v De Trafford*<sup>54</sup> remarked that '[n]o word is more commonly and constantly abused than the word "agent".' Similar comments can be made in relation to the status of 'trustee', which like agent and fiduciary, can assume different meanings for different purposes.<sup>55</sup> All this means that a reliance upon a power-holder's status assumes a complicated, and sometimes unstable, yet often unarticulated assessment, of when and why a power-holder is attributed a particular status as such.

Ultimately, and even when the criteria for the attribution of status is clear or fixed, one or more of these may depend upon some other concept of status.<sup>56</sup> Definitions of agency<sup>57</sup> or an express trustee,<sup>58</sup> for example, sometimes condition these statuses upon the pre-existence of the fiduciary status that typically *follows* from these other statuses.

### 2. Determination problems

Status is also under-determinative. There are some equitable controls that apply in the same way irrespective of a power-holder's status. As recognised by the New Zealand Court of Appeal<sup>59</sup> there is a 'fundamental juristic principle' of 'general application' according to which 'any form of authority

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<sup>52</sup> Miller, 'The Idea of Status' (n 1) 35.

<sup>53</sup> *Scott* (n 34) [227] (Gummow J).

<sup>54</sup> *Kennedy v De Trafford* [1897] AC 180, 188.

<sup>55</sup> See further, L Sealy, 'The Director as Trustee' [1967] CLJ 83.

<sup>56</sup> See further, *Wood v Commercial First Business Ltd* [2021] EWCA Civ 471 [26]ff (David Richards LJ, with whom Males and Laing LJ agreed).

<sup>57</sup> See eg, the definition of 'agency' in Article 1 of *Bowstead and Reynolds on Agency* (21st ed, Sweet & Maxwell, 2019) '[a]gency is the fiduciary relationship which exists between two persons...'

<sup>58</sup> *Trusts Act 2019* (New Zealand) s 13 'The characteristics of an express trust are ... (a) it is a fiduciary relationship...'

<sup>59</sup> *Wong* (n 16) [27] (the Court).

may only be exercised for the purposes conferred, and in accordance with its terms'. Equity's controls requiring compliance with the terms and a proper purpose (aka fraud on a power) apply to power-holders with recognised statuses, such as the express trustee,<sup>60</sup> director,<sup>61</sup> and agent,<sup>62</sup> and those who do not, such as third-party donees of powers under express trusts, for example.<sup>63</sup> Neither is fiduciary status determinative, and the High Court of Australia,<sup>64</sup> stated that a mortgagee's power of sale, '*like any other power*, must be exercised honestly, for the purposes of the power.'

Status tells us nothing about equity's remit. Status cannot be the reason for the requirement to obey the terms and to act for a proper purpose when these same requirements apply to those power-holders without such status. Indeed, fraud on a power was first developed in cases concerning power-holders who did *not* occupy any recognised status, being the donees of powers of jointure<sup>65</sup> in *Lane v Page*<sup>66</sup> and *Aleyn v Belchier*.<sup>67</sup>

Status is also not determinative of fiduciary loyalty. A power-holder with a status that typically attracts fiduciary loyalty, may still not be subject to fiduciary loyalty. For example, agents can act self-interestedly or otherwise in a position of conflict if permitted by the terms of the agency agreement.<sup>68</sup> Solicitors can act self-interestedly where the terms of the retainer allow.<sup>69</sup> Similarly, express trustees can act self-interestedly where the trust terms provide, as explained in *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* by Lord Templeman, who stated, '... as a general rule, a trustee is not allowed to derive a benefit from trust property, that general rule may be altered by the express terms of the trust instrument.'<sup>70</sup> This case, and others,<sup>71</sup> show, again, that status tells us little about the application and scope of equity's remit.

These cases are also instructive because they reveal what is determine of equity's control, and which can help us to contextualise the (limited) relevance of status - the terms on which a power is held. In each case, equity's remit depends on the relevant terms, and status can sometimes be a short-cut to

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<sup>60</sup> See eg: *Cowan* (n 35) 287-288 (Sir Robert Megarry VC); *Harries* (n 35) 1247 (Sir Donald Nicholls VC).

<sup>61</sup> As in: *Howard Smith* (n 7), 838; *Eclairs* (n 7). See also: Companies Act (England) s 171 'A director of a company must (a) act in accordance with the company's constitution ...'

<sup>62</sup> *John v Dodwell* [1918] AC 563; *Reckitt* (n 36); *Tobin* (n 36).

<sup>63</sup> *Gisborne v Gisborne* (1877) 2 App Cas 300, 309 (Lord Penzance) [emphasis added], see also 305 (Lord Cairns); *Duke of Portland* (n 17) 54-60; *Cloutte v Storey* [1911] 1 Ch 18, 30-32 (Farwell LJ, Cozens-Hardy MR and Fletcher Moulton LJ agreeing); *Re Hay's* (n 44) 209-210 (Sir Robert Megarry VC); *Re Londonderry's Settlement* [1965] Ch 918, 936-937 (Salmon LJ); *Hayim v Citibank* [1987] AC 730, 746-747. Sometimes, an employer will hold powers under a pension scheme in a non-fiduciary capacity, yet the employer will still be subject to equitable controls; *IBM United Kingdom Holdings Ltd v Dalgleish* [2017] EWCA Civ 1212 [46] (the Court).

<sup>64</sup> *Yorkshire* (n 37) 1728 (Robert Walker LJ, Kay J and Mantell LJ agreeing); *Downsview* (n 37) 315 (Lord Templeman); *Barns* (n 37) 943 (the Court), citing *Duke of Portland* (n 17) 54.

<sup>65</sup> A power of jointure is one in which a power is granted to a husband under a marriage settlement, the purpose of which is to make provision for the wife for her life upon widowhood and to the exclusion of dower, see further: C Farwell and F Archer (eds), *G Farwell, A Concise Treatise on Powers* (3<sup>rd</sup> edn, Stevens & Sons, 1916), Chapter 14.

<sup>66</sup> *Lane v Page* (1754) Amb 233.

<sup>67</sup> *Aleyn v Belchier* (1758) 1 Eden 132.

<sup>68</sup> *Kelly v Cooper* [1993] AC 205, 214 (The Board); *New Zealand "Oranje"* (n 40) 1129-1130 (Lord Wilberforce); *Wood* (n 56) [26] (David Richards LJ, with whom Males and Laing LJ agreed); *Prince Arthur Ikpechukwu Eze v Conway* [2019] EWCA Civ 88 [39] (Asplin LJ).

<sup>69</sup> *Beach Petroleum v Kennedy* (1999) 48 NSWLR 1, 188 (Spigelman CJ, and Sheller and Stein JJA); *Canadian National Railway Co v McKercher LLP* [2013] SCC 39 [37] (McLachlin CJ for the Court).

<sup>70</sup> *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1989] 1 WLR 1072 (PC) 1075. See also *New Zealand "Oranje"* (n 40) 1129-1130 (Lord Wilberforce).

<sup>71</sup> An express trustee has various powers of recoupment that can be exercised self-interestedly and for the trustee's own benefit, as discussed in J Hudson and C Mitchell, 'Trustee Recoupment: A Power Analysis' (2021) 35 TLI 3. See also Mitchell, 'Good Faith' (n 21).

identify when a power-holder is subject to certain terms. Equity's commitment to the terms and its significance for understanding equity's control of power are discussed in Part III.D next. Part IV will explore how the terms on which a power provides a basis upon which to contextualise the relevance of status to understanding's equity's control of power in the future.

## **D. Equity's Commitment to the Terms on which a Power is Held**

### **1. A Power Held on Terms**

'Terms' is a general label for a set of legal propositions that provide for when and how a power should and should not be exercised. They may be expressed as permissions, prohibitions and/or directives. A power-holder may be permitted to exercise a power to achieve some effects, and in some circumstances, but not others. Sometimes the terms may require a power-holder to exercise a power, and sometimes they may expressly prohibit the exercise of power. The terms may also prescribe the ways in which a power can be effectively exercised and impose requirements, such as writing, in addition to the basic principle that a legal power be exercised through the sufficient external manifestation of an intention to exercise a power.<sup>72</sup> Together, the terms on which a power is held define a positive sphere of permission in which power can, and sometimes should, be exercised, and conversely a sphere in which the power-holder is not permitted to exercise her power.

Part III.D.2 next will explain why equity's commitment to the terms has been singled out as the juridical justification for equity's control of power, and Part III.D.3 will briefly outline why the terms matter and the potential justifications for equity's commitment. Before doing so, it is important to distinguish the terms on which a power is held from the (separate) terms that define the existence and scope of a legal power. This distinction is sometimes overlooked and confused due to the various ways in which labels, such as 'terms', 'power' and 'authority', are used in the cases and scholarship. As such, this chapter will explain this distinction which is central to understanding equity's control of power.

#### *Distinguishing different terms*

As explained in Part II.A above, a legal power is created and defined by the legal principles that prescribe the actions a power-holder must take to affect a change to the legal status of another. These legal principles are sometimes referred to as the *terms of a power*. The terms of a titleholder's power to deal with her title, for example, are the principles of law, equity and statute that determine the assignability of specific property, as mentioned already in Part II.A above. The terms of an agent's powers to act on behalf of their principal are the principles of law that provide for when the agent's actions will be attributed to the principal, such that the principal's legal status is changed in some way, for example, by entry into a contract, or transfer of title to property.

The terms that define the existence and scope of legal powers are distinct from the terms that prescribe the circumstances in which a given power may or may not be lawfully exercised. Consider, for example, the terms of an express trust that provide for the ways in which the trustee may and may not exercise her powers as the titleholder. These are the terms on which a trustee holds her power, often referred to as the 'trust terms', and are derived from the meaning attributed to the parties' actions in manifesting their expressions of intention and consent for how the trustee should hold and

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<sup>72</sup> See n 5 and accompanying text above.

exercise her powers.<sup>73</sup> The trust terms are separate from the principles of law, equity and statute concerning the assignment of title to property and which define the trustee's power(s) to deal with her title to trust property.

A similar distinction can be made across other contexts. A company, for example, is conferred powers as an incident of its legal personality, such as to enter into contracts and hold title to property. The terms of these powers are defined by the relevant principles of law providing for when and how a company may, via its (corporate) agent, enter into contractual relations, or acquire and deal with title to property, for example.<sup>74</sup> The company's powers, an agent's powers, and the principles that define (the terms of) these powers are different to the terms according to which these powers are held.

In principle, it could have been possible for a legal power to be confined such that an effective execution would be dependent upon the power-holder's compliance with any additional and separate set of terms according to which the power is held. However, and as explained by Browne-Wilkinson LJ in *Rolled Steel Products (Holdings) Ltd v British Steel Corporation*, 'such ruthless logic has not been pursued'<sup>75</sup> at least in relation to some powers. An express trustee *can* exercise her powers as titleholder *contrary* to the trust terms, and a company or its corporate agent *can* exercise a power *contrary* to the terms on which it is held.<sup>76</sup> Nonetheless, the distinction between the terms according to which a power is held, and the legal principles (also referred to as terms) that define a power is not always observed<sup>77</sup> and not easily perceived. This is for two reasons.

One is that there are some powers where Browne-Wilkinson LJ's ruthless logic is pursued, and the terms of the power condition an effective execution upon the power-holder's compliance with the (separate) terms on which the power is held. An example is a power to vary the terms of an express trust. The equitable principles that define how a power to vary the trust terms must be exercised require the power-holder, at least, to manifest her intention to exercise the power<sup>78</sup> *and* to comply with the terms on which the power is held.<sup>79</sup> For these powers, the terms of the power effectively incorporate the terms on which the power, making it hard to perceive the distinction between these different terms.

Another reason for confusion is that the label of 'power' is not always used to refer to a legal power, and rather refers to a power-holder's *authority* to exercise a legal power. This usage is prevalent where an express trustee or company are granted a 'power' of 'sale', 'investment' or 'mortgage' under the

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<sup>73</sup> J Hudson and C Mitchell, 'Justificanda' in S Degeling, J Hudson and I Samet (eds) *The Philosophical Foundations of the Law of Express Trusts* (OUP, forthcoming).

<sup>74</sup> Which may be a combination of the general principles of law applying to individual legal persons as well as corporate legal persons, as modified by statute, see eg Corporations Act (Cth), ss 127-129.

<sup>75</sup> *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246, 303.

<sup>76</sup> As in: *Re David Payne & Co Ltd* [1904] 2 Ch 608; *Reckitt* (n 36); *Tobin* (n 36); *Great Investments Ltd v Warner* (2016) 243 FCR 516.

<sup>77</sup> See eg, *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [96]-[99], [121]; *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 [93] (Lord Walker). See also, for example, R Nolan 'Controlling Fiduciary Power' [2009] 68 CLJ 293, 294-300, 316-321, where the requirement for a fiduciary to comply with the terms is understood as the logical imperative that a fiduciary can only act within the scope and *terms of her power*.

<sup>78</sup> *Fischer* (n 5) [32] (French CJ and Bell J), [50]-[55] (Kiefel J).

<sup>79</sup> Unlike other legal powers, a power to vary the trust terms is effective only to the extent that a court will compel the trustee to act in accordance with the terms as varied. Cases show that a court will not compel a trustee to act in accordance with a purported exercise of power that is contrary to the trust terms; *Cloutte* (n 63) 30-32 (Farwell LJ, Cozens-Hardy MR and Fletcher Moulton LJ agreeing); and see further J Hudson and C Mitchell, 'Legal Consequences of the Flawed Exercise of Pension Scheme Powers' in S Agnew, P Davies and C Mitchell (eds) *Pensions: Law, Policy and Practice* (Hart Publishing, 2020) ch 7.

respective trust terms or articles of association. As explained in *Rolled Steel*<sup>80</sup> the trust terms or articles of association conferring 'powers' of 'sale', 'investment' or 'mortgage' do not create a power in the sense of conferring an ability or capacity on the power-holder to affect a change they did not already have. The trustee's or company's legal power to deal with her title either for the purposes of investment, sale or mortgage 'flow'<sup>81</sup> from the trustee or company having legal personality and title to specific property. A 'power' of 'sale', 'investment' or 'mortgage' under the respective trust terms or articles of association refers to the trustee or company's ability lawfully to exercise a legal power that exists independently of the terms on which that power is held.

The prevalent use of the label of 'power' in the drafting of trust terms, articles of association and the applicable statutory regimes mean that there may be little point advocating for some label other than power to be used. Nonetheless, the core conceptual distinction remains between a power-holder's power to change the legal status of another, as defined by the legal principles (terms) that determine the existence and scope of a power, and the lawfulness of an exercise of power, which for some power-holders is conditioned upon compliance with the (separate) terms on which a power is held.

## 2. Equity's commitment to the terms on which a power is held

Equity's commitment to the terms on which a power is held is singled out as the juridical justification for equity's control of power because it is determinative across a range of power-holding arrangements. For example, the equitable controls requiring compliance with the terms and a proper purpose apply, and can only apply, when a power is subject to terms. This point has been made in relation to fraud on a power, in *Dowdle v Coppel*, where Ormiston JA explained that '[t]he concept of "foreign purposes" can only be relevant where the power is a special power *containing restrictions on the appointment*.'<sup>82</sup>

Conversely, and when a legal power is not held on terms, is it also not the object of equitable control. Recall the example of an owner of property, who, absent other facts, is unconstrained in how she exercises her powers held incident of her title. The difference between this owner and one who is subject to control, is the conferral of power on terms. Another example is a general power of appointment, which allows the power-holder to appoint to anyone in the world and for any purpose, including the power-holder.<sup>83</sup> This power is not held on terms that restrict to whom property may be appointed. Consistent with this chapter's argument, equitable controls do not apply to the holder of a general power of appointment, who is analogous to the owner of property who holds that title free of any terms.<sup>84</sup> Both can exercise the power that they hold in a manner unconstrained by any equitable control.

As will be discussed below in Part III.D.3, there is a variety of juridical sources for different sets of terms and which means that there may be different normative values underpinning equity's commitment to ensuring that a power is exercised in accordance with the terms on which it is held. Equity's commitment is implemented via its doctrines and remedies, including via the requirement for the effect of an exercise of power to be permitted by the terms, and the doctrine of fraud on a power.

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<sup>80</sup> *Rolled Steel* (n 75) 303-304.

<sup>81</sup> *Rolled Steel* (n 75) 303-304.

<sup>82</sup> *Dowdle v Coppel* [1987] VR 1024, 1031 (Ormiston J).

<sup>83</sup> See generally: *Dowdle* ibid 1031 (Ormiston J); Farwell, *Treatise on Powers* (n 63), 6; Thomas, *Thomas on Powers* (n 2), [1.16].

<sup>84</sup> An analogy drawn in *Webb* (n 28) [77] (Lord Kitchin, Lord Carnwath, Lady Black and Lord Briggs agreeing).

When one or more of these controls are not satisfied, the exercise of power is visited by equity's remedial regime in response to an unauthorised exercise of power, such as an account in common form and consequent money orders, or orders setting aside the unauthorised exercise of power and associated proprietary relief. The sum effect of these, and other, controls, and consequent remedies, is to condition the lawfulness of an exercise of power - the power-holder's authority - on the effect of exercise and the power-holder's intended purpose being permitted by the terms.<sup>85</sup>

The terms on which a power is held can also be singled out as being determinative of fiduciary loyalty. Specifically, fiduciary loyalty applies when the terms require a power to be *held for or on behalf of another*. This is demonstrated by those cases<sup>86</sup> considering the application of fiduciary loyalty to legal powers held *outside* of the traditional status-based fiduciary relationships. Fiduciary loyalty could not be determined by the power-holders' status and the courts have had to articulate the precise reason why or why not fiduciary loyalty should apply; a power held for and on behalf of another. For example, in *Re Wills Trusts Deeds* Buckley J found that fiduciary loyalty applied to a power-holder '... because [the settlor] ... reposes a confidence in [the power-holder]... to perform vicariously on his, the settlor's behalf.'<sup>87</sup> Buckley J went on to state that the 'distinguishing characteristic' attracting fiduciary loyalty is 'the settlor's intention that the donee shall, in the exercise of the power, act on the settlor's behalf.'<sup>88</sup> Similarly, in *Basel Trust Corporation v Ghirlandina*, powers were subject to fiduciary loyalty when they are '... exercisable to promote the interests of the beneficiaries as a whole'.<sup>89</sup>

The terms are determinative for status based power-holders too. Company directors hold their powers on terms that require them to act for and on behalf of the company and for this reason are subject to fiduciary loyalty.<sup>90</sup> An express trustee *usually* holds power on terms requiring her to exercise power for and on behalf of another, and thus is subject to fiduciary loyalty. Fiduciary loyalty does not apply when the terms permit the trustee to act self-interestedly. Similarly, an agent, usually is subject to terms requiring power to be held for and on behalf of the principal, and for this reason fiduciary loyalty applies. Conversely, where the terms permit the power-holder to exercise power on her own behalf, then fiduciary duties do not apply, such as a mortgagee's power of sale, and some powers held by express trustees and agents as mentioned already in Part III.C.2 above.

A power held for and on behalf of another has previously been identified as the juridical justification for fiduciary loyalty.<sup>91</sup> This chapter identifies and delineates the juridical role of *the terms on which a*

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<sup>85</sup> The effects of a lack of authority are not uniform across different legal powers. Sometimes, an unauthorised execution means an ineffective execution, whereas in other situations an unauthorised execution is still an effective exercise of power, albeit susceptible to equitable relief. It is beyond the scope of this chapter to explain in detail the various effects of equity's controls and reconcile the different terminology of voidness and voidability, save to note that much of the terminological confusion can be reconciled by observing the distinction outlined above in Part III.D.1 between the terms of a power and the terms on which a power is held; see further, J Hudson, 'One Thicket in Fraud on a Power' (2019) 39 Oxford Journal of Legal Studies 577; Hudson and Mitchell, 'Legal Consequences' (n 79).

<sup>86</sup> In addition to the cases discussed above, see also *Lord Vesty's Executors v IRC* [1949] 1 All ER 1108, 1115, 1132 (Lord Morton) also emphasised that on construction of the trust terms, the power was held on behalf of the beneficiaries; *In re Skeats' Settlement* (1889) 42 ChD 522, 527 (Kay J); *Basel Trust Corporation v Ghirlandina* [2008] JLR 1; *Weller v Ker* (1866) LR 1 Sc & D 11; *Re Wills Trusts Deeds* [1964] Ch 219; *Mercanti v Mercanti* [2016] WACA 206 [397]-[398] (Newnes and Murphy JJA), special leave to appeal refused in *Mercanti v Mercanti* [2017] HCASL 59.

<sup>87</sup> *Re Wills Trusts Deeds* [1964] Ch 219, 228.

<sup>88</sup> *Ibid*, 229.

<sup>89</sup> *Basel* (n 86) 34.

<sup>90</sup> Companies Act (England) s 172(1).

<sup>91</sup> This feature has been identified as engaging fiduciary loyalty before, see eg: L Smith, 'Can We Be Obligated to Be Selfless?' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014), 148; L Smith, 'Fiduciary Relationships' (n 11) 613; Miller, 'Justifying Fiduciary Duties' (n 13) 1012-1015.



*power is held* in explaining the application and scope of fiduciary loyalty. Critically, the terms signify when a power is held for and on behalf of another such that fiduciary loyalty applies. Whether or not such fiduciary terms are present will depend on the meaning attributed to the parties' actions, as understood in light of the relational or institutional context. For example, the terms may expressly provide for power to be held and exercised for and on behalf of another, or the terms may also expressly declare that fiduciary loyalty does not apply altogether.<sup>92</sup> Sometimes the parties will be understood to intend for power to be held for and on behalf of another, at least in the absence of terms expressly providing otherwise.<sup>93</sup> Like the other equitable controls requiring compliance with the terms and fraud on a power, fiduciary loyalty implements equity's commitment, albeit to particular terms. This is by preventing the power-holder from exercising a power in circumstances of conflict or profit<sup>94</sup> that would prevent her from exercising her power for and on behalf of the principal.

Before moving on to consider some of the normative values that might underpin equity's commitment to the terms, it is necessary to address a different approach that understands various equitable controls, including fraud on a power and, sometimes, fiduciary loyalty, as implied terms. This approach can be seen in the context of agency<sup>95</sup> and some contractual discretionary powers.<sup>96</sup> In *General Assembly of Free Church of Scotland v Overton*,<sup>97</sup> Lord Lindley stated, 'there is a condition implied in ... instruments which create powers, namely that the powers shall be used bona fide for the purposes for which they are conferred.' Similarly, fiduciary loyalty has also been understood as an implied term.<sup>98</sup>

There are some problems with the implied terms approach, two of which are briefly outlined.

The first problem is that, sometimes, this approach fails to distinguish between the instrument or document that is created by the parties' actions in manifesting their intention, and the meaning or impact of that intention. An instrument or document is a physical sign or manifestation of the parties' intentions, to which the law responds by recognising a set of legal propositions between them.<sup>99</sup> The physical evidence could be destroyed and yet the set of terms would still exist to condition a power-holders authority. The physical evidence produced by the parties' actions in manifesting their intentions is distinct from the meaning attributed to those actions, collectively referred to as the terms.

The second problem is that the implied terms approach starts from the incorrect premise that the principles of law that define the existence and scope of a power (referred to as *the terms of a power*),

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<sup>92</sup> *ASIC v Citigroup Global Markets Australia Pty Limited* (2007) 160 FCR 35; M Leeming, 'The Scope of Fiduciary Obligations' (2009) 3 J Eq 181; J Getzler, 'Ascribing Fiduciary Obligations' in A Gold and P Miller (eds) *Philosophical Foundations of Fiduciary Law* (OUP, 2014), ch 2.

<sup>93</sup> See eg, *Basel* (n 86) 32-39. See also, *Mercanti* (n 86) where Newnes and Murphy JJA explained that a power to replace the trustee 'has generally been construed as having been conferred by the settlor ... for the due execution of the trust and for the benefit of the object of the trust' such that fiduciary loyalty would apply unless the parties expressed otherwise, and 'each instrument must be construed according to its own terms' [397]-[398].

<sup>94</sup> As to the operation and function of fiduciary loyalty, see eg, Conaglen, *Fiduciary Loyalty*, (n 19); L Smith, 'Deterrence, Prophylaxis and Punishment in Fiduciary Obligation' (2013) 7 Journal of Equity 87; L Smith, 'Fiduciary Relationships' (n 11).

<sup>95</sup> See eg: P Watts, 'Actual Authority' (2017) JBL 269; Watts, *Bowstead* (n 32) Article 23. Contra: *Rolled Steel* (n 75) 307 (Browne-Wilkinson LJ), where the express or implied limitation of power for a proper purpose was considered a factual possibility, not legal inevitability; S Worthington 'Corporate Attribution and Agency: Back to Basics' (2017) 133 LQR 118.

<sup>96</sup> A small sample includes: *Braganza* (n 45) [18], [30] (Lady Hale); *Paragon* (n 47) [32]-[36], [41] (Dyson LJ).

<sup>97</sup> *General Assembly of Free Church of Scotland v Overton* [1904] AC 515, 695.

<sup>98</sup> Edelman (n 1).

<sup>99</sup> F Wilmot-Smith 'Term Limits: What is a Term?' (2019) 39 OJLS 705.

are the same as the (separate) terms on which a power may be held. The distinction between these different sets of terms has been explained in Part III.D.1 above. Accepting this distinction, it is uncontroversial that equity's controls are not terms implied from the principles of law that define the existence and scope of a power. Fraud on a power, for example, does not form part of, or can be implied from, the law of assignment determining the trustee's power as titleholder to deal with her title.

Also, equity's controls do not apply as a matter of implication from the (separate) terms on which a power is held. The latter terms refer to the meaning of the parties' actions in manifesting their intention for how power should and should not be exercised. Equity's controls are not the terms, implied or otherwise. They respond to and presuppose the separate existence of the terms, as shown by the way in which these principles are discussed in other cases. For example, '[perhaps the] ... most important duty of a trustee is to obey the terms of the trust'.<sup>100</sup> This control operates as a general principle to give legal effect to the parties' intention for how a power should and should not be exercised, the meaning of which is referred to as the terms. The terms given specific content to the trustee's duty to obey as Kiefel, Gageler, Keane and Gordon JJ said in *ElecNet (Aust) Pty Ltd v Commissioner of Taxation*, the parties' legal relations are 'not determined by ... [a] general designation, but by the operative terms' of the trust.<sup>101</sup> This general principle presumes the separate existence of the terms and is not implied from them.

Similarly in relation to the doctrine of fraud on a power which, as explained above in Part II.B, requires the power-holder to intend to affect a change that is permitted by the terms on which the power is held. The particular problem addressed by fraud on a power is when an exercise of power achieves an effect permitted by the terms, but is intended to achieve some other effect that is not so permitted.<sup>102</sup> The doctrine presumes the separate existence of the terms that it requires the power-holder to comply with in her exercise of power. As explained by Briggs' LJ 'formidable dissent'<sup>103</sup> in the Court of Appeal decision in *JKX Oil & Gas Plc v Eclairs Group Ltd*, fraud on a power is a 'restriction imposed by law ... [and] ... [i]t is not a question of implied terms at all.'<sup>104</sup>

The terms will be relevant to determining the application and content of one or more equitable controls. As this chapter has shown, the effect(s) a power-holder can intend to pursue, the proper purpose of a power, will be determined from the objective meaning of the parties actions in expressing their intention and consent for how power should be exercised, the express and implied meaning of which are the terms.<sup>105</sup> The question of whether a power is held for and on behalf of another such that fiduciary loyalty applies is also determined by reference to the meaning attributed to the parties' actions as understood in light of the broader relational or institutional context, as discussed already in Part III.D.1 above.

Sometimes the terms on which a power is held may be implied. For example, and as discussed above, the meaning of the parties' actions is implied from other terms and the surrounding context and the

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<sup>100</sup> *Youyang* (n 16) [32] (the Court).

<sup>101</sup> *ElecNet (Aust) Pty Ltd v Commissioner of Taxation* [2016] HCA 51, (2016) 259 CLR 73 [50].

<sup>102</sup> *Vatcher* (n 17), 378 (the Board); *Eclairs* (n 7) [15] (Lord Sumption).

<sup>103</sup> *Eclairs* (n 7) [29] (Lord Sumption).

<sup>104</sup> *JKX Oil & Gas Plc v Eclairs Group Ltd* [2014] EWCA Civ 640, [99] (Briggs LJ). See also: Lord Sales, 'Fraud on a Power: The Interface Between Contract and Equity' Lecture for the Chancery Bar Association, 2 April 2019; 'Use of Powers for Proper Purposes in Private Law' (2020) 136 LQR 384.

<sup>105</sup> This process of construction to determine the purpose of a power is discussed further in Sales, 'Proper Purposes' (n 104).

parties will be understood to intend for a power to be held for and on behalf of another unless they expressly provide otherwise. The terms providing for the purposes for which a power-holder can intend to pursue through execution may also be implied. All this does not mean, however, that equity's controls themselves are implied. What is implied, if at all, are the terms on which a power is held, not the equitable controls, be it fiduciary loyalty or fraud on a power, for example that ensure compliance with those terms.

### 3. Why do the Terms Matter?

Having singled out equity's commitment to the terms on which a power is held as the juridical justification for equity's control of power, one might ask about the normative values underpinning this commitment. In other words, why do the terms matter, and why should equity, via its principles and remedies, require a power-holder's compliance with them? This chapter does not offer an answer to this question, save to explain that the variety of juridical sources for the terms may mean that there are a range of different justifications for equity's commitment to ensuring compliance with the terms in execution. For example, the terms on which an express trustee holds her title to trust property depends on the meaning attributed to the volitional actions of the settlor,<sup>106</sup> as well as the beneficiary and, in the case of a trust by transfer, the trustee in manifesting their expressions of intention and consent to their roles and entitlements on the terms as defined by the settlor and supplied by equitable principle or statutory regime in default of modification by the settlor.<sup>107</sup>

In the context of agency, an agent's power and the terms on which it is held, are usually created by the principal's exercise of her (separate) power exercisable through the principal's actual or apparent consent,<sup>108</sup> and the agent's acceptance of the power and its terms for exercise. In both contexts of the express trust and agency, the terms are derived from the actions of multiple parties. The terms are not only sourced in the voluntary undertaking of the power-holder. Nor are the terms only sourced in the manifestation of intention and consent of the beneficiary/settlor or principal.

Turning to other contexts and the terms on which company directors or other corporate officers hold their powers may be sourced in that company's constitution, any shareholders' agreement and relevant statutory regimes,<sup>109</sup> a power of attorney or other manifestation of the company's conferral of power, such as delegation by way of a board resolution. The terms on which powers are held in the corporate context are thus derived from various juridical sources, including the actions of the company via its agents, as well as parliament in granting powers on terms to various corporate

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<sup>106</sup> The 'parties' refers to the settlor, trustee and beneficiary. There is sometimes a focus on the settlor as the sole person who can determine the trust terms, although the trustee and beneficiary each have their own, albeit limited roles in choosing whether or not to accept their roles on the terms as defined by the settlor, see further J Hudson and C Mitchell 'Justificanda' (n 73).

<sup>107</sup> Some statutory regimes provide that some trust terms apply either by mandatory application, such as Pt IV (grants the court powers to appoint new or additional trustees, and to authorise trustee remuneration), s 57 (grants the court a power to authorise dealings with trust property), or by default, such as Trustee Act 2000, s 3 (permits a trustee to make certain investments); Trustee Act 2000, s 31(1) (permits a trustee to use trust funds either to recoup trust expenses or to discharge trust liabilities), and which parallels equitable principle, *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7, [2019] AC 271 [59]; *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20, (2019) 368 ALR 390 [29]-[33], [80]-[84]).

<sup>108</sup> *Pole v Leask* (1863) 33 LJ Ch 155, 161; (1863) 8 LT 645; *Garmac Grain Co Inc v HMF Faure & Fairclough Ltd* [1968] AC 1130, 1137 (Lord Pearson) 'The relationship of principal and agent can only be established by the consent of the principal and the agent' Watts, *Bowstead* (n 32) Art 1. In exceptional circumstances an agent's power may arise in response to necessity rather than the principal's actual or apparent consent.

<sup>109</sup> See eg: *Corporations Act* 2001 (Cth).

officeholders and general law in prescribing when and how certain corporate powers may and may not be exercised. Some similar observations can be made in relation to powers held by public bodies and officeholders. Powers are conferred on terms by the legislature or general law<sup>110</sup> and those terms provide for when a given power may or may not be exercised.<sup>111</sup>

The variety in the juridical sources for the terms means that there are likely to be different normative values underpinning equity's commitment to different sets of terms. For example, the reasons why a power-holder should comply with terms sourced in the parties voluntary expressions of their intentions and consent, such as an express trustee, or agent, may be different to the reasons why a power-holder should comply with terms sourced in an act of parliament, or exercise of executive or other ministerial power, or a combination of sources as the case is with corporate power-holders. The value of equity's commitment might lie in the interpersonal trust fostered by the conferral of power on terms defined by the parties, or the range of relationships and institutions that depend upon the conferral of power on terms for their function,<sup>112</sup> although further consideration of these issues is also left for another day. Accepting the normative values underpinning this commitment, it is this commitment that is the juridical justification for equity's control of power.

## PART IV: CONCLUSION AND IMPLICATIONS

Status has been relied upon to answer complicated and contested questions about equity's control of power. This chapter shows why that reliance is problematic, and that the terms on which a power is held is determinative. Status is, however, a convenient analytical short-cut to determining when one or more of equity's controls may apply, in so far as it identifies power-holders who are usually subjected to terms in their exercise of powers. Status can identify some instances when equitable controls apply, but not all, and it cannot explain why such controls do or do not apply. Similarly, fiduciary status, in particular, identifies those power-holders who usually are subjected to terms requiring them to exercise power for and behalf of another. To this extent fiduciary status, too, is a convenient or useful shortcut for identifying when, but not why, fiduciary loyalty may apply and the application, exclusion or modification of fiduciary loyalty ultimately depends upon the terms on which the power is held.

This Part IV concludes by exploring how the terms on which a power is held may help to answer some of the questions that status has previously been relied upon to answer, being (a) can equity control legal powers held outside accepted status-based categories of fiduciary relationships, such as contractual discretionary powers, and (b) what are the normative values underpinning fiduciary loyalty?

### A. Controlling contractual powers

A contractual power is one that allows the power-holder to vary certain of those terms. These powers differ in relation to their effect and the particular terms that may be changed. A loan agreement may confer upon a lender a power to vary the rate of interest payable by a borrower, or one party may have a power to terminate a contract for breach or some other reason, for example. As Lord Sales has

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<sup>110</sup> Eg, the terms according to which the Prime Minister of the United Kingdom held a power to prorogue Parliament are not sourced in statute but fundamental constitutional principle, see further *The Miller 2 case* (n 15) [38]-[41].

<sup>111</sup> *Bateman's Bay* (n 15) 267 (Gaudron, Gummow and Kirby JJ).

<sup>112</sup> See generally in relation to the power conferring nature of equity, M Harding 'Equity and Institutions' in D Klimchuk, I Samet and H Smith (eds) *The Philosophical Foundations of the Law of Equity* (OUP, 2020) ch 16.

observed extra-judicially,<sup>113</sup> the parties' ability (or separate power) to create contractual powers allows for the parties' contractual arrangements to deal with changing circumstances over time. Although conterminous with power is vulnerability and there is consensus that some contractual powers should be subject to some form of control. Less clear are which powers should be controlled, how they should be controlled, and why.

One answer previously given to these questions is status. As discussed above in Part III.B some cases have reasoned that equitable controls do not apply to powers not held by a fiduciary and instead have turned to public law principles to inform the control of contractual power. The analysis in this chapter has shown that, at best, status can only ever be a convenient starting point. It is respectfully submitted that cases that have relied upon status to determine equity's remit have started from an incorrect premise. This premise is ahistorical to the extent that public law doctrines concerning the control of power were themselves developed from equity.<sup>114</sup> Status also conceals equity's broader commitment to the terms on which a power is held. This commitment, in principle, extends to ensuring that a contractual power is exercised in accordance with the terms on which it is held including, for example, via the requirement for the power-holder's obedience and proper purpose, aka, fraud on a power. The relevant terms will give content to equity's controls and determine what changes can be affected by an exercise of power, as well as the changes a power-holder can subjectively intend to affect. The existence and content of further controls, such as fiduciary loyalty, will depend on the presence of particular terms. Either way, equity's controls are not implied terms, and this will have analytical consequences for how we understand the operation and effect of these controls, as well as the remedial responses, in the future.

### **B. Normative justifications for fiduciary loyalty**

There is a cannon of scholarship exploring the normative values underpinning fiduciary loyalty. One common approach has been to single out the juridical justification for fiduciary loyalty as a means to articulating its normative underpinnings. To this end, various answers have been given and which rely upon different features of relationships that attract fiduciary loyalty, including status, the fiduciary's authority, the fiduciary's voluntary undertaking, the parties' expectations, the principal's vulnerability, trust and reliance, for example.

This chapter has shown that status is not a juridical justification for equity's control of power, including fiduciary loyalty. Status should thus not be relied upon to draw conclusions about the normative values represented by fiduciary loyalty. The (limited) relevance of status is to identify those power-holders who hold their power on terms. Fiduciary status, in particular, identifies those power-holders subject to terms requiring power to be exercised for an on behalf of another. Equity's commitment to the terms is the juridical justification for equity's control of power. The analytical significance is twofold. First is to show that for some power-holders, there are multiple parties involved in the definition and imposition of the terms. In the case of the express trust for example, the settlor, trustee and beneficiary are all involved in the creation of the terms as between them. The theoretical implication is that any attempt to single out values pertaining to one party, such as the express trustee's voluntary undertaking, or the settlor's or the beneficiary's intention, expectation or vulnerability, ignores the fact that the terms on which a power may be held can be sourced in the

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<sup>113</sup> Sales, 'Proper Purposes' (n 104).

<sup>114</sup> See further, *Batmans Bay* (n 15); *Hanbury* (n 15); *Spigelman* (n 15).

actions of multiple parties. Second, is to reveal, potentially, multiple normative values underpinning equity's commitment to the terms, and with it, fiduciary loyalty. This is because the juridical source for the terms differs across relational and institutional contexts, sometimes depending on the voluntary actions of multiple parties, while at other times may depend upon an enactment of parliament. Given this variation, the values protected by equity's commitment, including via fiduciary loyalty, may differ too, albeit further examination is left for another day.