

INVESTIGATING THE
FIDUCIARY USING SOCIAL
POSITIONING THEORY: AN IN-
DEPTH ANALYSIS

Helen Mussell

WP 536
January 2023

**INVESTIGATING THE FIDUCIARY USING SOCIAL POSITIONING
THEORY: AN IN-DEPTH ANALYSIS**

Centre for Business Research, University of Cambridge
Working paper No. 536

Helen Mussell
Centre for Business Research, University of Cambridge
hjm47@cam.ac.uk

January 2023

Abstract

The legal concept of the fiduciary is used extensively in both financial and non-financial organizational contexts. It refers to the situation where one party - the Trustee - is entrusted with serving the best interests of another party – the beneficiary. Because of its wide-ranging use, studies of this concept feature in diverse literature, including legal studies, finance, business ethics, healthcare ethics, and social care. This paper delivers a novel analysis of this concept using social ontological theory – specifically Tony Lawson’s social positioning theory (SPT) – to examine the organizational structure and power embedded in fiduciary relations. It does so for two reasons. Firstly, by theorizing the fiduciary from a social ontological perspective we can better understand its structure, the effect of structure on agency, how and why it has evolved, and be clearer on potential for future development. Secondly, equipped with this social ontological analysis, we can explain identified contemporary phenomena which seemingly challenges and contests the power relations embedded in the fiduciary’s organizational structure within the context of financial fiduciary relations. The paper concludes by drawing on the emancipatory potential of SPT as outlined by Lawson, but by applying this potential to considering how financial fiduciary relations can be developed in light of the findings of the SPT analysis.

Keywords:

Fiduciary duty; economic agency; trustee; beneficiary; history of finance; shareholder activism; fiduciary activism; contract law; Ethics of Care; Power; Rights and obligations; Trust; Social Ontology; Social positioning theory

JEL codes:

A12 Relation of Economics to Other Disciplines

D02 Institutions: Design, Formation, Operations, and Impact

G11 Portfolio Choice • Investment Decisions

G30 Corporate Governance & Finance

G32: Financing Policy • Financial Risk and Risk Management • Capital and Ownership Structure • Value of Firms • Goodwill

K12 Contract Law

Acknowledgments

Acknowledgments are due to members of the Cambridge Social Ontology Group for advising on earlier versions of the manuscript, and to Professor Simon Deakin, for the initial introduction to the legal concept of the fiduciary.

Further details about the Centre for Business Research can be found at: www.cbr.cam.ac.uk

1. Introductory remarks: existing scholarship, contribution to literature

The legal concept of the fiduciary is used extensively in both financial and non-financial organizational contexts. It refers to the situation where one party - the Trustee - is entrusted with serving the best interests of another party - the beneficiary. Because of its wide-ranging use, studies of this concept feature in diverse literature, including legal studies (Bruner, 2013; Criddle, Miller & Sitkoff, 2018; Getzler, 2014; Gold & Miller, 2014; Richardson, 2011), finance (Hawley and Williams, 2000), business ethics (Author, b; Heath, 2006; Kaufman, 2002; Marens and Wicks, 1999; Young, 2007), philosophy (Laby, 2005; Sandberg, 2011, 2013), and healthcare ethics (Kutchins, 1991). Within the organization and management literature, a search for the term 'fiduciary' in the abstracts of papers published in leading management journals returns limited results given the pivotal position it holds in corporate governance. At time of writing, the Academy of Management Journal advises just one entry; the British Journal of Management zero; the Journal of Management also zero, and the Academy of Management Review just four results. Broadening the search in the latter journal to include all text - and still only returning fifty-one results - discussions concern the fiduciary duty of trustees to deliver shareholder value (Boatright 2007; Glac and Brehmer 2014; van Oosterhout, Heugens and Kaptein 2006, 2007), alongside contributions examining trust (Hosmer, 1995; Jeffries and Reed, 2000; Mayer, Davis and Schoorman, 1995; Sheppard and Sherman 1998), but there is no discernible direct focus on theorising the actual concept of the fiduciary itself. Theorisations of the fiduciary do however appear in legal theory, although not, as will be explained shortly, of the sort proposed here. These instead involve long running debates concerning whether the fiduciary is best theorized as a relationship, and/or duty (Laby, 2005; Miller, 2018; Richardson, 2011), or indeed can be reduced to contract. In the case of the former, this is arguably because identifying the existence of fiduciary relations can be notoriously difficult for judicial purposes (Laby, 2005; Miller 2014, 2018). In the case of the duties, it is the nature of the twin duties of loyalty and care - including any ethical aspects therein - which are theorised as guiding the way in which fiduciary relationships should be practised (Author, d; Laby, 2005; Penner, 2018). However, whilst such legal theorisation of the fiduciary does exist, this work does not specifically examine the fiduciary as an organizational structure with embedded power relations - *it does not provide a decontextualized blueprint of the fiduciary dynamic, or a general abstract analysis of its ontology*. Such an analysis would be beneficial for two reasons. Firstly, it would provide an account of how structure and agency interrelate within the framework the fiduciary sets out. This would further our understanding of how the structure of the legal arrangement works upon agents, bringing about changes in agent behaviour, such as hubris and apathy - returned to in greater detail in section two. The current theories of the fiduciary do not deliver such an account. Secondly, and

subsequently, this understanding would also help elucidate increasing contemporary social phenomena such as fiduciary activism and relatedly shareholder activism. The latter of these phenomena has been previously shown to be a challenge of fiduciary power relations - specifically of an epistemic kind (Author, c) - so the analysis here will build on such work. Definitions of both these phenomena, along with that of the fiduciary, and an outline of the specific example of the fiduciary to be analysed, are explained in full in the following introductory sections.

2. Structure

Following these introductory remarks, terminological definitions are introduced, the contemporary phenomena to be explained are outlined, and the specific example of the fiduciary to be analysed is introduced and substantiated. The first main section of the paper then goes on to introduce SPT, outline the central features of the theory, and apply it to the selected fiduciary example. The second section then uses the ontological analysis to shine a light on particular contemporary phenomena – that of fiduciary and shareholder activism -using the insights from the analysis to help explain them. The third and final section draws on the emancipatory potential of SPT as outlined by Lawson but does so by specifically applying this potential to considering how financial fiduciary relations can be developed in light of the findings of the SPT analysis. The need to rethink decision making criteria in relation to fiduciary responsibilities (Lydenberg, 2014) and relatedly reconceptualise fiduciary relations have been highlighted before (Author, b; Richardson, 2011). By using the findings of the SPT analysis we can take this a step further. We can instead see how structure-agency interrelationality, community organizing structure, the social positioning process, and power-over relations can limit or prescribe potential change.

3. Definitions; the analytical example; contemporary puzzles

3.1 ‘Fiduciary’ definition

The concept of the fiduciary, from the Latin *fiducia* meaning “trust,” plays a central role in a wide range of financial and non-financial organizational contexts, including medical and social care, education, charities, finance, and business. It is infamous for being a difficult concept, both as a subject for scholarly investigations and for judicial purposes, when identification of existence and evidence of the fiduciary is required (Miller, 2018). According to the Oxford Dictionary of Law¹, the fiduciary carries two definitions, one referring to fiduciary in noun form as an individual; “A person, such as a Trustee, who holds a position of trust or confidence with respect to someone else and who is therefore

obliged to act solely for that person's benefit”, and the other as an adjective, specifically referring to fiduciary relations; “in a position of trust or confidence. Fiduciary relationships include those between Trustees and their beneficiaries, company promoters and directors and their shareholders, solicitors and their clients, and guardians and their wards”.

At its most basic, whilst emphasising its highly contextual nature, the fiduciary is the legal protection and safeguard put in place to ensure that a Trustee acts in the best interests of a beneficiary when they have been appointed to do so, either directly by the beneficiary, or by a third party. It is often referred to as a fiduciary duty, with practice of fiduciary relations between the Trustee and beneficiary guided by the twin duties of loyalty and care, which are often interpreted as the fiduciary's ethical components (Author, c; Getzler, 2014; Johnson, 2002; Laby, 2005). In the medical context, fiduciary relations include the doctor (Trustee) and patient (beneficiary) dynamic, with the doctor obliged to hold the patient's interests as paramount and advise them accordingly. In the context of charities, those individuals responsible for the administration of donated funds are Trustees, with fund recipients being beneficiaries. And in the finance and business context, the roles that Trustees and beneficiaries hold, and the relations between them, are numerous. They include those of CEO's and Boards of Directors entrusted (Trustees) with shareholders (beneficiaries) capital but with a fiduciary duty to the legal body that is the corporation as opposed to the shareholders themselves, and investment and pension fund managers, entrusted with investors' funds. As these examples show, the contexts in which the roles of Trustees and beneficiaries feature vary widely, and the objectives and focus of the fiduciary relations between them – in both financial and non-financial – also vary accordingly.

3.2 Fiduciary context of analysis

Whilst the goal here is to use social theory, specifically Tony Lawson's social positioning theory, to examine how organizational structure and agency interrelate in the context of financial fiduciary relations, it is prudent, considering the varied contexts outlined above, to select one specific context as an analytical example, to maintain rigour and precision. This approach does not necessarily limit the application of the analytical findings to other fiduciary contexts, but it will provide a helpful systematic focus for this exercise. To this effect, the example to be used here is that of the financial fiduciary relations between an institutional investment fund manager (including pension funds) acting as a Trustee, and fund investors (including those of pension investments) as beneficiaries. For clarification purposes, from hereon in the term 'fiduciary' will be used to refer to this specific financial fiduciary relation, one between institutional investment fund managers and their investor clients as beneficiaries.

3.3 Why institutional investment funds? - Contemporary social phenomena/puzzles

The rationale for choosing institutional investment fund management as an example of the fiduciary lies in the rise since the 1980's of what James Hawley and Andrew Williams refer to as *fiduciary capitalism*. Describing this as the exponential movement of ownership of shareholder capital from private individuals to institutional funds, where fund managers are - as per above - working as Trustees in a financial fiduciary relation to their beneficiaries, Hawley and Williams note that 'Since 1997 these institutions, along with the insurance companies, now own more corporate equity than all the individuals in the country combined. The change is all the more stunning when one notes that individuals owned almost 80 percent of corporate equity as recently as 1970' (Hawley and Williams, 2000: xi-xii). The shift of power this represents, into the hands of institutional investment fund managers, is enormous, with major implications, as we shall see, for contingent arising issues such as *fiduciary activism*. This is the activity whereby fiduciary institutions (and the Trustees they employ) assert shareholder rights (on behalf of their beneficiaries) as active owners to influence the operations of the corporate institutions in which they have chosen to invest. As we shall come to see during the following analysis using SPT, this power accumulated by Trustees rests upon other accumulated power relations embedded in the structure of fiduciary relations, whereby the Trustee has power-over the beneficiary. In short, as more beneficiaries (are encouraged to) to invest in institutional investment funds (i.e., pension funds), so this leads to Trustees accumulating power-over relations in the beneficiary sense, subsequently resulting in the accumulation of corporate influence, i.e., fiduciary activism.

Institutional investment fund management thus presents an interesting example from to analyse the fiduciary from for two connected key reasons. Firstly, the benefits of developing a more sophisticated understanding of a specific social structure which is increasingly yielding power for Trustees is crucial when that power carries significant financial and operational influence. Secondly, having a more sophisticated understanding of this structure can help in investigating and explaining the arising contemporary phenomena such as fiduciary and shareholder activism. In short, understanding how the social structure leads to the recognised social phenomena is central to understanding the power mechanism at play.

4. Introducing SPT and the fiduciary analysis

4.1 Why use SPT?

The next task is to introduce SPT and explain why it is useful in this specific analytical context. To do this it will help to situate SPT in the wider Cambridge Social ontological project of which it is a part, and in which Tony Lawson is a central figure. The Cambridge Social Ontology Group (CSOG) is a group of researchers who have been collectively developing a comprehensive social ontology – or account of social reality including its structures, processes, and components – for over thirty years. Finding the ontological presuppositions of widely used philosophies of social science such as positivism or social constructionism fallacious and wanting, the group has instead sought to develop its own account, similar to that of the ontological project known as critical realism. CSOG has published position papers outlining the group’s core ontological commitments (i.e., see Lawson, 2015), with the recent SPT position paper utilised in this analysis being the newest addition (Lawson, 2022). SPT has been alluded to in previous CSOG related publications, but not fully fleshed out in a systematised manner. As such, the recent publication offers a beneficial opportunity to use this account of community organization to explain the fiduciary from a novel social – as opposed to say legal or purely financial – angle.

There are five key reasons worth highlighting for why SPT is of particular use in the context of the fiduciary. Firstly, Lawson claims that SPT goes further than existing agency-structure theories by additionally explaining *how* the two factors interrelate. He writes that “as will become clear in due course, the theory goes further than emphasising that human beings and their conditioning social structure(s) are irreducible, if mutually dependent, causal factors, in elaborating a theory of how the two interrelate in some detail, albeit still in a generalising fashion” (Lawson, 2021: 7). SPT should then be able to help us understand how the structure of fiduciary relations – whereby the Trustee is required to act in the beneficiary’s best interests but without the need to consult with them (thereby creating a power asymmetry) – affects the agency of both parties. Put differently, SPT should help us explain how the organizational asymmetrical power structure embedded in the fiduciary relationship impacts upon the agents implicated by its design. What these structural impacts may result in in terms of agential behaviour, and the social phenomena that may arise as a result, is discussed in the second section.

Another reason SPT is of particular use in analysing fiduciary relations is because it holds an account of positional power at its core. As already noted, the fiduciary’s organizational structure is premised on a power asymmetry, one which is arguably being increasingly contested through behaviour such as shareholder (including fiduciary) activism. The issue of what Lawson refers to as

‘power-over’ relations, and the central role it plays in SPT, will be returned to and explained in full shortly. Thirdly, SPT also provides an account for how community organizing structures are reproduced and transformed – again, also helpful when seeking clarity on how structures can change under agent challenge (i.e., as per above - shareholder activism). Fourthly, SPT accounts for how agents occupy numerous social positions at any one time, so helping us understand how changes in the power relations of other positions held in other communities may affect positions held in relation to the fiduciary context. And finally, according to Lawson, SPT offers emancipatory potential (a claim explained in full shortly). By understanding the process of how individuals come to be socially positioned and set within a community organizing structure, we can be furnished with the tools to explain resistance, reveal potentially harmful action, and undertake corrective measures. With this range of explanatory potential in mind, the next step is to introduce SPT.

4.2 Outlining SPT

Prior to engaging with the details of SPT, a note would be beneficial regarding how Lawson lays out the theory in his position paper, and how it is then applied here in the context of analysing the fiduciary. Lawson delivers a top-down methodical structure, starting with three overarching meta principles of SPT, followed by outlining five orienting assessments to identify social positioning in practice. These are then unpacked in more detail using a further seven sets of principles to deliver a more granular level of detail of the theoretical framework. The overall result is a systematisation of human organizing structures to provide a theoretical under-labouring for how human communities are organized, forming part of the wider social ontology he has been central in developing.

There are a range of approaches that could be taken when applying this sort of granular level detail of social theory to a topic. The structure deployed here is to firstly summarise the different levels of Lawson’s theory and then, following the same sequence outlined in the summary, apply the theory to the fiduciary. This is done for ease of reader cross referencing between the theoretical summary and topic analysis. Whilst this approach can feel rather regimental and inflexible at times, the result is a systematic and rigorous analysis that simultaneously maps out the social ontology of the legal concept alongside demonstrating the useful applicability of SPT to such social contexts.

Moving on to summarising SPT, Lawson initially lays out three meta principles, the overarching central focus of which is concerned with defining a totality, and how it is constituted by components (agents/individuals). The first principle is a simple definition of a totality noting that ‘By a totality, I mean simply an organized system that has integrity and coherence at its own level of being’. (Lawson 2021:3). The second principle highlights that a totality must be irreducible to the separate components (individuals) of which it is constituted –

the organizing structure must make a difference, it must matter, it must add something. The final principle outlined by Lawson is that a totality must work *through* its components. Whatever it is that the totality does, it must do so through the individual components that constitute it. How these three principles can elucidate the fiduciary is discussed in the following application section.

As noted above, in addition to the three meta-principles Lawson outlines a further five orienting assessments which he considers central to *community* and human social positioning. The first of these assessments is the community participant acceptance of organizing structures. As Lawson is clear to note, this reference to acceptance does not necessarily entail agreement, but instead refers to the sort of commitment of going along with something. He writes that ‘It does involve widespread commitment; and it does presuppose a degree of knowledgeable, usually including some shared understandings, on the part of individual participants, however tacit or indirect, not least of the structures (or relevant aspects of them) involved’ (*Ibid.*), but what it does not involve is agreement *per se* with the structure and situation. The second orienting assessment of community social positioning is that the community organizing structure provides the foundation upon which community actions and processes that contribute to the overall working of the community are built. This includes, for example, the allocation of specific capacities - such as rights and obligations etc - to specific community positions, the appointment to which in turn provides the opportunities for the community to reproduce itself. In Lawson’s words ‘The basic mechanism whereby this segmenting, delimiting and distributing of opportunities (and so powers) occurs is the creation (reproduction and transformation) of, and differential allocation of individuals and other entities to, highly differentiated social positions’ (Lawson, 2021:9). The third orienting assessment states that within an existing or emerging community, positions are created or will become available, an aspect shown in the application below to be the case in the context of the fiduciary. Lawson’s fourth assessment concerns the interrelated nature of communities to other communities in a wider system, with the assessment indicating that socially positioned individuals will be contingently positioned into wider communities by nature of their being positioned in the ‘initial’ community. The fifth and final orienting assessment of community social positioning states that the individual filling a social position will be required to be capable of supporting that community or system in whichever way is deemed appropriate – again, an assessment which will be shown below to hold true for the fiduciary context.

Grouping the latter four assessments together - which as we have seen focus more on the actual workings of social positioning - Lawson continues by providing some additional details about how social positions function. He lays out what he refers to as another seven sets of principles, each one focussing on a particular aspect of SPT and how it contributes to community/totality. The first of these sets

(*community position and relation constitution*) concerns the different sorts of social positions that feature in communities – namely those of person positions (for individual human agents²) or non-person positions – and how relations between the positions function. Central to articulating relations between different positions is the language of rights and obligations. These rights and obligations are deemed to be ‘matched’, with the rights of one position obliging the other – ‘the matched rights and obligations can be thought of, respectively, as positive and negative deontic powers’ (Lawson, 2021: 11). It is these ‘paired powers’ which constitute community social relations, or more specifically, set the agenda for ‘*power-over relations*’. Lawson writes that ‘Such power-over relations specify allowed and required actions and ways of operating for those parties associated with person positions *qua* positioned occupants, and appropriate (allowed and required) uses for those parties associated with nonperson positions as positioned occupants’ (Lawson, 2021:11). Moving on from the allocation of position related powers, the second of the sets of principles (*position components and their instances*) focusses on what Lawson refers to as position components. According to his account, communities are comprised of community components, which in turn are constituted of community positions, which are either/both person positions and non-person positions, and of course (as per above) the rights and obligations associated with those positions. A totality is formed once the component is complete (and the position occupied), and to clarify, a position title may be the same as the component (although not always). As with the totality, community components are irreducible to the positions that comprise it (including both persons and non-persons). It is this feature which facilitates the frequent movement and replacement of those who fill such positions without the cessation of the position component itself. As Lawson writes ‘At the same time, the human individuals that form the occupants of positions can (and do regularly) enter and exit (or are entered into and removed from) different positions *without* the power structure having to change...if *positions* are the locations or sites of power in a system of organizing community social relations, human individuals are effectively its localised agents or vehicles’ (Lawson, 2021:12). The third of the sets of principles (*component functions and relational orienting*) refers to the function of the component and of the associated positions. Lawson notes that ‘A component and its associated position are often named in accord with the component’s function, especially where the latter is both relatively enduring and recognised as such’ (Lawson, 2022: 13) – particularly apt in the context of the fiduciary as the below analysis will reveal. The fourth set (*position occupants and corresponding component instances*) concerns how position occupants are selected for the positions (i.e., whether this selection may involve training, education, access to community networks, etc., or not), and how the occupation of some positions result in the acquisition of individual identities i.e., being positioned as a woman (gender positioning), or as a biological father. In the instance of this latter example, it is widely accepted that such positions can only

be held by a single entity. The point that entities occupying positions retain their individual identities and are not reducible to any one position they occupy is underscored – ‘Where items are *selected* for position occupancy, they exist as entities that are individuated independently of any process of social positioning through which they become position occupants’ (Lawson, 2022: 14). Individuality is preserved. Or put differently, each position occupant equates to a different component instance. The fifth set (*position nesting and multiple nesting*) concerns the way in which some community positions may share similar rights and obligations, but still carry specificity, rendering them different from the primary *nesting* position. This does not necessarily lead to ‘position prioritisation’, but instead provides a way to explain intersecting positions which seemingly share similar rights, obligations, and power-over relations. The sixth set (*component instance performance*) concerns how the success of the function of the community component is contingent upon the capacities and capabilities of the position occupant(s). Lawson also uses this set to differentiate between how assessments of component success may be made, in either absolute or relative terms. Lawson uses the seventh and final set (*community position occupants*) to flesh out some additional detail regarding the capacities required of person position occupants. He notes three core basic capacities – ability to be subjected to rights and obligations; ability to detect and grasp the contents of rights and obligations; and ability to act in accordance with the content of the rights and obligations. In addition to these capacities, he emphasises that person position occupants are also required to be competent and reliable in the basic commitments of adherence and trustworthiness, specifically in regard to position obligations, and to show trust that others ‘matched’ to their rights and obligations will likewise adhere to their commitments. This mutual trust within the matched pair is key. To all of this Lawson adds one final point regarding capacities – that person position occupants will also be required to have context specific capacities, as required by the component’s function. Having now presented a summary of the assessments and principles of SPT, the next step is to apply the theory to the context of the fiduciary, and, as has already been noted, this will be done following the sequence in which SPT has been summarised above.

4.3 Application of SPT to the fiduciary context

How to apply and make use of the meta principles of SPT laid out by Lawson? We have already seen how totalities play a central role in these three initial principles, but what can the application of the meta principles to the fiduciary reveal about the ontology of this legal concept, and whether or not it is a totality, or constitutes part of one? Recalling Lawson’s earlier definition of what a totality is – i.e., an organized system that has integrity and coherence at its own level of being, and which can be constituted of a basic human community of two people – the fiduciary relationship looks to be a contender as such a totality. It also, however, can be argued to strongly present as a *relation* between the two

positioned occupants, with the *relationship* that such relations form constituting the fiduciary community totality. That community in turn is - as will be elaborated on when applying Lawson's fourth assessment – situated in wider and larger totalities (or communities, such as financial organizations). Of specific interest of applying SPT to the context of the fiduciary is an advanced understanding of how the individuals who constitute this totality are socially positioned, and what insights this can offer. It is to develop a deeper understanding of 'the nature of community relational organization and specifically community social positioning' (Lawson 2022: 6) in order to develop an advanced ontological analysis of the fiduciary. By doing this we can enrich our understanding of how such communities evolve, recognise the possibilities and challenges of initiating change, and develop insight into the relational dynamic between community members. What marks human community organizing structures apart from other totality organizing structures is that human persons are amongst the entities organised, and the humans and the structures *work upon each other* – they are engaged in a symbiotic relationship. The organizing structures condition human interactions and agency, whilst the humans' interactions will condition the community organizing structure through a process of 'being continually reproduced and transformed through the total of (community-based) human interactions over time' (Lawson, 2022:7) As a result, it can be said that 'Processes of determination between community organizing structures and human agency and actions run in both directions' (*Ibid.*). To recall, whilst acknowledging that other agency-structure theories exist, Lawson claims that SPT goes a step further, providing detail about how the two actually interrelate, how they come to affect each other. Recall also that it is this aspect of SPT which offers the most promise for explicating issues identified in the fiduciary - by way of explaining how being positioned as a Trustee or beneficiary potentially affects an individual's agency and behaviour, and how individual agency seeks to push back against and contest the organizing structure (shareholder activism). These are all points to be addressed in the following section when applying this SPT analysis to specific social phenomena. Moving on to the second meta principle, the fiduciary fulfils the feature of irreducibility in as much as it is the organizing power structure – by which the Trustee is not obliged to consult with the beneficiary – that constitutes/results in fiduciary relations as a totality. Put differently, the same two individuals (Trustee, beneficiary) interacting outside of the organizational structure of the fiduciary will be in a different dynamic. It is by way of relation to each other in their roles as Trustee and beneficiary that the fiduciary totality (human community) exists – it is the fiduciary's organizing power structure that makes it irreducible – it is the structure that matters. Regarding Lawson's third meta principle – that the totality must only work through its components – it is only by way of the beneficiary (or a third party) authorising, instructing, or agreeing for the Trustee to act in their best interests (e.g., investing funds on their behalf in the example of investment management), that such fiduciary activity is

enacted. Without the two parties/components entering into this agreement, the activity would not take place and the fiduciary – as relation which in turn constitutes the totality – would not exist.

Recalling Lawson's five orienting assessments, we can now use them to analyse the fiduciary. If we consider the first assessment concerning community participant acceptance in the context of the fiduciary relationship, we can see how the organizing structure of the fiduciary, including the different power roles assigned to Trustees and beneficiaries, entails a widespread commitment to the organizing structure – participants recognise their respective roles. However, as Lawson notes, participants are situated and so the extent of their knowledgeability/awareness of the organizing structure is hard to gauge, as will be their degrees of agreement. For example, an individual paying into a workplace pension fund (so a beneficiary) may have less knowledge regarding the fiduciary, its organizing structure, and the Trustee/beneficiary roles, than say a professional investor. They will be aware that another individual manages their pension fund, but the detail behind this, including the extent of roles, responsibilities etc., may be light – or in Lawson's words, indirect. By contrast, the professional investor and Trustee should have received more education regarding the fiduciary and fiduciary relations, so be more familiar with its organizing structure. When we consider the second assessment of community social positioning in the context of the fiduciary - whereby capacities such as rights and obligations etc are allocated to specific community positions - we can clearly see how the fiduciary's community organizing structure creates the roles of Trustee and beneficiary as social positions, positions constituted of highly differentiated rights and obligations. What these specific rights and obligations consist of are elaborated on in more detail below when applying Lawson's seven sets of principles, the first of which consider the distributions of power. Likewise, when considering the third assessment that positions will become available in existing or emerging communities, this also holds for the fiduciary. For example, when a new investment fund is established, the positions of Trustee and (likely multiple) beneficiaries emerge as the new community is created. In the example where an employee joins a company and wishes to also join its existing pension fund, the position of beneficiary emerges from the existing community. The fourth assessment concerning the interrelated nature of communities to other communities in a wider system can clearly be identified within the fiduciary context. In the context of being socially positioned within a fiduciary community as a beneficiary, this wider system way of working would involve, for example, being one of numerous shareholders of a company, within a wider financial system dependent upon the fiduciary organizational structure. Indeed, it is the deeply embedded nature of fiduciary communities within the wider financial system which makes the analysis of fiduciary using SPT attractive – we can start to clearly see how certain social positions systematically feature across wider

totalities or systems. In the context of the fiduciary community, a clear example from the position of a beneficiary joining a pension fund would be their capacity to make the requisite financial contributions to the community. The fifth and final orienting assessment of community social positioning states that the individual filling a social position must be capable of supporting that community in whichever way is deemed appropriate. This holds true for the fiduciary, with a clear example from the position of a beneficiary being that the possibility of joining a pension fund would be determined by their capacity to make the requisite financial contributions to the community.

The next step is to turn to applying the theoretical detail laid out in the seven sets of principles. The first set's account of the distribution of power as paired rights and obligations allocated to differently socially positioned persons is extremely illuminating in the context of the fiduciary, which is *premised* on an explicit and pronounced asymmetrical power relationship (Author, b, c). In the fiduciary, the Trustee has the *right* not to consult with the beneficiary and holds decision-making authority. They are however legally *obliged* to act in the beneficiary's best interests, and to not personally benefit from decisions made on the beneficiary's behalf. Considering the Trustee's obligation is to act in the beneficiary's best interests, and to not personally benefit from decisions made on the beneficiary's behalf, this must be the beneficiary's right. And considering the Trustee's right is to not to have to consult with the beneficiary and to hold decision-making authority, then to not be consulted as to what one's best interests are, and to rescind decision-making power, must be the beneficiary's obligation. These are the fiduciary's positive and negative powers, and the power-over relations they engineer are arguably coming under increasing challenge in the form of shareholder activism – a point to be returned to in Section Two when applying these social ontological insights to identified social phenomena. Lawson's second set of principles focussing on position components and their instances again is useful in elucidating the fiduciary. Humans positioned as Trustees frequently leave their social position of Trusteeship, passing on the rights and obligations (power-over relations) to another individual. Their exiting of the person position of Trustee does not cease the component to exist – the position of Trusteeship is still there to be occupied so long as – and this is a point strongly emphasised by Lawson – the community totality requires it. So, if, for example, an investment fund is wound-up and ceases its services, the community totality will no longer require the component of Trustee, but if the fund will continue to trade, then the exiting Trustee will need to be replaced, because the community totality requires the position to be occupied. The third of the sets focussing on component functions and relational orienting, including how the function often lends itself to the naming of the component, is particularly resonant for the context of the fiduciary, which as already noted, stems from the Latin *fiducia* meaning trust. That the components and positioned persons in the

community totality of the fiduciary are called the Trustee (the one being trusted) - and the Beneficiary (the one benefitting) clearly aligns with Lawson's observation. Application of the fourth set looking at position occupants and corresponding component instances in the context of the fiduciary also yields interesting results. It highlights how occupying the position of institutional investment fund manager arguably involves a significant selection process, with occupants undertaking both examinations³ and recruitment processes. The process of being selected to occupy the position of beneficiary in the same fiduciary context is arguably less stringent. One may have to apply to become a beneficiary and demonstrate the ability to consistently make the necessary financial payments, and access to pay into an institutional investment fund such as a company pension will be dependent on being successfully selected through a company recruitment process, but some sort of selection process will still exist. With regards to the issue of identity acquisition though the process of position occupation, whilst still maintaining individuality, Trustees are arguably more likely to draw on their position for identity construction (i.e., as career choice) than beneficiaries. Their identities are not however reducible to the Trustee position they occupy. Turning to applying the fifth set concerned with position nesting and multiple nesting, we can see evidence of this nesting if we consider, for example, the contextual nuances in rights and obligations afforded to Trustee's dependent on the community person position context, e.g., a person who works as a Trustee managing a pension fund and also acts as a Trustee on the Board of a local charity will experience some shared rights and obligations across the two positions but also differences due to the wider community totality (organizational structures) in which the Trusteeships are located. In this sense, the community position of Trustee *nests* the context specific Trusteeships, which add their contextual nuances of rights and obligations. This same example of 'fiduciary relations in organizational context' also applies to the position of beneficiary, where once again the context may result in a nuance of rights and obligations afforded to the position of beneficiary. Indeed, the need to determine the exact working example of financial fiduciary relations for this analysis (i.e., between an institutional investment fund manager and fund investors) was required precisely because of the multiplicity of context specific rights and obligations afforded to the positions of Trustees and beneficiaries. We can also see the sixth set concerned with component instance performance clearly evidenced in the example under analysis, as the capabilities and capacities of individuals occupying the position of Trustee are seen as contingent to the success of such fiduciary relations. The assessment of the success of such fiduciary relations will also likely be made in both absolute (if no comparable fund exists) and relative terms, as Lawson indicates. Interestingly, this sixth set of principles also connects with current contentious debates regarding how successful fiduciary relations should be assessed, as either an ongoing process or as a fixed outcome (see Author, d; Getzler, 2014; Hawley et al, 2011; Lydenberg 2014), a

point returned to in greater detail in the final section. Applying Lawson's final set of principles focussing on community position occupants to the context under analysis, we can again clearly see how such capacities and commitments are evidenced in fiduciary relations. As noted in the fourth set (which concerns position occupant selection, but to which Lawson does not make a direct connection), Trustees arguably undergo a rigorous selection process to determine both their core basic and specific capacities. Once occupying the position, Trustees will (as per the sixth set regarding component performance but to which Lawson again does not make a specific connection) continue to have their capacities monitored, as the component's performance continues to be assessed in line with its function. Moving on to Lawson's point regarding basic commitments of adherence and trustworthiness, the requirements of fiduciary relations – *whose central function is to ensure trust* - brings this crucial aspect to the fore. Indeed, it is when the position obligations of Trustees (which to recall are the twin duties of loyalty (to act in the best interests of another (i.e., the beneficiary), and of care (the obligation to act with skill and diligence) are not exercised in fiduciary relations that a breach of trust occurs.

Having now shown how the five orienting assessments and seven sets of principles of SPT can be applied to fiduciary relations, and what they reveal in terms of identifying the fiduciary's ontological generalities, the next step is to use this analysis to explain identified contemporary phenomena, phenomena which seemingly challenges and contests the power-over relations embedded in the fiduciary's organizational structure within the context of financial fiduciary relations.

5. Elucidating contemporary fiduciary-related phenomena using SPT: agency and activism

As noted in the opening introductory remarks, the preceding ontological analysis can help elucidate contemporary puzzles concerning fiduciary relations. This is important for management scholars due to the extensive use of the fiduciary in a wide range of organizational contexts, beyond the specific financial fiduciary focus here. To recall, SPT, according to Lawson, goes further than other agency-structure theories by providing comprehensive details about how the two elements interrelate and come to affect each other. SPT can show not only how the structure of the human community totality of the fiduciary affects individuals' agency, but also how changes to that structure might bring about change in individuals' agency. Before moving on to consider which of the orienting assessments and seven sets of principles can best explicate the contemporary phenomena in question, and before outlining fiduciary and shareholder activism, an initial discussion regarding recognised agential behaviour in fiduciary relations is required – specifically that of hubris shown to be exhibited by some

Trustees, and apathy, shown to be exhibited by some beneficiaries. Put differently, the objective here is to tease out potential connections between such behaviour and the fiduciary organizational structure, and to consider the role such agency plays in the contemporary phenomena of fiduciary and shareholder activism.

5.1 Trustee agency – hubris

Research investigating hubristic behaviour in organizations – particularly at Board level leadership where Trusteeship is commonplace – is not uncovered ground. Indeed, specifically in the context of banking and finance sectors under analysis here, the financial crash of 2008 gave rise to a great deal of work on the subject, following speculation that hubris was at least partly to blame. Analysis of the leadership of failed and rescued banking organizations such as Lehman Brothers and Royal Bank of Scotland (RBS) came particularly under the spotlight (Wray, 2016), along with research focussing on whether hubris is identifiable in the personality traits of CEO's (Brennan & Conroy, 2013), and looking at the relationship between hubris and financial performance (Park et al., 2018). More recent work in the context of an Italian bank has focussed on how corporate governance mechanisms fail to prevent CEO hubris from manifesting (Ferretti & Gonnella, 2020). Whilst this range of research focuses on the identification, existence, and abetment of hubris in a variety of contexts, what is absent from such work is explicit consideration of the extent to which individuals being primarily positioned as trustees within the fiduciary arrangement - and the power-over relations that dynamic delivers - facilitates the identified hubris. Put differently, does the structure of the fiduciary contribute to trustee overconfidence? Whilst work has focussed on how hubris results in an overestimation of one's problem-solving capabilities (Camerer and Lovo, 1999), and others have taken this a step further to examine links between hubris and risk taking (Li and Tang, 2010), again there has been no explicit consideration about the role that the fiduciary organization structure plays in such hubristic behaviour. As before, this is a surprising omission given that senior leaders working at Board level are in positions of Trusteeship, with the power-over relation in conveys. Whilst Ferretti and Gonnella note that the “hubristic individual perceives a very limited need to engage with others” (Ferretti and Gonnella, 2020: 165), they do not explicitly consider how the position of being a trustee (or in the case of the CEO, arguably the top trustee) is *premised* on not engaging with certain others – i.e., beneficiaries. This *is* the power-over dynamic of the fiduciary revealed in the preceding SPT analysis – to act in the beneficiaries' best interests, but to need not consult what they are. And whilst Ferretti and Gonnella are clear that the objective of their paper is to look at how a failure of *internal* control mechanisms in a bank facilitated CEO managerial entrenchment, Board compliance, and hubris, they do not consider the extent to

which the person position of Trustee and the power-over relations it ordains within the fiduciary organizational structure may have facilitated hubris.

The relationship between hubris and organizational structure is however explored by Dennis Tourish (2020) who parts company with work focussing on individual psychological traits as central in the development of hubris and instead advances an organizational theory of hubris. Likewise focussing on the financial crisis of 2008 and work undertaken to examine the presence of hubris, Tourish notes that “Sadler-Smith et al. (2017) describe hubris as an acquired disorder and stress its situation-specific (i.e. organizational) antecedents. Moreover, some environments – such as finance and banking – may provide a more hospitable climate for its emergence than others.” (Tourish, 2020: 92). Whilst Tourish goes on to explain how such a hospitable climate can be theorised as one of Bourdieu’s ‘social fields’, wherein behaviours such as hubris can become normalised through repetitious behaviour enacted in power saturated relationships, he does not extend his analysis of relationships in the context of finance to include that of the fiduciary, or the extent to which agents being placed into person positions of Trusteeship with power-over relations may contribute to such power saturation. Again, an explicit investigative link that draws together organizational structure, hubristic behaviour, and power ordained via fiduciary trusteeship is absent from the analysis. *This is a keystone observation.* It also drives home the point that individuals working in positions of Trusteeship in finance - who are not necessarily in positions of people management - are *also* in positions of power-over relations, thereby contributing to the hospitable climate in which hubris can emerge.

5.2 Beneficiary agency – apathy

If – drawing on the situation-specific theories of hubris outlined above – Trustee hubristic behaviour is the result of power-over relations embedded within the organizational structure of fiduciary relations, what, if any, is the possible effect of the organizational structure on beneficiary agency and behaviour? Put differently – in SPT terms – if the organizational structural rights and obligations which constitute the person position of Trustee interrelate with agency resulting in hubris, how do the matched rights and obligations for occupants in the person position of beneficiary effect their agency? To recall from earlier, considering the Trustee’s obligation is to act in the beneficiary’s best interests and to not personally benefit from decisions made on the beneficiary’s behalf, this must be the beneficiary’s right. And considering the Trustee’s right is to not to have to consult with the beneficiary and to hold decision-making authority, then to not be consulted as to what one’s best interests are, and to rescind decision-making power, must be the beneficiary’s obligation. How then could such rights and obligations effect beneficiary agency? The long-term effects of beneficiary non-consultation is an issue elaborated on in full elsewhere (Author, c; Fairfax 2019),

but the salient points, and established connections to shareholder activism (soon to follow), will be summarised here. The reinforced message communicated by long-term non-consultation is essentially an epistemological one: that the beneficiary is not fit to participate in the practice that originally generates the very idea of a knower practice (Author, c; Fricker, 2009). The consequence of that repeated delivery is to normalise the message that they are not ‘a knower.’ That this has indeed been the cumulative outcome in the context of the beneficiary is illustrated by Fairfax (2019: 1322), who writes, “Historically, governance experts pointed to the fact that shareholders were not active as clear evidence that shareholders did not believe that they ought to be active. In this respect, shareholder apathy itself served as the compelling evidence that shareholders had a normative preference for apathy.” To this Fairfax later adds that; “Some suggested that one reason for this continued embrace of apathy was shareholders’ continued belief that activism was not normatively appropriate. This means that the apathy norm was so powerful that shareholders continued to embrace it even when such embrace may not have been in their best interests” (Fairfax, 2019:1323). As noted elsewhere (Author, c) this apathy observation in the context of shareholder activism (soon to be discussed) is quite remarkable. It demonstrates the extent of the effect that the fiduciary organizing structure (the rights and obligations and power-over relations) has had on beneficiary agency – the degree to which apathy has become embedded and normalised in behaviour. In light of this organizational structure-agency (apathy) connection, the fact that fiduciary and shareholder activism is now gaining momentum carries even more weight, signalling both these contemporary phenomena are worthy of closer analysis, a point now turned to.

5.3 Fiduciary activism

As noted in the opening remarks, there has been a significant shift in corporate ownership since the 1980’s from what can be termed as managerial capitalism (manager ownership) towards fiduciary capitalism, whereby substantial shares or stock ownership has moved into the portfolios of institutional investment funds managed by Trustees (fiduciaries). This shift in ownership has led to the rise of *fiduciary activism* – whereby Trustees use their positions – or more specifically their voice – to engage in active ownership to bring about change in organizations they buy shares in, on behalf of the beneficiaries of the fund they manage. Highlighting how it is the nature and size of institutional investors’ portfolios that has resulted in corporate governance relying on formal and informal voice to achieve change (Hawley and Williams, 2000), the point is made that it is the size of such large institutions that prevents sale of low performing stocks. They write that ‘owing to their sheer size, and the fact that the largest institutions have portfolios that usually mirror those of other large institutions, most major fiduciary capitalists cannot sell. And if they cannot sell, then they must “care”. Caring in this context takes the form of active ownership” (Hawley and William,

2000: xiv). So, where divestment is not possible, fiduciary activism via use of voice takes place. That such activism is framed as caring activity within the context of fiduciary relations (as serving best interests of the beneficiary) aligns well with the argument that fiduciary relations are in fact best explicated using the ethics of care (see Author, d). This issue of caring dynamics in fiduciary relations is an important point returned to in the final section when considering how fiduciary relations can be developed.

5.4 Shareholder activism

Shareholder activism is the direct engagement and activism of beneficiaries as owners. It takes numerous forms and can involve a solo shareholder with a significant number of shares working alone to try to influence decision-making within the organization he or she partly owns, or it can involve a group of shareholders working together. As noted elsewhere (see Author, c), the format and motivation for shareholder activism also varies. Some activism takes place via private meetings (Coskun et al. 2018), whilst other activity is public, executed at shareholder meetings. In addition, shareholders' motivation for pursuing activism can be either financially motivated or non-financially motivated, with the latter referred to as social shareholder engagement [SSE], with the objective to advance social and/or environmental issues (see Goodman and Arenas 2015; Cundill, Smart, and Wilson 2018).

This same variation in format and motivation also applies to fiduciary activism. On the latter, there is a notable increase in institutional investors demanding that the organizations they invest in incorporate Environmental, Social and Governance (ESG) factors into their financial analysis. Whilst this activity may differ from SSE, it still indicates a departure from pure financial reporting and highlights broader motivation. Acknowledging that there are two different forms of activism, the fundamental issue remains the same: the objective of fiduciary and shareholder activism is to ensure the beneficiaries' voices – either directly or indirectly (as per fiduciary activism) - are heard. It is to command consultation where previously manager-owners had ownership power, and *it is to demonstrate resistance to Trustee-beneficiary power-over relations* (more on this to follow).

5.5 Applying SPT to contemporary social phenomena: fiduciary and shareholder activism

It would be helpful here to briefly recall the benefits of developing a sophisticated analysis of a social structure such as the fiduciary, one which, as we have seen, is increasingly yielding significant power for specific individuals (i.e., institutional investment fund managers). We can use this analysis to better understand arising contemporary phenomena such as fiduciary and shareholder activism, to see how changes to the social structure would result in changes to the identified social phenomena. In short, by a process of abstraction involving identifying ontological

generalities in the social structure, we can more clearly identify the ontological structures and processes in place. With that objective foregrounded, we can now apply elements of the preceding analysis to the social phenomena of fiduciary and shareholder activism.

5.6 Exploring fiduciary and shareholder activism: resistance to power-over relations and community participant disagreement

The first way in which SPT can help explain fiduciary and shareholder activism is Lawson's discussion regarding community positions (both persons and non-persons), including relations, as per set one outlined above. It is here that Lawson discusses the package of rights and obligations allocated to each position, and the matched or pairing of positive and negative deontic powers, of individual rights and obligations. Lawson names this feature *power-over relations*. This account of the distribution of power is very helpful in the context of fiduciary relations, which are premised on a power asymmetry (Author, b, c). To repeat, the Trustee has the right not to consult with the beneficiary and holds decision-making authority. They do however carry the obligation not to personally benefit from decisions made on the beneficiary's behalf, and they are also obliged to act in the best interests of the beneficiary, although they need not engage in consultation as to what those best interests may be. In the fiduciary relations context under analysis (institutional investment funds), the interpretation of what those best interests are remains open, and although they are not necessarily limited to, they have become largely confined by those ideas of economic agency embedded in neoclassical economics rational choice theory i.e., that of *homoeconomicus* pursuing short-term maximum financial gain. This widely assumed interpretation (largely promoted in investment management by the extensive use of Modern Portfolio Theory drawing on neoclassical economic ideology) is increasingly contested in relation to issues such as ESG investing (see Sandberg, 2011, 2013; Author, a; Freshfield report, 2005 and PRI/UNEP FI report, 2019), which as we have seen above features in fiduciary activism. It is here that we start to see power-over relations coming under increasing challenge. So, whilst there may be community participant acceptance of the organizing structure (fulfilling the first of Lawson's five orienting assessment of community social positioning), there is clear evidence of increasing participant disagreement and contestation of that structure - and of the power-over relations allocated to the social position of beneficiary - indicating that a change in the organizing structure of fiduciary relations may be required (and potentially in progress).

To recall, the analysis of fiduciary and shareholder activism using SPT should do more than simply explain these social phenomena - it should elucidate, as per Lawson's claim, how the organizing structure affects individuals' agency - as discussed with regards to hubris and apathy. Once we are equipped with this insight, we can be clearer on what changes to the organizing structure are required

to bring about desired transformation, transformation that may already be being sought via agent resistance to current position obligations. With this in mind, and as we have just seen, it is resistance to power-over relations within the structure of the Trustee-beneficiary dynamic, alongside the lack of beneficiary consultation, that results in fiduciary and shareholder activism. The use of voice (Hawley and Williams 2000) is a demand to be heard as a knower (Author, c), to challenge the obligations allocated to the beneficiary, to contest the structurally defined relations between Trustee-beneficiary person positions, and to attempt to challenge and change organizational practices (Hirschman 1970). That such agent resistance is in process has already been observed, with Fairfax noting that “Shareholders and directors have come to accept the propriety of shareholder voice and influence. They have come to believe that shareholders can and should play a role in holding directors accountable and shaping corporate practices.” (Fairfax, 2019, 1345), whilst adding that few have recognised that this represents a significant normative shift. The following and final task, then, is to draw on Lawson’s claims that SPT offers emancipatory potential by helping bring about positive transformation through understanding organizational structure, by applying this potential to the context of fiduciary relations, to the sort of transformation seemingly being sought by fiduciary and shareholder activism.

6. Emancipatory potential of SPT in context of the fiduciary: evolving fiduciary relations

Keen to ensure that what could be seen as a purely theoretical exercise in explicating social structure is shown to go further and have practical implications, Lawson emphasises SPT’s emancipatory potential. He emphasizes the irreducibility of a community to its components, and of persons and nonpersons to the social positions to which they are allocated. Both of these points are a refutation of reductionism. Outlining the example of gender, whereby persons are socially positioned according to their apparent biological sex, and by this positioning process assumed to possess certain characteristics and capacities associated with the social position, Lawson shows how SPT can explain what he terms as this ‘ontological error’ i.e., incorrect assumptions about the nature of the positioned person. He writes that ‘the treatment of (system) components and their relational properties as if they are identical to the items used to form them and their intrinsic properties, is one that social positioning theory is especially well placed to correct’ (Lawson, 2021:23). Elaborating on this point of emancipatory potential – i.e., freeing an individual from this ontological error - we can start to see more clearly *what it is* that individuals are challenging and resisting, when, for example, they contest the gender they have been socially allocated. Gender is an interesting example, as the social positioning it entails has become so embedded in our community social structure as to be rendered invisible or

‘choiceless’. By contrast, for example, to be part of the community of say an army, and to pursue the component and social position of being a soldier, is seen as a choice. Readers should be reminded that it was only in 2018 that women were permitted to serve in all combat roles alongside men in the British army – an example neatly combining shifting opinions about intrinsic properties and capacities of social positions. In short, according to Lawson the emancipatory potential of SPT and its highlighting of ontological error is to warn against the reductive tendencies of being socially positioned and the potential prescriptive measures that follow (which can also include social sanctions). There is however another related aspect of SPT which also offers emancipatory potential - albeit one that Lawson does not explicitly frame as such. Rather than resisting being positioned in a person position (i.e., as a man, due to one’s biology), this resistance concerns contesting the current rights and obligations allocated to the person position and the contingent power-over relations it results in. On this point Lawson writes that there is no “guarantee that occupants of person positions will always comply with their rights and obligations; very often of course occupants of person positions are found to resist or minimise their compliance with existing position obligations, etc.’ (Lawson, 2021:20). It is here the ontological error takes on a nuance: rather than resisting being positioned *per se* and contesting the limitations of being reduced to the defined person position capacities, the position occupant instead contests the rights and obligations allocated to the position (which will have been allocated in accordance with the assumed capacities). Gender serves well as an example here too. An individual may be content with being positioned as a woman but may contest some of the rights and obligations allocated to that person position.

Combined, these three areas of emancipatory potential – i) occupants contesting being positioned; ii) occupants challenging rights and obligations assigned to positions, and iii) SPT’s scope for considering how the function of a component or wider system can evolve and change over time in relation to the capacities of the position occupants - hold significant potential for understanding the historical development, continuing evolution, and current identified issues surrounding the fiduciary. The way in which we can apply these emancipatory insights from SPT to fiduciary relations and consider scope for transformation now follows.

6.1 Origins of fiduciary relations revealing contemporary ontological error

To understand any resistance to ontological errors in fiduciary relations, we need to firstly consider the assumed capacities and capabilities (ontological assumptions) of the occupants of the positions of Trustee and beneficiary, and the subsequent package of rights and obligations assigned to each position, alongside contingent power-over relations. Where did these ontological assumptions originate, and how do capacities mismatch? A brief synopsis of the origins of the fiduciary and fiduciary relations is required to assist with this. As

outlined in greater detail elsewhere (See Author b, c, d), returning to the original formulation of the fiduciary uncovers key foundational presuppositions regarding agential capabilities embedded in the Trustee–beneficiary relationship. Whilst the precise origin of fiduciary law is disputed – with theories ranging from evolution from Roman *fideicommissum* honor law (Avini, 1995; Graziadei, 2014), from the *waqf* in Islamic law (Avini, 1995), and from the Germanic *Salmannus* (Avini, 1995), all options, broadly speaking, involve a legal mechanism whereby property is placed under the administration of a Trustee, by a grantor, for the eventual use by a beneficiary, indicating a nexus of relationships evident in all three possible points of origin. Whichever theory is correct, fiduciary was subsequently adapted for use in English law, as a means to protect property put into Trust. It is a way of transferring the legal title of estate/property into the trust of the Trustee, for the benefit of a beneficiary, whilst not conferring ownership per se of the property to the Trustee. This results in the Trustee being granted decision-making authority over the property, within the scope that decisions are made in the beneficiary’s best interests, without necessary consultation with the beneficiary. With this fiduciary relationship power asymmetry in mind, what then are the presupposed capacities and capabilities of both Trustee and beneficiary that led to the need for the design of such an arrangement? Or in SPT terms, what are the assumed person position capacities (ontological assumptions about agents) that resulted in the design of the fiduciary relations organizing structure which constitutes this human community totality? It would be helpful here to draw on the observation of Benjamin Richardson who specifically refers to the development of fiduciary relations in the context of English trusts: “Historically, trusts arose in England primarily to protect family wealth and to provide for the wife and children, who were socially constructed as passive and dependent. Modern investment law transplanted these arrangements for the private trust into a very different context.” (Richardson, 2011: 6). Richardson’s observation makes two key points. Firstly, he highlights that beneficiaries were women and children, making helpful reference to their social status (more on this to follow), and secondly, he notes how the sort of fiduciary relations under analysis here – i.e., institutional investment funds working under modern investment law – have transplanted and appropriated the legal concept of the fiduciary into a different context, whilst, as we will now see, simultaneously transplanting assumptions about beneficiary passivity and dependency, which in turn are built on assumptions about beneficiaries’ capacities and capabilities.

A helpful way to determine what beneficiaries were (and by the above-described process of modern transplantation still are) assumed incapable of is to ascertain the capabilities Trustees are deemed to bring to the fiduciary relationship - to help identify the supposed capability gap. The work of the legal scholar Paul Miller is helpful here, specifically his identification of two methods by which judiciary determine the existence of fiduciary relationships – namely via status-based and

fact-based reasoning—indicating how the former tends to be the default. Miller notes that in the case of the former, it is evidence of presence of certain status-based occupations (including doctors, lawyers, Directorships, Trustees) which are often taken as the signal that a fiduciary relationship exists. As argued in greater detail elsewhere (Author b, c) the social status afforded to such occupations (and the individuals positioned in them) pivots on the perception that these roles involve high levels of professional reasoning capabilities, thereby serving as a clear example of what the philosopher Miranda Fricker terms as “reason’s entanglements with social power” (Fricker 2009). By extension, we can deduce that it is a capacity for reasoning that beneficiaries were deemed to be deficient in, thus requiring the assistance of a Trustee. This conclusion aligns with Richardson’s observation that beneficiaries were women and children, who, as argued in widely recognised and well-established critiques of the history of thought and construction of reason (Lloyd 1984), were positioned on the emotion side of the fallacious gendered reason-emotion dichotomy. Trustees, then, in addition to any subject specific expert knowledge, contribute perceived reason-based capabilities to the fiduciary relationship – capabilities previously assumed to be in deficit in beneficiaries. It is the perceived capability and capacity for high levels of professional reasoning that affords Trustees their credibility.

6.2 Fiduciary and shareholder activism – resistance to capacities reductionism: Time for a rights and obligations refresh?

To recall – in SPT terms - the interest in identifying the perceived capabilities of Trustees and beneficiaries connects with considering why certain rights and obligations constitute the person positions of Trustees and beneficiaries, and the power-over relations this results in. This is important for determining details of the ontological error causing resistance, specifically via fiduciary and shareholder activism. From the outline above, we can see that the rights of Trustees to have decision-making power over beneficiaries, with the obligation to act in their best interests but without the need to consult with them, arguably stems from the original perceived deficit of beneficiaries’ advanced reasoning capabilities (and expertise), a perception historically enforced via social constructions of passivity and dependency. The essence of this still exists in contemporary fiduciary relations. If, then, individuals occupying the person position of beneficiary are subjected to “the treatment of (system) components and their relational properties as if they are identical to the items used to form them”, the ontological error defined by Lawson will be in effect and result in resistance.

If this is an accurate interpretation of fiduciary and shareholder activism, what has significantly changed about the persons filling the person positions that gives rise to this resistance? After all, fiduciary relations have been utilised for hundreds of years, and fiduciary and shareholder activism are, as we have seen, relatively new social phenomena. In short, what has changed within fiduciary relations to

bring about this resistance, and does this increasing resistance warrant - in SPT terms - a need to alter the rights and obligations allocated to the person positions of Trustee and beneficiary? The preceding explanation that the majority of fiduciary and shareholder activism is enacted by individuals who are themselves finance professionals, who are in effect using voice to articulate their advanced reasoning capabilities and own professional expertise, elucidates the contemporary rub that the rights and obligations of beneficiaries based on an outdated perception of their capabilities and capacities delivers. Lawson is correct: an ontological error is evident and resulting in resistance. Does, then, the shifting patterns in stocks and shares management (i.e., the rise of fiduciary capitalism as described by Hawley and Williams) herald a need for fiduciary relations to be refreshed? Does the contemporary context of Trustees with power-over relations over increasing amounts of other Trustees (fiduciary activism) look to be an unsustainable organizing structure? These questions – in SPT terms – are arguably best addressed through consideration of the contemporary *function* of the community and its components, of how the structure affects the agents, and of course how the agents affect the structure, including change and evolution of function. Lawson notes the following on this topic:

‘the particular function of a component, that action or use that is expected or desired of any component instance, can, as already noted, itself evolve over time and may even adapt or be adapted (along perhaps with the workings of the system as a whole) to the capacities of the (contingent) position occupant(s) in place.’ (Lawson, 2021: 20)

Here we have a clear steer on how function may be adapted overtime in reaction to the changing capacities (and capabilities) of position occupants i.e., of beneficiary person positions now increasingly occupied by fellow Trustees in the case of fiduciary activism. As such, as the rights and obligations allocated to matched person positions are contingent to the perceived capacities and capabilities of those position occupants - as are the power-over relations - so these warrant attention if becoming increasingly out of touch with contemporary contexts. The use of voice (as highlighted by Hawley and Williams) is a demand to be consulted with, challenging the Trustees right and the beneficiary’s obligation. It directly confronts the organizing structure of power-over relations and contests the original beneficiary profile as passive and dependent.

In addition, the use of voice can also be read as way to challenge component performance as well as function. To recall, component instance performance is the subject of Lawson’s sixth set, concerning not only how the capacities and capabilities of position occupants will affect the component’s success, but also noting that function success may be measured in absolute or relativist terms, as well as assessment performance being subject to change of function. The use of voice in fiduciary and shareholder activism arguably demands not only to be

consulted, but also to contribute to the decision-making process, particularly when taking into account that voice is often used where exit (Hirschman 1970) is not possible due to institutions size (Hawley and Williams 2000). As noted earlier, there is an ongoing debate amongst fiduciary scholars as to whether fiduciary relations success should be assessed on outcome or process (again, see Author, d; Getzler, 2014; Hawley et al, 2011; Lydenberg 2014). Arguments for the latter note that the Trustees obligations to adhere to the duty of loyalty (to act in the beneficiary's best interests) and to the duty of care (arguably where Hawley and William's suggestion of voice as care comes into play) focus on process, not on outcome. Analysed in this way, fiduciary and shareholder activism, particularly when taking into account the ESG and SSE agendas highlighted earlier, look to be placing an emphasis on fiduciary performance as reasonable decision-making process (Lydenberg 2014) as opposed to an assessment focussing on final outcome. Again, we can see how the SPT analysis of fiduciary relations which identifies ontological generalities allows us to take a step back and consider - alongside the organising structure, rights and obligations of person positions, and power-over relations – how fiduciary and shareholder activism also challenges the function and performance assessment of contemporary fiduciary relations.

7. Final remarks: A caring relational realist response

How can future fiduciary relations as elucidated here using SPT be developed in line with the changing capacities and capabilities of beneficiaries? As we have seen, the increase in the contemporary phenomena of fiduciary and shareholder activism signals a significant change in the ownership of stocks and shares coming under the management of large institutional investment funds run by professional Trustees. These are professionals who do not fit the original profile of beneficiaries as passive and dependent, apparently lacking in core capabilities. They are instead equally as professionally capable as the Trustees with whom they exercise their voice, and by doing so they demand fiduciary relations which challenge the power-over relations which result from the original allocation of paired rights and obligations of the two fiduciary person positions of Trustee and beneficiary.

Returning to a point raised earlier, the use of voice by fiduciary activists is framed as an act of care – to repeat – “Caring in this context takes the form of active ownership”. This is not the only use of the concept of caring in the context of contemporary fiduciary relations. Other scholars have emphasised that “The Trustee has to develop a settled habit of caring well, both for the grantor (or her wishes) and for the beneficiary” (Goldstone, McLennan & Whitaker, 2013, 51), whilst other work emphasizes the relational ontology of the fiduciary, thus requiring a relational caring ethics as a suitable framework (Author, d). This move towards articulating the need to understand fiduciary relations through the

lens of, and as, caring activity provides a helpful steer in developing the future of fiduciary relations, including its organising structure, the rights and obligations allocated to person positions, and arising power-over relations. It brings to the fore the role that normative theories of caring – emphasizing that caring well (including good listening and consultation) can be *learnt*, and that caring is constituted of key stages that can be referred to, to bring about a good caring relationship (Tronto, 2009, 2013), including how to care well in an asymmetric power structure. In short, if we use the insights from SPT and its application to both fiduciary relations and the contemporary phenomena of fiduciary and shareholder activism, we can not only reassess the organizing structure, person position rights and obligations, power-over relations, function, and fiduciary performance, but we can also reconfigure future fiduciary relations as a caring activity which can deliver, whilst also being cautious to avoid overlooking any future ontological errors of the kind revealed here.

Notes

- 1 Dictionary of Law, 8th Edition, (Ed – Jonathan Law)
- 2 Lawson does not specify how non-human species are positioned
- 3 Being a CFA (Chartered Financial Analyst) charterholder is one example of the examination and selection requirements of becoming a Trustee

REFERENCES

Author a. Removed for blind peer review

Author b. Removed for blind peer review

Author c. Removed for blind peer review

Author d. Removed for blind peer review

Avini, A. (1995). The origins of the modern English trust revisited. *Tulane Law Review*, 70, 1139-1163.

Boatright, J. R. 2007. Dialogue. *The Academy of Management Review*, 32(1): 293-295

Brennan, Niamh and Conroy, John (2013). Bank CEOs, Executive Hubris and the Banking Crisis, *Accountancy Ireland*, 45(3), 56-58.

Bruner, Christopher. 2013. Is the corporate law duty of care a “fiduciary” duty? Does it matter? *Wake Forest Law Review*, 1027 – 1054

Camerer, C, & Lovallo, D. (1999). Overconfidence and excess entry: An experimental approach. *American Economic Review*, 89, 306-3

Criddle, E.J, Miller, P.B, and Sitkoff, R.H. 2018. *The Oxford Handbook of Fiduciary Law*. New York: Oxford University Press

Deakin, Simon. 2015. ‘Juridical Ontology: The Evolution of Legal Form’ in *Historical Social Research* 40(1): 170-184

Deakin, Simon. 2017. ‘Tony Lawson’s Theory of the Corporation: Towards a Social Ontology of Law’ in *Cambridge Journal of Economics* 41: 1505-1523

- Fairfax, Lisa. 2019. "From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as the New Corporate Governance Norm." in *Boston University Law Review* 99(1): 1301–45.
- Ferretti, Paola and Gonnella, Cristina. (2020). Governance practices and CEO hubris: An Italian banking case. In Q. R. Yasser and A. Al-Mamun (Eds) *Transforming corporate governance and developing models for board effectiveness*, (pp. 161-182), IGI Global
- Freshfields Bruckhaus Deringer. 2005. A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment. United Nations Environment Programme (UNEP) Finance Initiative, Geneva, Switzerland.
- Fricker, Miranda. 2009. *Epistemic Injustice: Power and Ethics of Knowing*. Oxford: Oxford University Press.
- Getzler, J. 2014. Financial Crisis and the Decline of Fiduciary Law. In N. Morris & D. Vines (Eds.), *Capital failure: Rebuilding trust in financial services*, Oxford: Oxford University Press
- Glac, K. & Brehmer, D. 2014. Seeing the shareholder whole: a potential rapprochement between stakeholder and shareholder theory. Paper presented at *Academy of Management Proceedings*, (1) Conference Paper DOI:[10.5465/AMBPP.2014.12799abstract](https://doi.org/10.5465/AMBPP.2014.12799abstract)
- Gold, A.S and Miller, P.B. 2014. *Philosophical Foundations of Fiduciary Law*. Oxford: Oxford University Press.
- Goldstone, Hartley, Scotty McLennan, and Keith Whitaker. 2013. "The Moral Core of Trusteeship: How to Develop Fiduciary Character." *Trusts and Estates*, May, 49–52
- Graziadei, M. (2014). Virtue and utility: Fiduciary law in civil law and common law jurisdictions. In A. S. Gold & P. B. Miller (Eds.), *Philosophical foundations of fiduciary law*. (pp. 287-301). Oxford University Press, New York.

- Hawley, J.P and Williams, A.T. 2000. *The rise of fiduciary capitalism: How institutional investors can make corporate America more democratic*, Philadelphia, University of Pennsylvania Press.
- Heath, J. (2006). Business ethics without stakeholders. *Business Ethics Quarterly*, 16(4), 533-557.
- Hirschman, A.O. 1970. *Exit, voice, and loyalty: Responses to decline in firms, organizations, and states*, Cambridge (Massachusetts), Harvard University Press
- Hosmer, L. T. 1995. Trust: The connecting link between organizational theory and philosophical ethics. *The Academy of Management Review*, 20(2): 379-403
- Jeffries, F.L., & Reed, R. 2000. Trust and adaptation in relational contracting. *The Academy of Management Review*, 25(4): 873-882
- Kaufman, A. (2002). Managers' Double fiduciary duty: To stakeholders and to freedom. *Business Ethics Quarterly*, 12(2), 189-214.
- Kutchins, H. 1991. The fiduciary relationship: The legal basis for social workers' responsibilities to clients in *Social Work*, 36 (2) 106-113
- Park, J. H., Kim, C., Chang, Y. K., Lee, D. H., & Sung, Y. D. (2018). CEO hubris and firm performance: Exploring the moderating roles of CEO power and board vigilance. *Journal of Business Ethics*, 147(4), 919–933.
- PRI & UNEP. 2019. *Fiduciary Duty in the 21st Century. Principles for Responsible Investment and United Nations Environment Programme (UNEP) Finance Initiative*
- Laby, A. T. (2005). Juridical and ethical aspects of the fiduciary obligation. *Annual Review of Law and Ethics*, 13, 565-587.

- Law, Jonathan. 2015. *A Dictionary of Law* (8th Edition), Oxford, Oxford University Press
- Lawson, Tony. 2015. A conception of social ontology in *Social Ontology and Modern Economics*, Oxon and New York, Routledge
- Lawson, Tony. 2022. Social positioning theory in *Cambridge Journal of Economics*, 46 (1) 1-39.
- Li, Jiatio and Tang, Yi. (2020). CEO hubris and firm risk taking in China: The moderating role of managerial discretion. *Academy of Management Journal*, 53(1), 45-68
- Lloyd, Genevieve. 1984. *The Man of Reason: "Male" and "Female" in Western Philosophy*. London: Routledge.
- Lydenberg, Steve. 2014. "Reason, Rationality and Fiduciary Duty." In *Cambridge Handbook of Institutional Investment and Fiduciary Duty*, edited by James P. Hawley, Andreas G. F. Hoepner, Keith L. Johnson, Joakim Sandberg, and Edward. J. Waitzer, 287–99. Cambridge: Cambridge University Press
- Marens, R., & Wicks, A. (1999). Getting real: Stakeholder theory, managerial practice, and the general irrelevance of fiduciary duties owed to shareholders. *Business Ethics Quarterly*, 9(2), 273-293.
- Mayer, R. C., Davis, J. H., & Schoorman, F. D. 1995. An integrative model of organizational trust. *The Academy of Management Review*, 20(3): 709-734
- Miller, Paul. 2018. "The Identification of Fiduciary Relationships." In *The Oxford Handbook of Fiduciary Law*, edited by Evan J. Criddle, Paul B. Miller, and Robert H. Sitkoff. New York: Oxford University Press

- Penner, J. E. 2018. "Is loyalty a virtue, and even if it is, does it really help explain fiduciary liability?" In A. S. Gold & P. B. Miller (Eds.), *Philosophical foundations of fiduciary law*. (pp. 287-301). Oxford University Press, New York.
- Pratten, Stephen. 2017. Trust and the social positioning process in *Cambridge Journal of Economics* 41(5) 1419-36
- Richardson, Benjamin J. 2011. "From Fiduciary Duties to Fiduciary Relationships for Socially Responsible Investing: Responding to the Will of Beneficiaries." in *Journal of Sustainable Finance and Investment* 1(1): 5–19
- Sandberg, Joakim. 2011. "Socially Responsible Investment and Fiduciary Duty: Putting the Freshfields Report into Perspective." in *Journal of Business Ethics* 101(1): 143–62.
- Sandberg, Joakim. 2013. "(Re-)Interpreting Fiduciary Duty to Justify Socially Responsible Investment for Pension Funds?" *Corporate Governance: An International Review* 21(5): 436–46.
- Shepphard, B. H., & Sherman, D. M. 1998. The grammars of trust: A model & general implications. *The Academy of Management Review*, 23(3): 422-437
- Tourish, D. (2020). Towards an organizational theory of hubris: Symptoms, behaviours, and social fields within finance and banking. *Organization*, 27(1), 88-109
- van Oosterhout, J. (Hans), Heugens, P. P. M. A. R., & Kaptein, M. 2006. The internal morality of contracting: Advancing the contractualist endeavour in business ethics. *The Academy of Management Review*, 31(3): 521-539
- van Oosterhout, J. (Hans), Heugens, P. P. M. A. R., & Kaptein, M. 2007. Contractualism vindicated: A response to Boatright. *The Academy of Management Review*, 32(1): 295-297

Wray T. (2016) The Role of Leader Hubris in the Decline of RBS and Lehman Brothers. In: Garrard P., Robinson G. (Eds) *The Intoxication of Power*. Palgrave Macmillan, London.

Young, S. B. (2007). Fiduciary duties as a helpful guide to ethical decision making in business. *Journal of Business Ethics*, 74(1), 1–