Whither Prescriptive Fiduciary Duties?

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Whereas there is little dispute that fiduciary duties are concerned to secure the loyalty of fiduciaries, the means by which they secure such loyalty is bitterly disputed. Whereas some courts and academics express the view that fiduciary duties are exclusively proscriptive, others hold the view that fiduciary duties are at least sometimes prescriptive. This divergence of views is of more than emotional significance to Chancery lawyers concerned that equity's role has been reduced to that of a mere handmaiden, subsidiary to others and having no separate and independent role of her own. It is proposed that the proscriptive fiduciary duties, whilst subsidiary and prophylactic, serve to enhance fiduciary accountability rather than non-fiduciary duties. While breaches of prescriptive fiduciary duties will remain comparatively rare, an acceptance of their existence is crucial to our understanding of how fiduciary duties operate.