

Fiduciary Relationships and Breach of Fiduciary Duty

Law of FR's

- Concerned with certain sorts of relationships, & aims to uphold the integrity of those relationships
- Exclusively part of equity's jurisdiction
 - Can only be dealt with in equity
- FR's: purely equitable relationships to which equity grants particular protection
- Fiduciary obligations: owed by the fiduciary to identified others (*beneficiary* of the obligation/*principal* to whom the obligation is owed)
 - Core obligation is undivided loyalty
 - Must act exclusively in the interests of the beneficiary
 - Not all obligations owed by the fiduciary to the beneficiary will be fiduciary obligations
 - Not unbounded → may be limited by time/nature of activities
- Benefits of establishing a FR:
 - Equity's strongest level of responsibility (more than K or tort)
 - Equitable methodology attracted
 - CL damages calculated at time of breach
 - Equitable damages calculated at time of judgment, with benefit of hindsight (usually benefits P, can get more money)
 - Full range of equitable remedies apply, incl. prop remedies
 - Can follow property that's been taken, get it back/proceeds
 - Can do this at CL, but more restricted
 - Can also obtain remedies against third parties – particularly attractive to Ps
 - Accessorial liability
- Reasons for fiduciary obligations:
 - Preventative function: prevent fiduciary's from giving into temptation to act in own best interests, rather than beneficiary
 - Prophylactic justification
 - No evidence it has any effect on others
 - Overcome evidentiary imbalances
 - Eg. Superannuation (fiduciary) fund has all knowledge against me (beneficiary)
 - Therefore all assumptions are against the fiduciary → assumed to be disloyal unless they prove they are loyal
 - Economic efficiency
 - Contractual
 - Encourage disclosure

Conaglen's Thesis

- Relationships can never be purely fiduciary, always another relationship existing eg. contractual
 - If this is so, then the fiduciary obligation is imposed in addition to the contract/law
 - Asks for underlying contractual obligations be performed loyally
 - If we define loyalty too widely → too easy to say someone is disloyal
 - Suggests only two types of loyalty (profit/conflicts rules)
 - [Heydon J](#) seriously opposes this theory
- Require obligations to be negative: rules in Australia only tell fiduciary what he can't do
 - Proscriptive only
 - [Gaudron & McHugh JJ](#): Fiduciary obligations don't impose positive legal duties on the fiduciary to act in the interests of the beneficiary (obiter, *Breen v Williams*)

Scope of Fiduciary Relationships

- Not all activities of a fiduciary are regulated by fiduciary law → only those which fall within its scope
- Sometimes scope is evident from character of relationship, or influenced by matters under CL eg. terms of a K establishing relationship
- Courts say scope is relevant to all FR's → but only super important for accepted categories
 - Already proved existence of non-accepted category → already proved scope
- Fiduciary will only be liable for profits/conflicts breach if it occurred within the scope (actual function of responsibility assumed)

Howard v Commission of Taxation

- H was personally involved in joint venture to re-do a golf course, H was also director of Disctronics. During negotiations for golf course, H passed the opportunity on to D.
 - Before this, the other joint venturer's diverted the opportunity
 - H claimed this was in breach of fiduciary duty of his director's duty to S
- Held: They indeed breached the fiduciary duty, but D wasn't owed any fiduciary duty by them
 - Joint venture was outside scope of his director's duties to D
- H owed D obligations, however the joint venture was a personal venture
 - He was under no responsibility to hand over the venture to D, so compensation was his

Grimaldi v Chameleon Mining NL (No 2) [2012]

- C acquired gold mining tenements in consideration for some of its shares of subsidiary company Winterfall, negotiated by G and another. Part of this transaction, G received commission (shares in C). G directed these shares to be given to Murchison (G controlled M).
 - Proceeds of this sale enabled M to take over W (reverse take over, private took over public), and G then got 10mil shares of M for this take over
 - Without the proceeds of the sale, M wouldn't have been able to take over W
- Held G, acting as 'consultant' can still be found to be a 'director' of a company
- Question of what responsibility a fiduciary has undertaken (**SCOPE**):
 - Question of fact
 - May be narrow (eg. specific agency) or broad & general (eg. company director)
 - May be pre-determined
 - May be ordained by past practice
 - May be left to fiduciary's discretion to determining
 - May evolve over time – one agreement at the beginning doesn't necessarily transpire

Hospital Products Ltd v United States Surgical Corporation (1984)

- **Mason CJ**: The obligation to act in the interests of another is the foundation of the fiduciary relationship, even if it be subject to qualifications... including that in some respects the fiduciary is entitled to act by reference to his own interests
 - Relevant to consider what parties themselves agreed to

Birtchnell v Equity Trustees, Executors & Agency Co Ltd (1929)

- Real estate agency ET discovered their deceased partner had been running a profitable land development business on the side with one of their clients. ET sued for account of deceased partner's share of profits in the business
- **Dixon J**: Held they were entitled to profits
 - Deceased had made profits by using business connection from partnership
 - Transactions of the land development business also concerned their partnership as it was involved in the same business (sub-division and sale of land)

Defences to Breach of Fiduciary Obligation

- Full disclosure and consent
 - Fiduciary must have disclosed all relevant information, depending on facts of case and nature of relationship between parties (*Farah*)
 - There is no freestanding ‘duty to disclose’ as yet in Australia (which would be prescriptive)
 - Instead, disclosure is one part of the defence – also matter of extensive debate
 - Can't have defence if there is no disclosure (also need consent)
- A beneficiary may consent to, excuse or ratify a breach of duty, after material facts have been sufficiently disclosed
- Doesn't matter when consent occurs → can be before, during or after the breach
 - After: called “ratifying the breach”

Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007)

- Parties entered into joint venture agreement to develop property. Mr Farah controlled FC & applied to council for planning permission, but it was refused as site was too narrow. Council told F permission may be granted if adjoining houses were purchased, so he arranged for FC to purchase them without informing Say-Dee (houses were put under F's family member's names).
 - SD claimed FC had breached fiduciary duty in exploiting the opportunity to purchase the house & completing the development
 - Also argued F's family were accountable in equity for having knowingly received property transferred in breach of FC's fiduciary obligations
- HC held FC wasn't liable for breach of fiduciary obligation, as SD had also been informed the houses were for sale, so they therefore consented
 - Even if FC had committed a breach, F's family weren't liable as they had only received information (not property)
 - However F's family did not receive consideration so they weren't bona fide purchasers

Boardman v Phipps [1967]

- Trustee Mrs Phipps had dementia, made no attempt to get consent from her (even though she couldn't have given it)
 - Using info they acquired while acting as agents for trustees (at the meeting and subsequent negotiations), they got major shareholding
- 2 points where disclosure could've been obtained, and wasn't obtained:
 1. Didn't get consent of trustees as they only told the active trustees what they were doing
 2. Didn't get consent of beneficiaries
- They did write to the beneficiaries telling them what was going to happen, however John didn't think the letter told the whole story (it was admitted not all the relevant info had been given) → therefore no consent was obtained

Regal (Hastings) Ltd v Gulliver [1942]

- R owned cinema, wanted to acquire leases over 2 more, so they formed a subsidiary company (Amalgamated) but R couldn't subscribe all shares in A. Company directors & secretary had to purchase remaining shares, then lease of cinemas in favour of A was granted.
 - Purchaser bought all shares in R and A. New board of directors sued former directors, claiming they'd used their position to obtain a personal profit
- HC: HoL held directors accountable to R for their profit, breach of fiduciary duty
 - Opportunity to take up shares only came to those people from their position in the company

Personal Remedies

Types of Equitable Personal Remedies

- Equitable remedies are always discretionary
 - CL damages are never available for a purely equitable wrong
 - Therefore they are never adequate
- Even though a P has made out the case, they might be denied a remedy/have it reduced due to discretionary factors, such as:
 - Availability of any equitable defences
 - Available in the exclusive jurisdiction: where the action only recognised in equity
 - Available in concurrent/auxiliary jurisdiction: but equity usually won't apply a remedy where the common law remedy is adequate
 - Interests of third parties (*Giumelli*)
 - Impossibility, futility
 - Availability of adequate common law remedy: reason for denying equitable remedy
- Why a P may refer proprietary remedy over personal:
 - Personal remedy is equity's default, sometimes impossible to get proprietary
 - If P can get a proprietary remedy, they claim actual property
 - Important if D is insolvent
 - Proprietary remedies are enforceable against third parties (other than bona fide purchaser)
 - Personal remedies only enforceable against D/estate

1 Specific Performance

- Order requiring that obligations arising under a K be performed
 - Available in auxiliary jurisdiction to support a CL claim – only available as remedy for breach of K
- Only available if breach of K, so it's quite limited
 - Even if denied, can still get damages for breach of K
 - Can also be entitled to *Lord Cairns Act*
- Available where CL damages inadequate, unavailable or impracticable (eg continued supervision)
- Usually need a legally enforceable K, but equity flexible (*JC Williamson*)
 - K should be specifically enforceable (can't get spec perf of illegal K)
 - Generally ordered for sale of land K
 - Not usually for sale of chattels/personal services
 - Can prove chattels are unique or can't be easily acquired
 - Fractured relationship,
 - Identity issue: can't force them to work (but can force an employer to employ certain people)
 - Building Ks – need supervision
- Valuable consideration: nominal consideration isn't sufficient
 - Doesn't have to be full value, but it has to mean something
- 2 considerations generally relevant to award:
 1. Fairness to both parties
 - Unjust to insist D perform his side of K unless the P has performed hers, or is ready, willing & able to perform
 - Strict mutuality isn't always required
 2. Supervision issues
 - Court must be satisfied it can supervise the order (*Argyll*)

5 Account of Profits

- Personal remedy usually granted only in the context of a breach of fiduciary duty, breach of confidence or in response to the infringement of intellectual property rights
 - Not available for undue influence, unconscionable conduct, estoppel (but see *Giumelli*)
- Purpose is to stop wrongdoer profiting from breach
 - Not to punish, just strip the profit (net profit, not gross profit)
- Have to articulate what the wrong is
 - Must relate to unauthorised use
- Allowance may be made for time, skill, expertise (*VUT v Wilson*)
- Calculation → irrelevant factors (*Warman v Dwyer*):
 - P has/hasn't suffered loss
 - Irrelevant because P isn't complaining about loss, were complaining about illicit profit
 - P could/couldn't have ever made the profit (*Keech; Boardman*)
 - D's honesty/dishonesty (*VUT v Wilson*)
 - May impact on allowance
 - Equity has different standard of honesty as common law (not as high as CL)
- Unlikely D is going to keep exact records of their breach, so therefore an estimate of account of profits is acceptable

Warman International Ltd v Dwyer (1995)

- W had agency agreement with Italian manufacturer B, and D was the general manager of W's Qld branch. B wanted to enter partnership with W but they refused. D approached B, began negotiating with him. B terminated agreement with W and D quit, and they entered a 20-year agreement
 - Held D committed breach of fiduciary duty, both the loss of W and profit made by D's companies were assessed
- **Mason CJ, Brennan, Deane, Dawson & Gaudron JJ**: Held W was entitled to elect between equitable compensation and account of profits
 - Mathematical exactness isn't required for account of profits – reasonable approximation is acceptable
- Fiduciary's liability to account does not depend on detriment to principal, or dishonesty by fiduciary
 - If principal suffers loss that exceeds fiduciary's profits, can seek compensatory remedy
 - Distinction between misappropriation of asset, and misappropriation of opportunity
- D has burden of showing it should not account for all profit
- Court usually won't apportion profit, but will make allowances for fiduciary's skill, effort, expertise

Victoria University of Technology v Wilson [2004]

- 2 academics and former student were involved in computer programming at VUT. Former student came to professor with idea for computer program, needed help putting it together. Program tracked computer purchases. Professor didn't tell VUT enough about it
- Only case showing generous allowance