

Week 2B – Fiduciary obligations: existence and scope

BDDV chapter 10.1 – 10.4b

BV 10

ABN AMRO Bank NV v Bathurst Regional Council [2014] FCAFC 65 para [1066], extract on Moodle
Wingecarribee Shire Council v Lehman Brothers Australia [2012] FCA 1028, extracted and summarised on Moodle

BV 10

- Fiduciary relationships do not simply require the fiduciary to act reasonably, as may be the case in tort or contract.
- Fiduciary obligations regulate managers' behavior where their activities cannot be properly supervised by those on whose behalf they act, whom we will refer to as 'the beneficiary.'
- Obligations:
 - The duty not to make a profit out of the relationship
 - The duty not to place themselves in a position of conflict between self-interest and the duty owed to the beneficiary, or in a position where they owe conflicting duties to several beneficiaries.

Problem Question Structure:

1. Is there a fiduciary relationship? Scope?
2. What are fiduciary duties?
3. Breach?
4. Disclosure + consent?
5. Remedy

What is a fiduciary relationship?

"Defies definition" (*Breen v Williams*)

1. Is there is a fiduciary relationship?

- a. Status based? If YES, there is fiduciary. If NO, see B.
- b. On the facts?
 - i. Undertaking principle (*Hospital Products*)
 - ii. Indicia of fiduciary relationship (*Breen v Williams*)

2. What is its scope?

3. Was there a breach?

- a. No profit rule (*Breen v Williams*)
- b. No conflict rule (*Breen v Williams*)

Recognised or status based Fiduciary Relationships

There are some relationships that the court deems fiduciary based on their status: (*Hospital Products*)

- Trustee-beneficiary
- Solicitor-client

- Director-company
- Employee-employer
- Agent-principal
- Partner-co-partner
- Executor-beneficiaries of deceased's estate

No Australian court has held that parents are recognized fiduciaries.

The fiduciary is expected to act exclusively in the interests of another on matters covered by the relationship and is not permitted to pursue self-interest.

The more closely a legal relationship approximates that of a vendor and purchaser, the less likely is to be fiduciary.

Outside the recognized relationships

News Ltd v Australian Rugby League Ltd

Drew distinction between:

Vertical fiduciary relationships:

- Where one party has greater access to resources, skill or information
- e.g. trust and agency relationships

Horizontal fiduciary relationships:

- Resources, skills and information are shared for purposes of achieving a common goal
e.g. professional or business partnerships

Identifying Relationships

- Must first identify duty, then the breach (do not work backwards): *Tito v Waddell*
- Must also identify **scope of duty**

There is no definitive test to identify a fiduciary relationship – however there are several indicia that can be used:

Breen v Williams (1996) – 5 indicia of a fiduciary relationship

1. Existence of a **relationship of confidence**
2. **Inequality of bargaining power**
3. An **undertaking** by one party to perform a task or fulfill a duty in the interests of another party
4. **Scope** for one party to unilaterally exercise a discretion or power which may affect the rights/interests of another
5. **Dependence or vulnerability** on the part of one party that causes that party to rely on another.

Test for commercial/advisory relationships

- One party must undertake or agree to act on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that person in a legal or practical sense: *Hospital Products v USSC (1984)*
- Example: A creditor may owe fiduciary obligations where it has undertaken to provide wholly disinterested advice to the customer and to act exclusively in the customers interests: *CBA v Smith (1991)*

Undertaking Test

- **Hospital Products** undertaking test apt to determine whether a partnership or other potential horizontal fiduciary relationship imposes fiduciary obligations
- Question will be whether the parties have placed a high degree of mutual trust and confidence in each other in pursuing goals
- Generally, degree of trust that one partner expects of another will also be expected in any horizontal commercial relationship alleged to be fiduciary.

***Hospital Products v United States Surgical Corporation (1993)* – leading authority on the application of fiduciary obligations to vertical business relationships.**

Note: Mason's test below is not law just persuasive.

Facts:

- USSC manufactured surgical stapling products
- Blackman realized USSC's products were not patented in Australia and offered to become its distributor
- Obtained exclusive distribution rights in Australia, then established his own company Hospital Products
- Competed with USSC by repackaging their products and selling them as its own and by reverse engineering USSC's products to enable competing products to be developed – began competing w/ USSC in USA as well
- USSC terminated contract w/ Blackman/sued for breach of contract and fiduciary obligation

Issue:

Does a fiduciary relationship exist or is it purely commercial?

Held:

- Undertaking test: *'The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interest of that person in a legal or practical sense'*
- HC unanimously held that Blackman had breached his contract
- But majority held that he did not owe fiduciary obligations to USSC.
- Majority held that Blackman and Hospital Products had not undertaken to act in USSC's interests so as to justify the imposition of fiduciary obligations.
- Blackman was not obliged to sell any specific quantity of USSC's products, could determine the sale price of the products and was permitted to make a profit on his own account.
- Moreover, the contract was terminable by either party at will.
- These factors all indicated that the D's were free to promote their own interests and had not exclusively agreed to act in the interests of USSC.

Mason J (dissenting):

- D's were under a limited fiduciary obligation to protect USSC's Australian product goodwill
- All factors indicated D's were free to promote own commercial interests, had not agreed to act exclusively for USSC
- A person may stand in a fiduciary relationship to another for one person, but not for another (depends on scope)

Commonwealth Bank of Australia v Smith (1993) 42 FCR 390

Facts:

- P's were longstanding customers of the bank and often relied on their advice in business dealings
- Sought advice of bank in buying lease of a hotel from another of the bank's customers
- Bank was also interested in arranging sale of hotel so that loans it had made were repaid
- Branch manager told P's that the hotel was a 'good buy' even though the bank's mortgage evaluation was worth less than the price P's had agreed to pay
- Bank also represented that the lease would be renewed despite having no grounds for the representation.
- P's bought the hotel and lost considerable money operating it, landlord refused to renew the lease

Issue:

Does a fiduciary relationship exist or is it purely commercial?

Held:

- Bank had so identified its interests w/ those of the P's that it owed fiduciary obligations.
- Had undertaken to act exclusively in their interest in advising them on the purchase.
- Breached fiduciary obligations by placing itself in a position of conflict.
- Despite making no profit, ordered to pay equitable compensation for losses.

Test for financial advisors: *Daly v Sydney Stock Exchange (1986):*

- Note: just because you have a stock broker, don't say status-based (Daly). Stock Broker's can be fiduciary but only when they act as agent.

Daly v Sydney Stock Exchange (1986):

Facts:

- Dr Daly sought advice from stockbroker about investing sum of money
- No mention in HC of Dr Daly being a pre-existing client of broker –probably not pre-existing
- Broker advised him against investing on stock exchange at that time, recommending money should be lent to broking firm
- Dr Daly accepted that advice, but the broker became insolvent and the loan was not repaid

Held:

- Stockbroker is sometimes an agent for its client concerning buying and selling of listed securities
- Here, the most that could be said was that, depending on advice given by broker and whether it was accepted, a relationship of principal and agent might come into existence
- **Brennan J:** "Whenever [a person] holds himself out as having expertise in advising... and undertakes to give it... the adviser stands in a fiduciary relationship to the person whom he advises."