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1 FIDUCIARY OBLIGATIONS

Chapter 10
Cases
- ASIC v Citigroup [2007] FCA 963, [270]-[321]
- John Alexander’s Clubs Pty Limited v White City Tennis Club Ltd (2010) 241 CLR 1 ([85]-[93]).
- Breen v Williams (1996) 186 CLR 71 (106-114)
- Pilmer v Duke Group Limited (2001) 207 CLR 165, ([116]-[136]) per Kirby J.

1.1 FIDUCIARY RELATIONSHIPS

1.1.1 Presumed fiduciary relationships

- Presumed commercial and professional relationships:
  - Trustee-beneficiary
  - Solicitor-client
  - Director-company
  - Employee-employer
  - Agent-principal
  - Partner-co-partner
  - Executor-beneficiary of deceased’s estate

- Note:
  - This is not a closed list and other relationships may be added
  - Prime candidate may be adviser and client
  - Canadian Supreme Court has held the relationship between parent and child is “intuitively fiduciary”
  - The more closely a legal relationship approximates that of a vendor and purchaser, the less likely it is to be fiduciary

1.1.2 Vertical and horizontal relationships

- Other relationships outside the recognised ones will be held to be fiduciary, wholly or in part, where there is a reasonable expectation that one party should subordinate his interests in a particular matter to the interests of another

- Definitions per Gummow J in News Ltd v Australian Rugby League Ltd
  - Vertical relationship: Where one party has greater access to resources, skill or information than the other
    - E.g. trust and agency relationships
  - Horizontal relationship: where resources, skill and information are shared for the purposes of achieving a common goal
    - E.g. professional or business partnerships

1.1.2.1 Vertical relationships

- Hospital Products Ltd v USSC is the leading authority on the application of fiduciary obligations to vertical business relationships

  “Undertaking” test of a fiduciary relationship:
  “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.”

- Hospital Products Ltd v USSC

  - Facts:
    - Blackman had an exclusive distributorship arrangement for products manufactured by United States Surgical Corporation (USSC)
    - Blackman’s company, Hospital Products Ltd (HPL), was soon after substituted as the distributor.
    - HPL, using USSC products as models, began to manufacture products that were essentially identical to those manufactured by USSC. HPL went into competition with USSC

  - Issue:
    - Was HPL a fiduciary?

  - Held:
    - HC majority held there was no fiduciary relationship and USSC’s right to relief rested in a claim for damages for breach of contract.
    - The relationship between the parties was a commercial one entered into by equal parties at arm’s length with the intention that both parties would gain a profit, it was inappropriate to find a fiduciary relationship between the parties.
    - Mason J dissented on the ground that theDefs were under a limited fiduciary obligation to protect USSC’s Australian product good will

- CBA v Smith

  - Facts:
    - Pls sought CBA’s advice in buying lease of hotel from another of the bank’s customers. CBA wanted to sell hotel so that loans it had made were repaid. Branch manager told Pls it was a good buy despite bank’s mortgage valuation showed hotel was worth less than price Pls had agreed to pay. Also represented that lease of hotel would be renewed despite having no grounds for making the representation.
    - Pls bought hotel and lost considerable money operating it. Landlord refused to renew lease.

  - Held:
    - Full Federal Court held CBA owned Pls fiduciary obligations.
      - The bank had so identified its interests with those of the plaintiffs that it owed fiduciary obligations – had undertaken to act exclusively in their interests in advising them on the purchase of the hotel.
    - CBA breached fiduciary obligations when it placed itself in position of conflict between the advisory duties it owned the plaintiffs and its interest in ensuring the sale of the lease.
      - Note: bank made no profit from the conflict of interest. Nevertheless, it was ordered to pay equitable compensation to Pls for their financial losses incurred in running the hotel.

1.1.3 Horizontal relationships

- Paradigm of horizontal fiduciary relationship is a business or professional partnership

- Hospital Products test is inadequate to determine whether a partnership imposes fiduciary obligations
  - a partner does not undertake to act exclusively in the interests of co-partners (unless otherwise specified) – all partners act in the interests of the partnership
  - The question to be asked is:

Mutual trust and confidence test for relationships analogous to partnerships:
Whether the parties have placed a high degree of mutual trust and confidence required to justify the
imposition of fiduciary obligations – matter for judicial assessment.

**United Dominions Corp Ltd v Brian Pty Ltd**

- **Facts:**
  - Brian entered into a joint venture agreement to construct a shopping centre with United Dominions Corporation (UDC), Security Projects Ltd (SPL). Shopping centre was successfully developed although Brian was neither repaid his financial contribution nor paid a share of the profits. Unknown to Brian, UDC had taken a mortgage over SPC’s land (which the centre was built on) and claimed payment of the profits under a collateralisation clause in the mortgage.

- **Held:**
  - Joint venture agreement was in substance a partnership even though it was not labelled such in the documentation
  - The High Court found in Brian’s favour. It held that SPL and UDC owed fiduciary duties to Brian and that the collateralisation clause in the mortgage was obtained in breach of such duties
  - The relationship was fiduciary since the willingness of the parties to proceed with the project prior to executing the agreement demonstrated a high degree of mutual trust and confidence.
  - The parties owed each other fiduciary obligations at the time the mortgages were executed so that UDC could not obtain for itself a collateral advantage without the knowledge and consent of the other parties.

**1.1.4 Concurrent contractual and fiduciary relationships**

- Fiduciary relationships may be created by contract (e.g. solicitor-client relationships). Others may evolve from a relationship which was initially a contract permitting the pursuit of self-interest but which over time became a relationship of trust and confidence.

  1. Fiduciary obligations can be modified or excluded by the terms of a contract (ASIC v Citigroup)
     - “The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.” (Hospital Products).
  2. Not every breach of duty committed by a fiduciary amounts to a breach of fiduciary obligation. The breach may constitute a breach of contract or a tort without necessarily involving any fiduciary failure.
    - Only if the breach constitutes unauthorised conflict of interest or profit-making, will it be a breach of fiduciary duty.

**ASIC v Citigroup**

- **Facts:**
  - IB agreed to advise company on its proposed takeover bid for another company. Day before takeover bid was announced, bank employee purchased shares in target company on behalf of the bank.
  - Employee did not have insider information about the takeover, and bank had procedures in place to restrict flow of commercially sensitive information
  - ASIC argued bank acted in a fiduciary capacity in advising on the takeover bid, and that it had committed a breach of fiduciary obligation by permitted the shares to be bought.

- **Held:**
  - Claim failed. Letter of engagement specifically excluded the existence of a fiduciary relationship. Court held that the law did not prevent an investment bank from contracting out of a fiduciary obligation at the commencement of the relationship.

**Farrington v Rowe McBride & Partners**

- **Facts:**
  - Solicitors acted for PI in personal injury claim. PI recovered damages and sought firm’s advice on investment of the damages. Firm had major corporate client in financial difficulties. Solicitor advising PI had financial interest in the corporation. Persuaded PI to invest in the corporation. Two years later corporation went into liquidation.

- **Issue:**
  - Conflict between fiduciary duties to two principles

- **Held:**
  - New Zealand Court of Appeal held that the solicitors had placed themselves in a position of conflict and had therefore committed a breach of fiduciary obligation. The firm was ordered to compensate the PI for lost investment.

Distinguish from **Hill v Van Erp**

**Hill v Van Erp**

- **Facts:**
  - A solicitor negligently failed to ensure that a will complied with statutory formalities, with the result that the plaintiff failed to recover the legacy she expected.

- **Issue:**
  - Breach of duty does not necessarily amount to breach of fiduciary obligation.

- **Held:**
  - The solicitor had acted in breach of duty of care and was liable in tort. She was also in breach of the contractual duty of care and skill she owed to her client’s estate. She was not, however, liable for breach of fiduciary obligation because she owed no duty to the plaintiff to protect her interests and there was no element of conflict of interest or unauthorised profit-making in her negligent conduct.

**1.2 DISTORTION OF THE FIDUCIARY CONCEPT**

The fiduciary concept is sometimes at risk of being distorted in cases where the plaintiff is considered to deserve an award of a remedy for breach of fiduciary obligation (such as an account of profits or a constructive trust) but where the requirements for a fiduciary relationship are not met. In these cases, courts may impermissibly ‘read equity backwards’ by artificially finding the existence of a fiduciary relationship.

**Chase Manhattan Bank NA v Israel-British Bank (London) Ltd**

- **Facts:**
  - Employee of Pl bank mistakenly made a double payment of $2mil to Def bank. This was a personal claim meaning that if the payee is insolvent, the payer will be an unsecured creditor in the payee’s insolvency. Def bank was in liquidation. Payer successfully argued payee
owned fiduciary duty to repay mistaken payment and therefore held payment on constructive trust for payer.

- **Issue:**
  - The practical effect of the imposition of the constructive trust was that the PI became the equitable owner of the payment and was entitled to keep the money in priority to Def’s unsecured creditors.
  - There was no pre-existing fiduciary relationship on the facts except in the artificial sense that payment created a relationship between the parties. Neither undertaking nor the mutual trust and confidence tests were satisfied.

- **Held:**
  - Fiduciary duty to return the payment was recognized because the court considered that the Def’s insolvency should not prevent the PI from recovering its money.

**However this is impermissible** – Courts should not retrospectively impose a fiduciary duty on a party – *LAC Minerals Ltd v International Corona Resources Ltd*

### 1.3 **SCOPE OF THE FIDUCIARY RELATIONSHIP**

- Fiduciaries only owe duties in respect of their undertaking thus it is important to distinguish between aspects of the parties’ relationship which are fiduciary and those which are not.
- Court determines the scope of the fiduciary relationship by reference to the fiduciary’s undertaking and do not impose obligations outside of that undertaking.
  - However, equity is not limited to any written record of the agreement – can consider the conduct of the parties in full.
  - Questions of scope usually only arise in cases involving recognized categories of fiduciary relationships.

**Birchnell v Equity Trustees Executors and Agency Co Ltd**

- **Facts:**
  - The deceased was in a real estate partnership with others. A partnership client introduced a land development opportunity to the partner which he took up personally, not informing his co-partners of it. After his death other partners alleged a breach of fiduciary duty.

- **Issue:**
  - Scope of fiduciary obligations and conduct of parties.

- **Held:**
  - High Court examined the written agreement between the partners and it appeared that the partners had in fact regarded themselves as bound to offer such opportunities to the partnership – the opportunity was within the scope of the partnership.

### 1.4 **PRESCRIBED CASES**

#### 1.4.1 Fiduciary obligations and contracts

**ASIC v Citigroup**

- **Principles:**
  - A fiduciary relationship exists where a person has undertaken to act in the interests of another and not in his or her own interests.
  - The scope of the fiduciary duties will vary and is to be determined according to the nature of the relationship and the facts of the case.
  - The distinguishing and overriding duty of a fiduciary is the obligation of undivided loyalty.

**John Alexander’s Clubs Pty Limited v White City Tennis Club Ltd**

- **Principle:**
  - Courts should not seek to introduce fiduciary obligations as implied terms into ‘limited contracts’
  - The judgment stands for the proposition that establishing a fiduciary relationship out of a commercial relationship will be very difficult given the inherent nature of commercial relationships, where each party is essentially acting in its own interests. The primary source for the rights and liabilities of commercial parties is the contract between them, and where a fiduciary relationship is not expressed or implied from the contract, it will be very difficult to superimpose one.

### 1.4.2 Negative duties

**Breen v Williams**

- **Principle:**
  - A fiduciary’s obligation does not impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed.

- **Facts:**
  - Breen wanted access to her medical records from Dr Williams in order to join a class action in the USA in relation to faulty breast implants. W had helped B remove the faulty breast implants. W agreed as long as B signed a written waiver stating she would not sue W. B disagreed with this process and sued W to obtain her records.

- **Issues:**
  - Whether there is a fiduciary duty between a doctor and a patient.
  - Whether the records are within the scope of this fiduciary duty.

- **Held:**
  - Doctor patient relationship is not an accepted fiduciary relationship.
  - Fiduciary duties – could not be distorted to create positive duties (as in Canada) (They are negative – requiring someone not to do something).
  - ‘Some aspects of the doctor-patient relationship exhibit characteristics that courts have used to find a fiduciary relationship.’
  - However, there was no “pre-existing duty to provide access to the records.”
  - Therefore, access to records lay outside the scope of the narrow fiduciary duty between a doctor and a patient.

**Pilmer v Duke Group Limited**

- **Facts:**
  - The case concerned where accountants had been engaged by company A to provide a report as required by ASX rules on whether the proposed consideration for a takeover by company B was fair and reasonable. The report had been prepared incompetently with this process and sued W to obtain her records.

- **Held:**
  - Fiduciary obligations are prescriptive rather than prescriptive in nature; there is not imposed upon fiduciaries a quasi-tortious duty to act solely in the best interests of their principals. It could not be shown a conflict of interest existed.

- **Principles regarding to the nature of fiduciary obligations were summarised as follows:**