

LAW3111 SEM 1 2018

EQUITY NOTES

(2) Breach of Fiduciary Duty

2.1 Fiduciary Relationship Existence

Mason J defined a fiduciary relationship in *Hospital Products*

- The fiduciary undertakes or agrees to act for 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 other person in a legal or practical sense.
- The fiduciary has a special opportunity to exercise the power or discretion to the detriment of the other person who is accordingly vulnerable to abuse by the fiduciary

Legal and practical interests that are vulnerable to fiduciary's powers and discretions

Fiduciary relationships are purely negative (*Breen v Williams*)

NB: Do not need to prove that the fiduciary actually took advantage to show that the relationship is fiduciary, just that the opportunity existed.

2.1.1 Accepted Categories of Relationship

Due to the legal nature of the relationship, equity knows that the following are fiduciary relationships:

- Trustees and Beneficiaries (*Keech*)
 - o Trustee can abuse ownership of trust property
- Directors and Companies (*Regal Hastings*)
 - o Companies rely on directors with company property
- Agents and Principals (*McKenzie v McDonald*)
 - o Agent can take title on the principal's behalf
- Employees and Employers (*Warman v Dwyer*)
 - o Employees have practical custody over firm assets
- Partners (*Chan v Zacharia*)
 - o Either partner has the power to dispose of assets over which the other has a claim
- Solicitors and Clients (*Nocton v Lord Ashburton*)
 - o Client reposes custody of their legal situation to the solicitor

I.e. **take custody of property and misapplying it** (i.e. interfering with bank account, depriving opportunity to enter a contract, etc.)

2.1.2 Deemed/Factual Relationship

If the relationship on the facts does not fit into an accepted category, Mason J in *Hospital Products* held that analogy with an accepted category can aid in seeing if a factual relationship exists

- E.g. joint venture can be analogised with a partnership (*UDC v Brian*)

NB: not a less strong relationship, comes from same nature of obligation as accepted categories

Possible Examples:

- Financial advisor
- Accountant
- Bankers
- Real Estate Agents, etc.

Examples which do not exhibit fiduciary characteristics

- Executive government exercising s61 powers to manage international relations (*Habib v Cth*)
 - o A purely public actor (govt.) cannot abuse H's interest as it has no interests of its own
- C.f. a government business entity could owe fiduciary duty as it has its own interest

- NB: if scenario where there are no shareholders of a company, directors can consent to breach (*Qld Mines*)

Consent by acquiescence is possible (*Qld Mines*)

2.5 Third Party Liability

Equity may impose personal liability on third parties when fiduciary obligations are breached

- E.g. banks, solicitors and other intermediaries (white collar professionals who assist a wrongdoing fiduciary)

2.5.1 *Barnes v Addy* Limbs

2.5.1.1 Knowing Receipt (1st limb)

“Knowing receipt” describes the wrongdoing of those third parties who acquire or deal (“receive and become chargeable”) with trust property or other fiduciary property in the knowledge that it has been transferred to them in breach of fiduciary duty

- E.g. company assets paid by director to third party
- Includes persons who receive property misappropriated by fiduciaries and/or who follow instructions concerning its disposal

2.5.1.1.1 “Receipt”

Semi-technical term

- Receipt = taking title/ownership
- Exception = **mere conduit doctrine**
 - Taking title but only in the course of facilitating a payment to someone else, not in receipt under the first limb (protects banks)

2.5.1.2 Knowing Assistance (2nd limb)

“Knowing assistance” names the liability imposed on those who assist dishonest and fraudulent fiduciaries while having knowledge of their wrongdoing

- Liability depends on causal link with breach of fiduciary duty

2.5.1.2.1 “Assisting”

Not a technical term, nor defined in a particular way

- E.g. filling in paperwork, helping to develop plans, banking cheques, etc.
- Can be confusing when a third party buys property that was never controlled by the fiduciary (not receipt even though the TP takes title) (*Consul*)
 - i.e. fiduciary knows from his position that there is an opportunity to buy these properties, but they are not under the control of the fiduciary, and the properties are thus not in the fiduciary “orbit” until the TP acquires them

2.5.1.2.2 “Dishonest and Fraudulent”

“Dishonest and fraudulent” have their ordinary meaning, and “trivial” or “honest” breaches don’t count (*Farah*)

- Possible to have breaches which are not trivial, but nonetheless not dishonest and fraudulent (*Hasler*)
 - Contrary not contradictory terms
 - Need to talk about fiduciary state of mind (affirmative requirement to make out dishonesty)

(3) Remedies

Equitable remedies are not awarded “as of right”, they are **discretionary**.

Money remedies vs specific remedies

- Money remedies require **measure**
 - o Money remedies create a debt, which is a purely personal matter, thus cannot be proprietary
- Specific remedies require **subject matter**

ELECTION

NB: In a situation where there is both an available disgorgement and compensatory remedy, the plaintiff has the right of election (*Warman*)

Where there are multiple defendants, e.g. fiduciary and third party accessory, the plaintiff may seek different remedies against different defendants and the measure of the remedy may be different against each (*Club of the Clubs*)

- Confined by maximum liability of each defendant
- Confined in total by the biggest measure of gain or loss

3.1 Personal Remedies

3.1.1 Account of Profits

Gains based (disgorgement) money remedy (*Warman*)

- Measured by reference to the defendant’s wrongful gain **at the time of breach**

3.1.1.1 Doctrine of Allowances

Apportioning Profits

- In extreme cases where the bulk of the profits came from the skill, effort, property and resources of the fiduciary, profit sharing may be appropriate
 - o Has to have introduced capital and taken risks
 - o Wrongdoing of the defendant should not be transformed into a vehicle for the plaintiff

3.1.1.1.1 “Head Start Period”

What part of the profit is attributable to the wrongdoing, compared to what part is outside the scope of any duties owed?

- At a certain point, the defendant would have extracted himself from the fiduciary relationship and set up own enterprise
- Thus profits after this point are not measurable in account as they are outside the scope of duties owed

3.1.1.1.2 Outlays

If in acquiring assets/income against which account is being measured, defendant engaged in outlays, those outlays are subtracted from the measure of the account

- Similar if labour was performed in acquiring the asset (effectively salary allowance for time, effort and expertise)

3.1.2 Equitable Compensation

Measured with regard to the plaintiff’s losses (restitutionary rather than compensatory)

Obligation on the breaching fiduciary to restore what was depleted (*Re Dawson*)

- E.g. money out of a trust, or assets of a company
- Measured at the time restitution is ordered

Must restore everything that but for the breach, would be in the possession of the beneficiary (*Youyang*)

- However if the fiduciary attempts to correct the breach, only liable to compensate the gap caused by the breach (*AIB Group*)