

Fiduciary Obligations

X may be liable for breach of his fiduciaries duties owed to Y

1. IS THERE A FIDUCIARY RELATIONSHIP?

a) Accepted category?

The relationship of _____ is an accepted category of fiduciary relationship (case). Hence, X owes fiduciary duties to Y.

- Partners (*Zacharia*)
 - o This is clearly a partnership as X and Y carry on a business in common with a view of profits (s 5(1))
 - o S 6: rules for determining existence of partnerships (basically taking a share of profits)
 - o S 14: firm liable for partner's wrongs
 - o S 23: Mutual rights/duties of partners can be varied by consent
- Trustees > Beneficiaries (*Keech*)
- Agents > Principals (*McKenzie*)
 - o Buying/selling for someone – straight away agent/principal
- (Senior) employees > Employers (*Warman*)
 - o Employee taking away from a business
 - o This could be information, contracts, opportunities...
- Directors > Companies (*Regal*)
 - o Director doing something without the knowledge of the shareholders (e.g. buying shares)
- Solicitors > Clients (*Nocton*)
 - o Look for dodgy advice – where the solicitor advises poorly for their benefit

b) Proven fiduciary relationship?

As the relationship of _____ is not an accepted category of fiduciary relationship, it must be proven on the facts.

F undertook to act on behalf/in the interests of X in _____. This allowed F to exercise power which will affect the interests of X in a legal/practical sense, leaving him vulnerable to abuse and affording F a special opportunity to take advantage of his position. (Mason J per *Hospital Products*)

Other indicia:

- Relationship of trust and confidence; (*Hospital Products*)
- Inequality of bargaining power; (*Breen*)
- A fiduciary relationship can exist without a formal contract – the lack of which can often point towards a high degree of mutual trust and confidence (*UDC*)

3. HAS THERE BEEN A BREACH OF FIDUCIARY DUTY?

Fiduciary obligations are prescriptive in nature and are strictly enforced. (*Breen*)

1. Conflict rule

X must establish that Y placed himself in a position of conflict. (*Chan*) A reasonable man would think that a real or sensible possibility of conflict exists between Y's duty to _____ and his own interests (*Boardman*; approved in *QLD Mines*)

On the facts, Y did _____.

- Look for a personal interest in conflict with the principal's interest:
 - o A conflict can exist even where no profits are made (*Nocton*)
 - o Profitable investment/transaction (*Boardman*)
 - o Cannot promote personal interest (Mason J in *Hospital Products*)
 - o Commission/bribe (*Grimaldi*)
 - o Partners: X can't compete with firm without consent, can't divert opportunity (s 34)
 - Further, as partners hold firm property on trust for each other, there is an irrebuttable presumption that Y obtained the virtue of his fiduciary position (s 24 *Partnership Act*; *Chan*; *Boardman*)

A) Duty v duty

Where F owes duty to two or more different parties in possible conflict. Examples:

Simultaneous representation

A fiduciary's loyalty to his principal must be undivided. If there is an 'actual' conflict of interests, solicitor must fully disclose conflict to both principal's and obtain their informed consent to his so acting. (*Farrington*)

- Although that case related to solicitors, the principle as the same and evidences a clear breach.

Successive representation

Later client has conflicting interests with an earlier client you no longer act for

- Duties end when the retainer ends, but obligation to not breach confidentiality continues (*Bolkiah*)
- The court should intervene unless it is satisfied that there is no risk of disclosure. The risk must be real, but it need not be substantial. Evidential burden on D (*Bolkiah*)
- P will also rely on Brooking JA's obiter comments in *Spincode*:
 - o Fiduciary duty prevents a solicitor from acting *in the same or a closely related matter against a former client* – acting against a former client is subversive to the appearance of justice.
 - APPLY HOW THEY ARE CLOSELY RELATED
- Also, fiduciary duties may continue after retainer ends if continue to seek advice and trust them with your affairs (*Farrington*)
- Duties may continue even if partnership is over. Each partner is a trustee over assets in course of winding up (*Zacharia*; s 42)

Third Party Liability

Equity may impose liability on 3rd parties, as well as fiduciaries, when fiduciary obligations are breached.

Knowledge – *Baden's test (Farah)*

Actual

1. Actual knowledge;
2. Willfully shutting eyes to the obvious;
3. Willfully and recklessly failing to make the inquiries that an honest and reasonable person would make (i.e. thinking it is wrong AND failing to enquire);

Constructive

4. Knowledge of circumstances which would indicate the facts to an honest and reasonable person
5. Knowledge of circumstances which would put an honest and reasonable person on inquiry (negligent failure to inquire)
 - o Insufficient, need 1-4 (*Consul*)
 - o For a KR claim, liability arises as a matter of conscience, not of property – 5 insufficient, to go further
 - o Strict liability rejected in obiter in *Farah*

1. KNOWING RECEIPT

X must prove three elements to hold Y personally liable for KR of fiduciary property (***Barnes v Addy***)

Requirements:

1. Primary breach;
 - o ‘See above’ usually sufficient
2. Receipt of property;
 - o Information not property unless a trade secret (*Farah*)
 - o Must be beneficial; not liable if only received as an agent of others (*Quince*)
3. With knowledge it was received in breach of duty.
 - o Third party knew or had reason to know it was trust/fiduciary property and knew the circumstances that indicated the fiduciary’s breach was a misapplication of trust property (*Grimaldi; Farah*)

2. KNOWING ASSISTANCE

A party who knowingly assists a breaching fiduciary with a dishonest and fraudulent design is personal liable for the breach. (***Barnes v Addy***)

Requirements:

1. Primary breach;
 - o Usually sufficient to say ‘see above’
2. Dishonest and Fraudulent Design

Confidential Information

Breach of confidence pertains to the unauthorised use of confidential information

1. IS THE INFORMATION SPECIFIC?

The information claimed to be confidential must be defined with sufficient precision (*O'Brien*)

- Rationale: amongst other things, to allow D to adequately defend themselves to the claim and so courts can identify and provide effective relief (*Ocular*)

Examples:

- *Ocular*: 'more or less everything'
- *O'Brien*: information was too general to allow it to be specific

2. DOES IT HAVE THE NECESSARY QUALITY OF CONFIDENCE?

a) Secrecy/confidentiality

Information must be sufficiently secret as opposed to being common or public knowledge (*Lenah*)

- Consider security measures (*Lenah*)
- Information can be released to parties for limited purposes, and retain its confidential nature (*Talbot*); limited publication of information may not destroy confidentiality (*AFL*)
 - o Test: has the confidential information entered the 'public domain'? I.e. Is the information "so generally accessible" that it cannot be regarded as confidential?
 - o Factors to consider:
 - Whether the limited publication would become known to an "ever-widening group of people" (eg 100 books sold already, or widely circulated print media) cf. if disclosure is "transitory and brief" (eg a mention on TV); and
 - Whether the form of publication" lacks accountability" (if so, the information "is still in the realm of speculation" and so does not destroy confidentiality) cf. accountable sources
- Mere fact that the information arises on or is created on private property is not enough to establish secrecy (*Lenah*)

Examples:

Confidential?

- ✓ Cultural and religious secrets known by some in Aboriginal community (*Foster*);
- ✓ Information published online to a small number of Govt organisations + electronically available to subscribers on SMH, mention on Fox Footy by a caller, knowledge by some within the AFL (no evidence), and internet chat forums (*AFL v Age*)
- ✓ Video footage of sexual activities (*Giller* – Gillard J held that, while it was common knowledge that G and P were having sexual relations, the images in the video footage were not)

EQUITABLE COMPENSATION

EC is restitutionary and aims to put the plaintiff in the position they would have been in had no breach been committed.

Identify the loss, THEN

P will claim EC for \$x suffered when F did....

- The amount of compensation is calculated at time of judgement, not date of breach (*Re Dawson*). Further, it will be judged when compensation is at its highest.
 - o Reason: P must be put back in the same position it would have been in as if no breach was committed.

Causation

P must demonstrate a causal causation between the D breach and the loss

- But for test (*Youyang* – but for that breach, P would have got back its \$500k, so \$500k + interest owed)
- But must be tempered by use of common sense (*Canson*)
 - o On a common-sense view of causation, the loss must flow from the breach, although it need not be reasonably foreseeable.

Mitigation?

P is not required to mitigate, although loss caused by unreasonable behaviour of P will flow from that behaviour, and not from the breach. (*Canson*)

- E.g. *CBA v Smith*: Smiths could *not* recover consequential loss thereafter, as they should have sold the hotel once they realised the true position (damage limited to what they paid for the business)
- Suggests that loss caused by failure to mitigate won't be recoverable

Contributory negligence?

No doctrine of contributory negligence in equity (*Pilmer*)

INJUNCTION

Test is two-fold: (*ABC v O'Neill*)

1. There is a prima facie case
2. Balance of convenience factors: injury done to D OR third party if injunction vs injunction done to P if injunction not granted
 - Weigh the two up

To enforce a negative term in contract

Equity CAN grant an injunction preventing D from breaching a promise to perform services exclusively for P (*Lumley*); HOWEVER, granting the injunction must not be a roundabout method of ordering specific performance (*Atlas Steels*)

- Injunction awarded in *Lumley* to prevent her from working elsewhere. She could earn money in other ways if she didn't perform there, wouldn't be forced into destitution.
- Injunction not awarded in *Atlas Steel* because it would be tantamount to SP – steel company can't do anything other than sell steel.