

WEEK 5: FIDUCIARY OBLIGATIONS

Lecture: Fiduciary Obligations Part 1

Fiduciary comes from the Latin word 'fiducia' meaning confidence. This relationship is of confidence whereby the person of whom the confidence is imposed is called the fiduciary and to whom obligations are owed are called beneficiary or principle.

If a fiduciary abuses their confidence to obtain an advantage beyond the beneficiary, they can seek a relief in the court of equity. The fiduciary can only escape liability if they have the beneficiaries consent.

Fiduciary duties are dealt with in two ways:

- Horizontally: duties are owed by both parties to one another. Both fiduciary and benefit from the obligations (partnership)
- Vertically: fiduciary duty only owed by one party to another (trustee and beneficiary)

Macquire v Maceronus: "equity intervenes not so much to recoup a loss suffered by the plaintiff as to hold the fiduciary too and the high duty owed to the plaintiff. Those in a fiduciary position who enter transactions to whom they owe a duty. The liability of the fiduciary doesn't depend on establishing loss suffered or injury. It arises even if the beneficiary was unlikely or unable to make a profit from exploiting the fiduciary. Nor will it matter whether they consented to the fiduciary making the profit had the beneficiary been properly informed if informed consent was never obtained.

Determining whether a Fiduciary is Owed

Dispute parties may be regulated by other principles like contract or tort law. Equity wont usually override the existing regulations which govern fiduciary obligations. In these situations:

Hospital Products Limited v US: Mason J: "contractual and fiduciary relationships which may coexist between parties has never been doubted. Indeed, the existence of an existing contractual relationship provides the foundation for a fiduciary relationship. Here it is the contractual foundation which is important as it regulates the duties liabilities between parties. Fiduciary relationship must comply with these contractual terms and mustn't be so imposed as to alter the intended operation of the contract".

Even though a fiduciary relationship exists, it doesn't mean its attached to every element of the fiduciaries conduct.

Remedies

- Account of profits
- Equitable compensation
- Rescission
- Imposition of constructive trust (Johns Alexander "ought not to be imposed if there are other orders which can grant justice")
- *Churnside v Clay*: "principle which developed from *Broadman v Phipps* is that there is a presumptive requirement that the errant fiduciary by all profits made as dent of the breach. There's room for the court to exercise some discretion and allow the errant fiduciary an allowance for effort, skill and enterprise in making those profits if it would be unconscionable not to do so".

- *Hillmer v Doop Group*: obligations are proscriptive rather than proscriptive. This doesn't mean a person (fiduciary) doesn't have a duty which can be enforced at law. They may be liable in law under contractual or tortious breaches of trust.

Defining fiduciary obligations (Factors & Nature)

Breen v Williams: “the law hasn't been able to formulate a definition of the circumstance upon which a person is construed a fiduciary in their relations with another. HC ruled that no fiduciary obligation is cast upon a medical practitioner to provide a patient with access to their medical information”

This lack of uniform test had led some to find a unified understanding of fiduciaries in law. *Breen v Williams* determined that there are a range of factors which influence the content and nature of a fiduciary including existence of a relationship of confidence, inequality of bargaining power, undertaking by one party to fulfil an interest in the other, scope of one party to laterally exercise discretion which may affect the rights of another and a dependency or vulnerability of one party causing them to rely on another.

Hospital Products v US: Dawson J “the position of disadvantage or vulnerability by one party which causes them to rely on another and imposes a duty on equity to assist with the vulnerability of that party”. Issue is whether vulnerability is a characteristic of or consequence of a fiduciary duty? “The relationship between parties is one which gives the fiduciary the power to exercise discretion to the detriment of the other party who is vulnerable to the abuse of their position”.

Hospital Products v US: “critical element of a fiduciary is that they undertake action for or in the interests of another person in the exercise of a power which will affect the interests of that person in a legal or practical sense”.

Fiduciary reflects a functional theory of equity, where equity acts as a safety valve in prohibiting opportunistic ideas. Opportunism is “behaviour which is desirable however cannot effectively be detected by explicit an anti-rule making. Consists of behaviour which is legal but is done to obtain benefits from a system which are less costly than that which they impose on others”.

When do Fiduciary Relationships Arise

1. Relationship which are fiduciary
2. Facts and circumstances of the case give rise to a fiduciary relationship

Even though a fiduciary may exist, it doesn't mean others can't co-exist. (Liable for tort or contract or negligence).

Relationships defines as fiduciary

- Trustee/beneficiary relationship: trustee of a discretionary trust owes duty to the objects of the trust
- Director/company: must avoid conflicts of interest and not use information for personal gain. *Pilner v Doop Group & Hart Security*: “act in the interests of a company as a whole”. Shareholders are prima facie not owed fiduciary obligation however may arise in cases like company takeover or acquisition by another entity.
- Legal practitioner/client: owes a fiduciary however in some cases not. *Spalling v Adams*: “care must be taken to determine whether the sued party owed fiduciary duties at the time – whether a retainer existed”.

- Agents/Principle: real estates, power of attorney. Obligated to communicate information to their principle. *Mackenzie v McDonald*
- Partnership: presumed fiduciary obligations whereby people work together in an enterprise for making a profit (horizontal). They owe and are owed duties to one another. They can extend beyond termination of the partnership until liability and assets have been resolved. *Chan v Zacharia; Friend v Bucha*.
- Guardian/ward: presumed fiduciary obligation whereby guardians are appointed by courts to care for individuals who can't care for themselves. V State of Tasmania "observation needs to be made between moral duties, fiduciary imposed by law and equity". Wards physical wellbeing is best looked after by trt law.

Fiduciary Obligations extending beyond the retainer.

- Confidentiality remains
- Prince Geoffrey v KPMG: found fiduciary didn't remain post retainer
- Spalding v Adams: also, concluded that a fiduciary didn't extend beyond the retainer
- Spinn Co: "fiduciary obligations did survive the termination of the retainer"
- Dealer Support Services v Motor trade: "revealed the outcome in spin co was in error"

Required Reading: Chapter 10

Fiduciary roots in Latin word 'fiducia' meaning confidence. The person to whom fiduciary obligations are owed is called the beneficiary. If the fiduciary abuses their position to obtain an advantage or benefit, the beneficiary will be able to seek relief from the court of equity.

Macquire v Makaronis: "equity intervenes not to recoup a loss suffered by the plaintiff as to hold the fiduciary to and vindicate the high duty owed to the plaintiff... those in a fiduciary position are under a heavy duty to show the righteousness of the transactions".

Fiduciaries are a 'concept in search of a principle' and currently can't be defined. Despite this, some argue that fiduciary relationships aren't always governed by fiduciary principles.

Bell Group v Westpac Banking: "the fact it is classified fiduciary doesn't mean that all obligations arising from it are fiduciary. They stem from the obligation of loyalty".

Nature of Fiduciary Obligations

Strict Horizontal and vertical duties

Fiduciary obligations are strict and they are precluded from acting in any way other than the interests of the person to whom the duty is owed. It is one of 'undivided loyalty'.

- The fact there was no intent to defraud on the part of fiduciary is irrelevant (*Nocton v Lord Ashburton*)
- Liability of fiduciary doesn't depend on establishing that the person to whom fiduciary duties are owed suffered loss or injury (*Birtchnell v Trustees*)
- Fiduciaries liability arises even where the other was unlikely or unable to make a profit from exploitation (*Warman v Dwyer*)
- Won't matter that the beneficiary would've consented to the fiduciary making a profit had they been properly informed, if the informed consent was never obtained (*Murad v Al-Saraj*)

Horizontal situation: is one where duties is owed to both parties, both benefitting (partnership, joint ventures)

Vertical situation: fiduciary duty is only owed by one party to another, duty isn't reciprocated.

Prohibitive Duties/Prescriptive Duties

Fiduciary obligations ‘don’t impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed’ (*Breen v Williams*). They are limited to negative or proscriptive duties where fiduciaries are forbidden from acting in ways which conflict with their duties (*Wilden v Green*). They are informed what ‘not to do’ rather than ‘what to do’ as that’s exemplified in tort, contract law.

Only exception to negative nature of fiduciaries is duty to disclose possible conflicts of interest and seek the informed consent of the beneficiary of the relationship. These are mainly seen as defences.

Westpac Banking Corporation v The Bell Group: directors breached their duties to act in the best interests of their companies and exercise powers properly when they had authorised loans in the overall interest of corporation and not individuals. On appeal, discarded that fiduciary duties were purely negative and that director’s duty to act in the company’s best interest was negative. There are many obligations which seem or could be constructed as positive.

Interest Protected by Fiduciary Obligations

Fiduciary duties protect economic and proprietary interests. Other areas are usually served justice via tort law. Although equity would find it difficult to value non-economic interests, cases like *Giller v Procopets* has begun to recognise damages for mental distress and aggravated damages in cases of distress.

Joyce argues that fiduciary principles can address conflicts of interests in ways tort law can’t. If tort law can deal with abuses of trust and betrayal via aggravated and exemplary damages, what can equity add?

Search for Unifying Principle

Lack of uniform test for fiduciary duties has led some to search for a unifying principle at law. While loyalty is a touchstone, *Breen v Williams* suggested “existence of a relationship of confidence, inequality of bargaining power, an undertaking by one party to perform a task or fulfil a duty in the interests of another party, the scope for one party to unilaterally exercise discretion or power which may affect the rights or interests of another, and a dependency or vulnerability on the part of one party that causes that party to rely on another”.

Trust and confidence are usually principles of fiduciaries however as Meagher, Heydon and Leeming explore, it’s not always needed to be shown.

Vulnerability is another factor to vertical fiduciaries. *Hospital Products v US Surgical Corporation* suggests its relevant to ‘examine the position of disadvantage or vulnerability on the part of one of the parties which causes to place reliance upon the other and requires the protection of equity in acting on the conscience of that other’. It’s argued however that vulnerability may arise as a consequence rather than a principle of fiduciary. This case alternatively argued that the critical feature of a fiduciary was “that the fiduciary undertakes or agrees to act for or on behalf of 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”.