WEEK 2: THE FIDUCIARY PRINCIPLE

TERMINOLOGY
- Fiduciary (F): the person who owes the duties
- Beneficiary (B) or Principal (P): the person to whom the duty is owed (used interchangeably, former is more common in trust-like relationships)
- The fiduciary obligation can be thought about in terms of ends and means
  - Ends: undivided loyalty with regards to beneficiary's economic interests
  - Means: through overlapping proscriptive things

Some relationships give rise to a special opportunity for one party to abuse their position of "trust" Some class of persons demand protection and the law responds through
- Criminal law
- Discrimination law
- Through fiduciary obligations, we are protecting the principle's economic interests
  - Equity demands the undivided loyalty of F to B's economic interests
  - Achieved through fiduciary obligations
  - "The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary" - *Bristol & West v Mathew* [1998]

The rule in *Keech v Sanford*: 'the trustee is the only person of all mankind who may not have the lease.' (Lord King LC)

Securing loyalty through fiduciary accountability:
- How can we secure the fiduciary's loyalty to P/B's interest?
  - What are the duties?
- Who is deserving of undivided loyalty?
  - Who owes these duties?

*Cook v Deeks*
- Some brothers appropriated a contract which should have tone to a company they were directors of
- "Men who assume the complete control of a company's business must remember they are not at liberty to sacrifice the interest which they are bound to protect, and, while ostensibly acting for the company, divert in their favour business which should properly belong to the company... belonged in equity to the company"
- Found that the company belonged in equity
- Fiduciary responsibility can be viewed as a set of ends and means
- The Ends: to exact undivided loyalty from a fiduciary to the beneficiary (or the principal)
- The Means: the purpose is achieved through two overlapping proscriptive themes

REMEDIAL CONSEQUENCES
- Equitable compensation
- Account of profits
- Constructive trust
- Rescission (of contract)
- Injunctive relief
- Permits 'tracing' of assets in Equity
- Third party liability
- More favorable limitation periods

*Paramasivam v Flynn* (1998) 90 FCR 489, 503 (Miles, Weinberg and Lehane JJ)
- Equity's concern is the protection of a beneficiary's/ principle's economic and proprietary interests
  - A ward suffered horrendous sexual abuse over a number of years
  - Difficultly with the claim was statute barred
IN a bid to circumvent the statutory limitation period, the plaintiff argued that the sexual abuse was a breach of the guardian's fiduciary obligations. Argument was rejected by Federal Court on the basis that according to Miles, Weinberg and Lehane 'in Anglo-Australian law, the interests which [fiduciary obligations] have hitherto protected are economic interests'.

In terms of fiduciary obligations in Australia, we only protect the principle/ beneficiaries economic interests:
- Contrast with other jurisdictions
  - Eg Canadian court have a broader view. In Norberg v Wynrib, a doctor who prescribed narcotics in exchange for sexual favors was in breach of his fiduciary duty
  - Ex. P 96 casebook

**Chan v Zacharia** (1984)

**Facts:**
- Dr Chan and Dr Zacharia entered into a partnership together (accepted fiduciary relationship)
- A new lease of premises where they carried out their medical practice was registered to their partnership
- In 1981, Chan dissolved the partnership - partnership ended but before the affairs of partnership was wound up but after the partnership was dissolved, Chan obtained an agreement to grant him a new lease to premises personally
- The lease itself is a valuable asset - piece of property and Dr Chan took it for himself
- The partner who took lease was bound by the rule in Keech v Sanford and it belonged in equity to the partnership

**Held:**
Two overlapping rules/themes (the conflict and profit rules) F must account for gains:
- "principle of equity is a that a person who is under a fiduciary obligation must account to the person to whom the obligation is owed (ie here the partnership). For any benefit or gain which
  - Obtained or received in circumstances where a conflict or significant possibility of conflict existed between his fiduciary duty and his personal interest
  - By use or by reason of his fiduciary position obtained or received an opportunity or knowledge resulting from it (Deane J)
- (i) = the conflict rule
- (ii) = exposition of the profit rule
  - When someone secures a profit at the expense of what should have gone to the principle, they are in a position of conflict
  - Approved in Grimaldi v Chameleon Mining (2012)

CONFLICT AND PROFIT RULE

**CONFLICT RULE**
- Can be a conflict of F's interest and duty to P (**Conflict of interest**)
- Conflict of duty and duty (i.e. to more than one principal) (**Conflict of duty and duty**)
  - Kelly v Cooper
- If you are conflicted in that way, you can still run a foul of the conflict rule
- You do not have to prove that the fiduciary was actually conflicted, all you need to show is that there was a conflict or a significant possibility of a conflict
- Nature of the interest = economic interest
  - "the presence of some personal concern of possible pecuniary value in a decision taken, or a transaction effected, within the scope of a fiduciary's duties" - Grimaldi (2012)
  - When you look at a scenario and it seems that there is a possible pecuniary value in a particular transaction that may flow to the fiduciary, AND it is in conflict with the economic interest of the principle (or significant possibility to be conflict) then you may be in breach of the conflict rule
- Interest must be pecuniary
**PROFIT RULE**

- If you through your fiduciary position actually secure a secret profit then you are in breach of the profit rule
- A profit must be realized
- Often triggered where fiduciary accepts a secret commission or bribe
- Must show that some profit or property is received
- *Grimaldi* - "themes" overlap significantly (but not completely)

---

*Breen v Williams* (1996) 186 CLR 71

**Facts:**

- Breen was member of class action against a manufacturer in Australia
- As part of the class action proceedings, she sought reasonable access to her records from the surgeon who originally inserted her implants
- There was no issue with how Mr Williams performed the procedure
- Williams was prepared to give her access provided that Ms Breen released him from any liability with respects to the surgery
- She refused to do so and argued that as a doctor, his fiduciary obligations compelled him to release those documents - she did not have to sign a release
- Dr Williams has a positive obligation to release these documents too
- Question: did surgeon have a positive duty grounded in his fiduciary obligation to grant access to those documents?

**Held:**

- No
- Question of scope - are all aspects of relationship subject to fiduciary obligations?
- If compelling doctor to do something positive, you will be prescribing conduct
- Proscriptions and prescriptions - tortious and contractual duties vs duties of loyalty
  - Gaudron and McHugh JJ make a distinction between proscriptive and prescriptive duties
    - Conflict rule and profit rule are both proscriptive - something that you cannot do
- **Fiduciary duties are limited to proscriptions** so there was no prescriptive duty to hand over the records
- Proscriptive = negative; prescriptive = positive obligations
- Gummow J: "It would be to stand established principle on its head" to require Dr Williams to disclose those documents
- Restricting scope of fiduciary obligations to conflict and profit rule
- Question following this case is whether duty to act in care and diligence fiduciary duties?

---

*Regal (Hastings) Ltd v Gulliver* [1967]

**Facts:**

- Regal Hastings had interest in several cinemas in England and it wished to enter into a new lease for another cinema called The Elite
- In order to give effect of that plan, Regal Hastings created a subsidiary called 'Amalgamated'
  - The lessor would only offer the lease if the subsidiary had a certain amount of capital
- Parent company was unable to commit required funds. The parent company only had 2/5 of the share capital of the subsidiary. Unless the remainder of the 3/5 was subscribed for, Regal would lose the lease
- Directors of Regal Hastings therefore chipped in themselves - subscribed their capital for purportedly the interests of Regal Hastings
- Lease secured and when Regal Hastings sold, the lease meant the entire profit for the parent company was made
- Directors acted wholly to benefit the principles

**Decision:**

- House of Lord said it was a breach of their fiduciary duty - the profit rule
  - Regardless that they were acting in the principle's interests, if you breach the profit rule, equity will come into effect
"The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff."

Lord Russell demonstrates the strictness of these sorts of relationships.

Liability does not depend on fraud or absence of bona fides. F, even though acting for the benefit of B, does not escape liability under the profit rule. Inability of Regal to acquire the shares was not relevant. The shares in Amalgamated were acquired solely by reason of their directorships (and therefore within the scope of their fiduciary loyalty to Regal).

NB: all of this could have easily been avoided had the directors asked the shareholders (therefore no longer undisclosed profits under profit rule).

**Boardman v Phipps**

**Facts:**

- Beneficiary under a testamentary trust (trust set up in will) commenced proceedings against Mr B who was the solicitor in charge of the trust and also Tom Phipps.
- Mr Boardman owed fiduciary obligations because he was solicitor to charge.
- Beneficiary owed fiduciary obligations as Tom Phipps was acting as an agent for the trust which also gave rise to fiduciary obligations.
- Trust held a significant parcel of shares to a company.
- In course of acting on behalf of the trust, Mr B and Phipps attended certain company meetings.
- The company was run very poorly and there was a movement to install Tom Phipps as a director of the company, in hopes of turning things around.
- In course of action, they obtained information.
- Trust could not have purchased more shares in the company.
- Trust could not under terms invest more into company.
- Boardman and Phipps therefore bought shares personally under their own names and purportedly for the benefit of the trust.

**Held:**

- Lord Hodson stated that it was immaterial that the trust itself could not have bought shares;
- Here there was a possibility of a conflict between Boardman’s duty to give advice to the trustees as to the wisdom of acquiring the shares themselves;
  - Different from Australian perspective in Chan v Zacharia "conflict or a significant possibility of a conflict."
- "no doubt is was but a remote possibility that [Boardman] would be asked by the trustees"
- Lord Upjohn - "real, sensible possibility of conflict" (dissent)
  - Closer to Australian position.
- Deane J’s formulation in Chan v Zacharia

Either there was a conflict of interest or significant possibility of conflict of interest.

**Should fiduciary law distinguish between honest, good faith, breach and dishonest breach?**

**Deane J in Chan**

- “human nature being what it is, there is a danger, in such circumstances, of the person holding the fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect” - Bray v Ford
- “The law of fiduciary duty rests not so much on morality or conscience as on the acceptance of the biblical injunction that ‘[n]o man can serve two masters’ (Matt: 6:24).” - Breen v Williams

**SUMMARY**

- Designed to secure undivided loyalty.
- Concerned with P/B’s economic interests only.
- Proscriptive
  - Does not tell F that they must act in certain ways.
  - Says what they cannot do.

**WHO IS SUBJECT TO THESE DUTIES?**