

OS: the law of FR is concerned with certain sorts of relationships and obligations that arise from those relationships. Equity protects the integrity of these relationships. It must be established whether P may sue D for breach of fiduciary duty in relation to [facts].

Step 1: Is there a FR?

Accepted categories; OR

- **Trustee/beneficiary – *Keech v Sandford* – Trustee cannot take up opportunities for self, even if trust cannot**

RULE: A trustee is prevented from retaining the benefit of a lease that is renewed in his own name, the lease having previously been held on trust. If a trustee does renew for his own benefit a lease that was previously the subject matter of the trust, even in circumstances where there is no desire for or prospect of the lease being renewed for the benefit of the trust, the trustee will be irrebuttably presumed to be a constructive trustee for those who were beneficially interested in the original lease.

- **Agent/principal – *McKenzie v McDonald* – agent can only buy at arm's length**

RULE: Did amount to a FD. The agent assumed the function of advising and assisting the women in the acquisition and sale of the property. The agent had specialised knowledge of the market and her position. He undertook the sale of the farm and acted as her agent.

- **Employee/employer – *Warman v Dwyer* – even where business is poorly run, senior ee's may be liable for breach if taking assets/knowledge from business**

RULE: Breach of FD. Dwyer had used his knowledge and his position as a senior executive officer of Warman to advance his own interests and those of the other D's to Warman's disadvantage, by reducing Bonfiglioli's confidence in Warman and offering himself and the agency staff as an attractive competitor for Bonfiglioli's business.

- **Director/company – *Regal Hastings* – cannot take opportunity and/or special knowledge obtained as directors in their capacity as fiduciary's without consent**

RULE: In the circumstances, the directors, other than the chairman, were in a FR to the appellant company and liable, therefore to repay to it the profit they had made on the sale of the shares.

- **Solicitor/client – *Nocton v Lord Ashburton* – must not advise client if it gives you a personal advantage**

RULE: N had security over the same asset that he advised A to release. There was a factual conflict, even though N may not be aware or did not act dishonestly.

- **Partner/partner – *Chan v Zacharia* – partner cannot directly/indirectly use partnership assets for gain**

RULE:

(i) C was in breach of his FD as partner to the other partner

(ii) he was a constructive trustee for himself and the other partner of the interest which he obtained under the agreement for lease

(iii) Deane and Dawson JJ: the former partners occupied two related and overlapping roles as regards legal rights under the lease, the first as trustee of those legal rights and the second as a member of the former partnership of which the beneficial interest in those rights was an asset and that there was an irrebuttable presumption that any rights in respect of the new lease were obtained by C by use of his position as trustee of the previous tenancy and there was a rebuttable presumption of fact that any such rights were obtained by use of his position as a partner in the dissolved partnership whose assets were under receivership and in the course of realisation.

Partnership Act

- s3: definitions - business
- s4: equity preserved, unless inconsistent with express term of Act
- s5(1): partnership is the relation which subsists between persons carrying on a business in common with a view of profits...
- s5(2): companies are not partnerships
- s6: rules for determining existence of partnerships (basically taking a share of profits)
- s8: meaning of 'firm'
- ss9, 10: each partner is agent of firm (the partnership) and his other partners. Partner's acts bind the firm and other partners
- s13: partners jointly liable with other partners for debts/obligations of firm
- s14: firm liable for partner's wrongs

- s15: where one partner misapplies money or property received from third party, firm liable to make good loss
- s16: Liability for wrongs joint and several
- s23: Mutual rights/duties of partners can be varied by consent – Birtchnell case
- s24: partnership property treated as held on trust for all partners – *important re remedies – chan case*
- s33: partners have to account to firm for benefits derived without consent from transactions concerning partnerships (restate profits rule)
- s34: partners can't compete with firm without consent - must account for profits made in competition
- s42: continuing authority of partners for purposes of winding up partnership

- **Bankruptcy trustee/creditor – unlikely examinable**

Proven FR outside accepted Categories

OS: for a FR to exist outside accepted categories it must be proven on a factual basis that a FR exists. This can be proven by analogising with characteristics from Hospital Product.

ASK:

- Was there an undertaking to act in interest of another?
- A relationship of trust and confidence?
- Power to affect the principal's interests?
- Vulnerability/disadvantage/reliance?
- Holding of property (not strong indicator)?

Partnership - UDC v Brian – JV to build shopping centre financed by UDC – HELD: Breach of FR – Mason, Brennan and Deane: depends on form of JV and content of obligations. Distinguish between continuing partnership and one JV.

Doctor/patient - Breen v Williams – leaky breast implants and doctor – HELD: no F, conflicting obligations, the fiduciary will be brought to account for any benefit or gain which (1) has been obtained or received in circumstances where a conflict or significant possibility of conflict existed between the fiduciary duty and personal interest in the pursuit or possible receipt of the benefit or gain or (2) was obtained or received by use or by reason of the fiduciary position or opportunity or knowledge resulting from it.

Government v Citizen – Habib v Cth – detainment without charge OS, claim Cth had duty to intervene – HELD: role of legislature – equity will not fetter foreign policy – Cth would have had to disregard its own interest to act in the national interest.

Step 2: Is the transaction within the scope of that relationship?

OS: Even if a FR is established it does not necessarily follow that all actions of the fiduciary will attract fiduciary obligations (FO). Accordingly, it's necessary to analyse the nature of the relationship and function or responsibility assumed by fiduciary.

Grimaldi v Chameleon Mining – nature of responsibility undertaken

Director of company used company money to make profit for his own company and benefit

HELD: If the directors dispose of corporate property in a dealing which is beyond their authority, whether actual, ostensible or usual, the dealing ordinarily is void and no interest passes to the third party done, purchaser etc. however if the dealing occurs in a transaction which is within the directors' authority but which is not in the company's interest or is otherwise in breach of fiduciary duty, the transaction will only be voidable.

Hospital Products v USSC – consider that parties agreed to

HELD: contractual and FR can co-exist. However, FR must accommodate itself to the terms of the contract. FR cannot superimpose the contract in such a way to alter the operation of the contract according to its intended true construction.

Birtchnell v Equity Trustees – Written documentation won't determine issue if actual course of dealings between parties is inconsistent with written terms – ONLY UDE when had previous dealings

Real estate partnership, one died, found out he had been developing prop with someone else for own profit

HELD: look to written agreement and past dealings – FR existed, mutual confidence that partners only engage in a particular activity or transaction for joint advantage. Duty to avoid conflict – knowledge and consent

Howard v Commissioner of Taxation – transaction outside scope

JV

HELD:

French and Keane J:

- Must account for the nature and limits of the relationship

Hayne and Crennan JJ:

- Must pay attention to the duties, interests and alleged manner of conflict that directors owe to FD's.

- Obtaining unauthorised benefit – must not obtain unauthorised benefits by reason or by use of the relationship between director and company.
- Assess how and why the director obtained the benefit
- No transaction was made in the course of his position at Disctronics, nor was it made due to knowledge or opportunity resulting from his position.
- Conflict of duties or conflict of duty and interest in this case – the duty which a fiduciary owes may not attach to every aspect of the fiduciary's conduct. The venture which the defaulting venturers were found to have wrongly turned to their account was a venture between 6 individuals, not a venture to which Disctronics was a party.
- If Disctronics had bought the golf course, there may have been some conflict between duty and interest, however this was not the case. There was no conflict between the duties or duty and interest.

Step 3: Whether the F has breach conflict or profit rule?

OS: In AUS, F's have proscriptive obligation not to obtain unauthorised benefits from the relationship or be in a position of conflict. If breached F must account for any profits and make good any losses arising from the breach. A F must not place himself in a position involving a real, sensible possibility or significant possibility of conflict between duty to act as a F in his own interest (duty/interest) and duty to act as F to 2 or more persons (duty/duty). Nor use their position, knowledge or opportunity as F to derive an advantage or 3P's possible advantage.

Conflict

Rule: The duty is the obligation to avoid being placed in a position where that undivided loyalty might be challenged. The breach of duty arises merely from being placed in the position of conflict and does not require that the conflict be acted upon. Thus the 'no conflict' rule is infringed where a fiduciary occupies a position where his self-interest and the duty to the beneficiary conflict.

Boardman v Phipps

solicitor for trust, trust had shares in company, Phipps was beneficiary for trust, company meeting and worked out company = poorly run, wanted restructure of company to increase profit, trust was unable to invest in company
Issue: whether B and P were in a F relationship to the company and whether they could buy shares on their own.

Held:

- important for establishing FR, held that they were agents or close enough that there was a FR, they needed consent from the beneficiaries which he didn't get, Phipps didn't give full disclosure to beneficiaries.
- Breach their duties to avoid a conflict of interest – because beneficiaries might have come to Boardman for advice as to the purchases of the shares. They owed FD because they were negotiating over use of the trust's shares
- Liability to account for the profits due to a FR is strict – does not depend on fraud or an absence of bona fides. Accordingly, would have to account for their profits, despite the fact they had best intentions and made the Lexter & Harris a profit

Chan v Zacharia

Doctors Partnership – lease of practice - one wanted to exercise renewal option – chan agreed to indemnify lessor against all actions which Zacharia might bring against it in respect of a lease to Chan.

Rule – F must account for any benefit or gain (i) which has been obtained or received in circumstances where a conflict or significant possibility of conflict existed between his FD and his personal interest in the pursuit or possible receipt of such benefit or gain or (ii) which was obtained or received by use or by reason of his F position or opportunity or knowledge resulting from it.

Nocton v Lord Ashburton

FACTS:

- one transaction involved the solicitor getting the client to release from his mortgage property over which, by that release, the solicitor obtained further security for a mortgage of his own

HELD:

- case shows that the jurisdiction to remedy breaches of FD extends to decreeing compensation to the person whose confidence has been abused
- Breach of FD and conflict rule
- Compensation payable to LA for the loss of his security caused by relying on N's advice

Grimaldi

- Murchison Metals Ltd (**Murchison**) acquired mining tenements in Western Australia (Iron Jacks) through Crosslands Resources Ltd, previously known as Winterfall Pty Ltd (**Winterfall**).
- Winterfall had an agreement with the vendors of Iron Jacks to buy the mining tenements for \$1 million in instalments and royalties for any ore extracted.
- Winterfall could not pay the second instalment.
- Murchison paid \$350,000 towards the second instalment and Winterfall was to allow a "reverse take over" by Murchison.
- Grimaldi was a director of Murchison and a de facto director of Chameleon Mining NL (**Chameleon**). Barnes was a director of Chameleon.

- Both Grimaldi and Barnes were going to receive commissions if Iron Jacks was acquired.
- Grimaldi and Barnes used Chameleon's share capital to raise funds to acquire the tenements. Five million shares were issued to Murchison.
- Murchison's Chameleon shares were sold by Grimaldi to provide the funds that Murchison had committed to assist Winterfall's purchase of Iron Jacks.
- Barnes also drew cheques on Chameleon payable to Iron Jacks' vendor. This also contributed to Murchison's commitment to Winterfall.
- This diversion of funds was dishonest; it was done for Murchison's benefit and also for Grimaldi and Barnes' personal gain.
- The reverse takeover of Winterfall occurred; 10 million Murchison shares and 12 million options were also provided to Barnes and Grimaldi as their spotters' fee. Iron Jacks was estimated to be worth \$1 billion. Chameleon gained no benefit throughout this ordeal.

HELD:

- Grimaldi was held to be in a fiduciary relationship with Chameleon – he breached his fiduciary and *Corporations Act* statutory duties.
- Grimaldi and Barnes acted together and misused their fiduciary positions to divert Chameleon's funds.
- Grimaldi and Barnes also had an undisclosed interest in the spotters' fee in conflict with their fiduciary duties to Chameleon.
- Grimaldi and Barnes' conduct violated both the conflict of interest and secret profit duties.
- They were jointly and severally liable with Barnes's nominee for the spotter's fee in the form of Winterfall shares and Murchison shares; they received these shares as a reward. This was a breach of the fiduciary relationship and occurred without Chameleon's consent.
- Grimaldi was also liable to account for Chameleon's shares, issued without consent to Murchison.

Conflicts rule – Duty and Duty

- **Farrington v Rowe - NZ Ct App**
 - o Giving financial advice to client was within the scope of obligations
 - o Duty-duty breach – obligations to both clients
 - o Held immediate conflict of interest in acting more in the interest for one client
- **Pilmer v Duke Group – H Ct**
 - o No fiduciary relationship established
 - o Company wanting accountants to value a target company – not a good valuation – over inflated significantly – retainer – company goes into liquidation -
- **Prince Bolkiah v KPMG – HL**
 - o No continuing fiduciary obligation to avoid a conflict of duties with former client – still BOC
 - o KPMG did litigation work, found out a lot of confidential information, finished work with him, FR ended when the relationship ended.
 - o No conflict in the case of a former client
 - o But obligations to keep information confidential
- **Spincode - Victorian Court of Appeal**
 - o Adopted *Bolkiah*, but suggested (*in obiter*) additional grounds to restrain solicitors, beyond *Bolkiah*
 - o Question: when does the FR end?
 - o Ends when the retainer ends but confidential information remains indefinitely

When do fiduciary obligations end?

- **Chan v Zacharia**
 - o Survives dissolution of partnership: s42
- **Bolkiah v KPMG – UK HL**
 - o The fiduciary relationship ends with termination of the solicitor - client retainer
 - o The duty to preserve confidential information is a continuing duty – covered by BOC claim
- **Spincode – Vic CA**
 - o Decided on same grounds as *Bolkiah* decision
 - o Obiter comments re obligation of loyalty persists even when solicitor no longer acts for client & court's inherent jurisdiction

Profit

OS: To be successful in a breach of the profits rule, it must be proven that the F made an unauthorised profit from his position by utilising information, knowledge or opportunity which has come to the F in the F's capacity. To be successful X must show that the unauthorised profit was made within the scope of the FR. No element of intention is required.

Examples

- Chan v Zacharia – one partner’s diversion of business opportunity from another partner
- UDC v Brian – a joint venturer’s acquisition of benefits not disclosed to another joint venture
- Regal (Hastings) or Boardman v Phipps – exploitation of knowledge gained in a fiduciary capacity
- Attorney-General for Hong Kong v Reid or Grimaldi v Chameleon – bribes and secret commissions

Attorney General for Hong Kong v Reid

FACTS:

- Mr Reid a fiduciary accepted bribes
- Reid (Solicitor) joined the legal service of the Government of Hong Kong and eventually became acting DPP
- R breached FD which he owed as a servant of the Crown – he accepted bribes as an inducement to him to exploit his official position by obstructing the prosecution of certain criminals
- Sentenced to 8-years imprisonment and ordered to pay Crown HK12.4m
- R had 3 asset properties in NZ

HELD:

- Fiduciary liable to account on basis of a CT
- As long as there is no double recovery can hold on CT, if the property has increased in value, the F cannot retain the value of the increase
- If there is a trust, then the unsecured creditor will be deprived of their rights to proceeds if the false F becomes insolvent. But unsecured creditors cannot be in a better position than their debtor. But if authorities show that property acquired by a trustee in breach of trust belongs to the trust and not the trustee personally whether he is solvent or insolvent.

Grimaldi v Chameleon Mining

HELD:

- Not a bribe but an undisclosed personal interest
- Secret commissions can take other forms such as shares. Don’t have to be just money