

EQUITY AND TRUST NOTES

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- *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431
 - ❖ (Stamp Duty on Trust)
- *Chief Commissioner of Stamp Duties v Buckle* (1998) 192 CLR 226
 - ❖ (Indemnity is not an Encumbrance for Stamp Duty)
- *Cf. Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254
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 - ❖ (Discretionary Trust may Count as "Property")
- *Fonu v Merrill Lynch Bank & Trustee Co (Cayman) Ltd* [2011] UKPC 17
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 - ❖ (Trust over Sale Periods)
- *Fletcher v Fletcher* (1844) 4 Hare 67
 - ❖ (Covenant can Constitute a Trust)
- *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107
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History of Equity

- 1066: William The Conqueror was crowned William 1st of England
- The King's Council
- The Court of Exchequer
- But 'trial by battle' at the local level. (Overseen by Local Lords)
- Henry II – (1154 -89) He placed more power to dispense justice in the hands of the King's Council and appointed 'travelling justices' to hear disputes in all parts of England.
- The travelling justices developed a common bank of cases which they applied to all disputes.
- In this way the law became "common" across England rather than being local instances of customary law.
- 3 separate common law courts established
 - Court of Common Pleas
 - Court of King's Bench
 - The Exchequer
- These courts all administered common law – eg contract law, property law, tort law

Common Law

- The common law courts became slaves to precedent
- If people could not fit their matters into the existing **writs** (legal forms) they could not bring their matters to court.
- This meant that by 1399 the law had become rigid and unyielding

Petitions to the King

- Litigants who were unable to use existing common law writs petitioned the king to hear their case.
- The King had the Prerogative to Grant Mercy – Outside the Legal System
- The King, in turn, delegated these Petitions for mercy and justice to the Lord Chancellor
- The Lord Chancellor was the Head of Chancery
- He would grant a remedy for a dispute that fell outside the common law writs available

Early Equity

- The early Lord Chancellors were ecclesiastics
- Soon the Lord Chancellors had to appoint additional staff
- This how the Court of Chancery was established

Equity Grows

- The Court of Chancery gave decisions about matters that supplemented the common law – eg: tort law (remedy of injunction) and contract law (remedy of specific performance, equitable estoppel, undue influence)
- Here we say equity is acting in its ‘auxiliary jurisdiction’
- But Equity also developed an exclusive jurisdiction – Trusts, Recission, Breach of Confidence

The Trust

➤ Example

- James, a crusading knight transfers his land to his best friend, Thomas.
- He tells Thomas to 'hold and use for James and James' wife and children while James is away on the crusades.'
- James goes off to fight.
- When he returns, he asks Thomas to re-transfer James' land back to him. Thomas refuses.
- James could fight it out with Thomas OR;
- James could go to Court and ask a judge to order Thomas to return James' land to him
- But the Common Law judge said that Thomas was the LEGAL owner of the land.
- So, James would go to the Lord Chancellor in the Court of Chancery and petition him for mercy and justice
- The Lord Chancellor rules that Thomas' conscience is bound. Thomas must 'use' the land **only** for James and James' family benefit.
- And with this, the Trust was born.
- We are going to study Equity and Trusts in detail in this course

Equity Flourishes

Equity grew from 1485
– 1707 as the trust
developed

Equity became more
'law' like and focussed
on doctrine rather than
natural justice and
fairness

Equity's Court
procedures were
regularised

Equity judges started
to report their
decisions in official
Chancery law reports

Equity/Common Law Conflict

- “Earl of Oxford’s case” (1615) 21 ER 485
- Lord Ellesmere (Lord Chancellor) v Sir Edward Coke (Chief Justice) took their dispute to James 1
- Lord Ellesmere said Equity was justified and should take priority over the common law

Reform

- 2 courts – expensive and inefficient. .
- In 1873 the *Judicature Act* abolished the 2 courts and created 1 court, the High Court of Judicature with 5 divisions – Queen’s Bench, Probate, Chancery, Divorce and Admiralty


Judicature Act

The Judicature Act did not fuse the substantive principles of equity and common law – only the **administration** of that law.

That is why still today in Australia we have a tradition of equity being separate from and not fused with common law.

Equity works with Common law – they are not rival systems of law (although sometimes they come close!)

Equity has delivered a more sophisticated and attuned hierarchy of legal rights and a more sophisticated legal system.



It has:

recognised
trusts.

Created
new duties

Created
new
remedies

Fiduciary Duty

Definition of Fiduciary Relationship

- A fiduciary relationship is one where a person (the fiduciary) acts solely for another person (the beneficiary) in exercising discretionary power over the legal or practical interests of the beneficiary
- At the heart of fiduciary law is the division between management of property and enjoyment of property
- Case Law & Journals define it in specific circumstances

Fiduciary Obligations

- Comprise stringent duties of loyalty and propriety enforced exclusively in equity which differ from duties of care and skill owed at common law in tort and contract and which differ from standards of behaviour such as unconscionable conduct or good faith and fair dealing mandated by equity

What is a Fiduciary Obligation

- A duty of loyalty, fidelity and honesty which is undertaken by F to B with the consequence that B is entitled to have trust and confidence in F
- Party in whom trust is reposed (F) is the fiduciary
- Party to whom fiduciary duty is owed (B) is the beneficiary

Historical Origins of Fiduciary Law

- From the law of trusts – trustee/beneficiary relationship is paradigm fiduciary relationship
- Other persons (agents, directors etc) designated fiduciary by analogy with trustee
- Why? – Acting exclusively for the beneficiary (May not work against unless an exemption exists)

Identifying Persons Who are Subject to Fiduciary Obligations

- Clear categories of relationships give rise to fiduciary duties – the so called ‘status’ fiduciary relationships :
 - Trustee/beneficiary
 - Agent/principal
 - Solicitor/client
 - Director/company
 - Employee/employer
 - Partner/partner
 - Guardian/ward

Fact Based (*Ad Hoc*) Fiduciaries

- Do existing categories or the cases provide signposts as to when other relationships will attract fiduciary obligations?
- Is the fiduciary concept ‘a concept in search of a principle’ as Sir Anthony Mason suggested?
- How do we decide when a person will incur fiduciary obligations?
- Difficulties acute in commercial relationships

Why Subject a Person to Fiduciary Obligations?

- What function is served by the fiduciary designation?
 - Maintain high std of propriety by those who are under a duty to act exclusively in the interests of others
 - Prevent abuse of trust/misuse of property by confiscating gains made by errant fiduciary who acted in a self-interested manner rather than for the beneficiary

3 Features

- Undertaking by Fiduciary to exercise discretionary power vis a vis Beneficiary's legal interests (usually economic) solely for Beneficiary and for no-one else
- Fiduciary's power to affect interests of Beneficiary
- Beneficiary's vulnerability to Fiduciary's abuse of position

Undertaking

- Undertaking is to exercise discretion in advancing or setting beneficiary's interests solely (ie to promote beneficiary's interests and exclude fiduciary's own interest)
- Was this the case in *Hospital Products*? Did HPI undertake to subordinate its interests to USSC?
- Assumption of fiduciary duty by undertaking or imposition of fiduciary duty by law – which is it?

Power to Affect the Interests of Another

- Lots of people undertake to act in the interests of another but they aren't all saddled with fiduciary obligations
- The distinguishing feature here is fiduciary actors can affect the legal (practical/economic?) interests of persons for whom they have undertaken to act – eg agents can bind their principals; directors can affect shareholders' financial interests; trustees can abscond with beneficiary's property

Vulnerability

- Vulnerability that enlivens unconscionable bargains means a weakness in a person's circumstances which is known to 3rd party who takes advantage of such weakness
- Vulnerability in fiduciary duties sense means something different – the Beneficiary is vulnerable because she is unable to safeguard position/detect F's defalcation

Definition of a Fiduciary

- Justice Finn has ventured a description of when a person will incur fiduciary obligations to this effect:
 - X will be a fiduciary in his relationship with Y when and so far as Y is entitled to expect for reason of an undertaking by X or for the reason of an agreement/understanding between X and Y or for the reason of public policy that X will act in Y's interests or in X and Y's joint interests, to the exclusion of X's own several interests

Protection of Reasonable Expectations

- Finn espoused this idea in an important article – The Fiduciary Principle in Youdan (ed), *Equity, Fiduciaries and Trust* (Carswell Toronto 1989)
- See also Finn *Fiduciary Reflections* ALJ (2015) (on learnonline)
- He spoke of a 3 tiered hierarchy of standards committed to fostering social co-operation and neighbourhood responsibilities

Finn J's Thesis

- Unconscionability Standard
 - A can act self-interestedly but must eschew excessive self-interest/exploitative conduct
- Good Faith Standard
 - A can act self-interestedly but must positively have regard to the legitimate interests of B
 - Could it be argued that Hospital Products was really a good faith standard case?

With Unconscionability and Good Faith Standards

- To what extent should A's ability to pursue her own interests be circumscribed because of her relationship with B?
- To what extent should B's interests be protected because of that relationship?
- So the 2 questions become one - 'how do we mediate between the "several" (individual) interests of the parties to a relationship?'

Fiduciary Standard

- A must act selflessly and with undivided loyalty to B
- A must act so as to secure paramountcy of B's interests only and no one else's interests
- It is about loyal service of B's interests
- There is no question of mediating between the several interests of A and B
- Any hint of disloyalty by A breaches A's duty, no matter that no harm is occasioned to B
- X and Y will be so circumstanced when the actual facts of their relationship are such that Y is reasonably entitled to expect that X will act in Y's sole interests or in X and Y's joint interests exclusively for the purpose of the relationship
- X must be so implicated in Y's affairs that a foundation exists for Y's fiduciary expectation
- So are fiduciary duties undertaken or imposed?

Distinguishing Feature of Fiduciary Role

- The fiduciary must subjugate his personal autonomy to the interests of another
- she is never allowed to prefer her own self interest

What is the Content of the Fiduciary Duty?

- Millett LJ In *Bristol and West Building Society v Mothew* [1998] Ch 1 described it as follows:
 - *The distinguishing obligation of a fiduciary is the obligation of loyalty.* The principal is entitled to the single-minded loyalty of his fiduciary. (emphasis added)

The Duty of Loyalty

- This duty is expressed at a very high level of generality. It is not a duty as such – it is more of a ‘policy’ which expresses other more detailed duties.
 - These duties are:
 - No conflict of duty and interest
 - No secret profit

Fiduciary Standard of Loyalty is Manifested in Overlapping Duties

- Duty of no conflict between duty to beneficiary and fiduciary’s own interest
 - Fiduciary must not put own interests or a 3rd party’s interests ahead of beneficiary’s interests
- Duty of no unauthorised benefit or profit arising from an abuse of fiduciary position
 - Fiduciary must not make any profit from his or her position as fiduciary when the beneficiary/principal has not authorised that profit

Fiduciary Standard is Proscriptive

- Loyalty, but no more than loyalty, is exacted from a fiduciary
- Pure negligence, excess of authority, improvident investment, breach of partnership deed – as such these are not breaches of fiduciary duties.
- If no disloyalty involved, then deal with alleged misconduct by laws of negligence, contract etc

Fiduciary Law's focus is on

- The defendant – the Fiduciary
- Not on the plaintiff – the Beneficiary/principal
- We strip the Fiduciary of his gains and make him disgorge profits
- The whole enterprise becomes a waste of the Fiduciary's time
- The focus here is gain stripping not compensation for loss
 - “This core liability (of loyalty) has several facets. ... a fiduciary... must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he must not act for his own benefit or for the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations

Proscriptive or Prescriptive

- Proscriptive duties are negative – forbid certain conduct
- Prescriptive duties are positive – requires certain positive action – eg duty to disclose records
- Prescriptive fiduciary duties generate a new form of civil liability – seemingly the case in Canada where fiduciary law's reach extends beyond pure economic interests to protection of bodily integrity, privacy, right to information etc

Fiduciary Duty Represents the Pinnacle of Duties of Co-operation

- There is a continuum of duties involving thinking about others...
- Duties of care imposed by contract, tort, statute
- Equity's doctrines of unconscionable bargains and good faith
- Fiduciary duty of selflessness, disinterested conduct and loyalty at the top

Why do these Proscriptions Exist

- X, as agent who has been instructed to sell Y's land, is forbidden from purchasing that land from principal Y (unless of course Y gives her fully informed consent) – why is this so?
- Prevents unfair or biased outcomes only if no agreement has been reached otherwise

Proscriptive Rules

- Prohibition on fiduciary extends beyond preventing her taking property/actual gains to cover the exploitation of opportunities if fiduciary person should be pursuing those opportunities for beneficiary/principal
- The rule in *Keech v Sandford* (1726) 25 ER 223 exemplifies this
- Loyalty is exacted in a draconian fashion – so take care to ensure that breach involves disloyalty only

The Rationale for Enforcing Fiduciary Duties

- The enforcement of fiduciary duties is said to rest on the principle of deterrence – both general (as a warning to all fiduciaries of what lies ahead if they breach their duties) and individual (strip profits off wrongdoing fiduciaries.)
- The stringency of fiduciary duties is required because of the fact that beneficiaries cannot detect wrongdoing until well after it has occurred.
- But is deterrence the real goal?

- Could the underlying rationale of fiduciary duties be explained in terms of restoring to a beneficiary something (business opportunity/property) that is actually theirs?
- Informed consent by the beneficiary allows a fiduciary to breach fiduciary duties.

CASES FOR WEEK 1:

Earl of Oxford's case" (1615) 21 ER 485

- The office of the Chancellor is to correct Men's consciences for Frauds, Breach of Trusts, Wrongs and oppressions, of what Nature soever they be and to soften and mollify the Extremity of the Law... When a judgment is obtained by Oppression, Wrong and a hard Conscience, the Chancellor will frustrate and set it aside, not for any error or Defect in the Judgments, but for the hard Conscience of the Party."
- RULE
- James 1, by royal decree, ruled that where there was a conflict between the common law and Equity, then Equity would prevail.
- And with this the position of 2 sets of courts – Kings' Courts and Chancery was cemented and continued for the next 200 years.
- The King's decree established that if there was a conflict between common law and equity, equity would prevail. This principle was later enshrined in the [Judicature Acts](#).

Hospital Products v USSC (1984) 156 CLR 41

- Mason J in *Hospital Products* (at 96)
- The critical feature of (traditional fiduciary) relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interest of that person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position
- My conclusion that H.P.I. was at liberty to make some business decisions by reference to its own interests, subject to the obligations arising under the best efforts promise and the other terms of the contract express and implied, presents an overwhelming obstacle to the existence of the comprehensive fiduciary relationship found by the Court of Appeal. This is because H.P.I.'s capacity to make decisions and take action in some matters by reference to its own interests is inconsistent with the existence of a general fiduciary relationship. However, it does not exclude the existence of a more limited fiduciary relationship for it is well settled that a person may be a fiduciary in some activities but not in others: Kuys²⁶; Birtchnell v. Equity Trustees, Executors and Agency Co. Ltd.
 - RULE
 - **A person cannot be a fiduciary unless, in the matter to which the alleged duty relates, he is obliged to act solely in the interests of the other.**
 - McLelland J. would not have found a fiduciary relationship if he had not first found the implied term that the distributor would do nothing inimical to the plaintiff's interests. He erred in implying that term. It was inconsistent with the express term that the distributor would use its best efforts to promote the plaintiff's product.
 - The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations (cf. *Phipps v. Boardman*)
 - **The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position**
 - DISTINGUISHED
 - *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1
 - By the court) In proceedings where breach of a fiduciary relationship is asserted, a defendant who may have to rely on a claim for just allowances should either obtain an order for a separate trial of that issue or (however tactically unpleasing it may be) call evidence on the claim, so as to permit the court to deal with it.

- A constructive trust ought not to be imposed if there are other orders capable of doing full justice.
- Care must be taken to avoid granting equitable relief going beyond the necessities of the case. In particular, third party interests must be borne in mind in deciding whether a constructive trust should be granted.
- The Giumelli line of cases [[Giumelli v Giumelli \(1999\) 196 CLR 101](#)] does not permit a constructive trust to be declared in a manner injurious to third parties merely because a plaintiff has no other useful remedy against a defendant.
- The respondent operated a tennis club on inner-Sydney land leased from the sport's governing body. The land became surplus to that body's requirements after major international tournaments were moved to a different venue, and its sale was mooted. The appellant approached the respondent with a proposal to acquire a portion of the land so as to preserve the respondent's presence at the site. A series of agreements was entered into, the intent of which was to co-operate in a third-party's purchase of the entire site in exchange for the grant of an option, in favour of a company to be formed, to purchase a selected portion. In those circumstances, the respondent promised to surrender its existing rights as lessee. Disputes arose and the appellant served notice terminating its agreement with the respondent. Sometime later, a nominee of the appellant exercised the option to purchase. The respondent alleged that the appellant breached a fiduciary duty owed to it and claimed a constructive trust of the optioned land (subject to reimbursing the nominee its purchase price). The primary judge dismissed the respondent's proceedings, but it was successful before the Supreme Court of New South Wales (Court of Appeal). The appellant appealed to the High Court of Australia.