

## Equity & Trusts (LAWS5103)

<b>FIDUCIARY DUTIES .....</b>	<b>2</b>
step 1: does the <i>relationship</i> give rise to a fd?.....	2
Step 2: What is the <i>scope</i> of the duty? .....	4
step 3: has the FD been <i>breached</i> ?.....	7
step 4: are there any available <i>defences</i> ?.....	8
Step 5: What are the available remedies?.....	9
<b>ACCESSORY LIABILITY – THIRD PARTIES.....</b>	<b>11</b>
accessorial liability.....	11
receipt based .....	13
<b>VALIDITY OF EXPRESS TRUSTS.....</b>	<b>13</b>
i. certainty of intention.....	13
II. CERTAINTY of subject (property) .....	15
iii. certainty of object (who?).....	17
UNCERTAINTY OF OBJECTS .....	20
EVIDENTIAL UNCERTAINTY .....	20
ADMINISTRATIVE WORKABILITY .....	21
CAPRICIOUSNESS .....	21
concluding advice .....	21
<b>COMPLETE CONSTITUTION .....</b>	<b>21</b>
constitution vs formalities .....	22
LEGAL REQUIREMENTS FOR THE TRANSFER OF PROPERTY.....	22
(1) EVERYTHING NECESSARY TO BE DONE .....	22
(II) ACCORDING TO THE NATURE OF THE PROPERTY INVOLVED .....	23
EXCEPTIONS to incomplete constitution .....	23
GIFTS IN CONTEMPLATION OF DEATH (DMC) .....	24
CONSIDERATION .....	24
<b>FORMALITIES.....</b>	<b>25</b>
s 34 of the Property Law Act 1969 (WA) .....	25
(a) + (b) → overlap .....	27
cases .....	32
<b>CHARITABLE TRUSTS .....</b>	<b>33</b>
DISQUALIFYING FACTORS .....	35
CONFER A BENEFIT ON THE PUBLIC .....	36
BE EXCLUSIVELY CHARITABLE .....	36
general ADMINISTRATIVE SCHEMES → when carrying charity out is unclear .....	36
Quistclose Trusts .....	37
Trusts for Unincorporated Associations .....	37
<b>TRUSTEE DUTIES.....</b>	<b>38</b>
Irreducible Core Obligations .....	39
Duty to Obey the Terms of the Trust .....	39
Duty to Get in the Trust Property .....	39

Duty to Invest .....	39
Duty to Act Impartially Between Beneficiaries.....	40
duty of care .....	40
duty to act personally.....	40
duty to consider exercise of powers .....	40
Duty to Keep and render accounts .....	41
duty to give information to the beneficiaries .....	41
<b>REMEDIES .....</b>	<b>42</b>
<b>PERSONAL REMEDIES .....</b>	<b>42</b>
(1) ESTABLISH LIABILITY OF A TRUSTEE .....	43
(2) DEFENCES THAT A TRUSTEE CAN CLAIM .....	44
(3) PERSONAL REMEDIES AGAINST A TRUSTEE? .....	45
(3) PERSONAL REMEDIES AGAINST THIRD PARTIES? .....	45
termination + vestion .....	46
approach the courts for direction.....	47
perpetuity periods .....	47

## FIDUCIARY DUTIES

### STEP 1: DOES THE RELATIONSHIP GIVE RISE TO A FD?

ISSUE: ...likely has a claim of breach of FD against...[X] appears to have acted in a way that harmed [Y]'s interests. The threshold question is whether [X] owes [Y] a FD at all.

RULE/APPLY: The legal rule is...[established category/de facto].

- Established category: [Parties] fall under an established category.
- De facto: [Parties] do not fall under an established category, so we apply the common characteristics of FR as identified by Mason J in Hospital Products.

COUNTER:

- In commercial dealings, courts are reluctant to impose FD [Gibbs CJ per Hospital Products]. Where both parties pursue mutual benefit at arm's length, the absence of an obligation to subordinate self-interest is fatal. The existence of a contract may suggest parties relied on legal rather than equitable obligations.

REASONING: Courts impose FD to protect structurally vulnerable parties who repose trust in another. The prophylactic nature of the duty prevents abuse even where no actual harm is intended. Imposing FD in purely commercial settings risks over-judicializing ordinary business dealings.

CONCLUSION: On balance, [X] [does/does not] owe [Y] a FD because [insert strongest indicator]. It is submitted the court would find [in favour of/against] the existence of a FR on these facts.

### ESTABLISHED CATEGORIES

- |   |  |
|---|--|
| <ul style="list-style-type: none"> <li>- Trustee/beneficiary</li> <li>- Director/company</li> <li>- Agent/principal</li> <li>- Solicitor/client</li> <li>- Partner/partner</li> <li>- Receiver or liquidator/creditors</li> <li>- Executor or administrator of deceased estate/beneficiaries of estate</li> </ul> | <ul style="list-style-type: none"> <li>- Stockbroker or financial adviser/client</li> <li>- Company promoter/investor</li> <li>- Employee/employer (<i>Anderson v Canaccord</i>)</li> <li>- Guardian/ward</li> </ul> |
|---|--|

### Employee/employer

- Prior to 2023 → accepted it was a FR when the employee had a position of seniority and was able to exercise discretion [*Metal Manufacturers*].
- NOW *Anderson (2023)* clarified the position:
- ALL employee/employer relationships are fiduciary as a question of status (not fact)
- Check whether the conduct was **within the scope**

- A senior employee will have a higher level of responsibility.

### Solicitor

Solicitors undertake a position of trust and confidence by advising their client (influencing their decision making). A solicitor represents their client through this role.

### Banks

*Folley* is no longer an accurate view because banks have a modern function, though it did shape the structure of modern banking. The practical effect of this case is that the bank is not inherently a FR, but depending on its facts, it could give rise to a FD.

### DE FACTO FR

<b>Undertaken a relationship of trust and confidence [Hospital Products]</b>	<ul style="list-style-type: none"> <li>• Expectation that the fiduciary should act in the principal's best interest</li> <li>• Contract is not necessary → BUT can use a contract to interpret the nature of the relationship but the relationship may already be in place before there's a contract agreed</li> </ul>
<b>Representative capacity [Hospital Products]</b>	<ul style="list-style-type: none"> <li>• Fiduciary makes an undertaking to act on behalf of the principal</li> <li>• In doing so, fiduciary exercises a power or discretion which affects the interests (legal or practical) of the principal</li> <li>• The principal is therefore vulnerable to abuse by the fiduciary</li> </ul>
<b>Reliance [Hospital Products]</b>	<ul style="list-style-type: none"> <li>• Objective → Comes with the representative/influential features, affecting the Principal's interests</li> <li>• Emphasises the structural vulnerability of the Principal</li> </ul>
<b>Property entrusted [Reading]</b>	<ul style="list-style-type: none"> <li>• Property or information of the principal is entrusted to the fiduciary</li> <li>• So that the fiduciary might use/disclose it (to the detriment of principal or for their own gain)</li> <li>• Is why doctor/patient, parent/child are generally not FR</li> </ul>
<b>Vulnerability [Hospital Products]</b>	<ul style="list-style-type: none"> <li>• Inherent position of disadvantage/vulnerability, which results in reliance (typically a consequence of other elements)</li> </ul>

### Parent company + subsidiary company

When a claim is brought by the subsidiary company:

- Look at reasoning by analogy → it is an agency like relationship (i.e. negotiating/decision making on behalf of subsidiary as an agent in the interests of the subsidiary).

### Joint venture

**UDC v Brian:** FD can arise before a formal contract is executed if parties are acting on trust and embarked on a joint venture. FD can exist between parties who may never reach a final agreement. **Limit:** Mere negotiation does not create a FR; the relationship must have moved beyond the preliminary stage.

### Hospital Products → affirms de facto test

#### FACTS:

- USSC was a US company that manufactured surgical stapling products. USSC entered into an oral contract w/ Mr Blackman, who later became the distributor of the df's products in Aus. USSC's products weren't patented in Aus.
- Mr Blackman's company was HP → in competition w/ USSC, HP repackaged products and sold them under the HP brand.
- In addition, HP reverse engineered df's surgical stapling devices, thus enabling competing products to be developed and sold in other markets, including the US.
- HP thus competed w/ USSC in the US and Aus markets.
- USSC terminated its distributorship contract w/ HP and sued for breach of contract and breach of FD.

ISSUE: does the relationship give rise to FD?

- Contractual relationship between distributor/manufacturer is not an accepted category
- Court had to engage in analogical reasoning

HELD: no FD was owed (my majority)

- **Gibbs CJ** gave 3 main reasons (reasons why no FD):
  1. Purely commercial relationship, legal representation, arms-length
  2. The purpose of this arrangement was that both parties could profit (mutual benefit)
  3. No obligation written into the contract that B acted in USSC's best interests, and disregarded his own
    - Provision that B devoted his best efforts to distributing their products and expanding the Australian market did not require that B put USSC's interests above his own
    - He could still act in his own interests, so long as he acted reasonably to also work toward USSC's interests
- **Positive indicators:**
  - Relationship of trust and confidence
  - One party acting on behalf of another, and not in their own interests
- **Negative indicators:**
  - Relationship is purely commercial, and parties are negotiating at arm's length on equal footing
  - Both parties entered that relationship for their own benefit, giving rise to an inherent conflict of interest

- Insufficient that one party is under a duty to 'do something' for the other
- **Mason:** limited FD arose from being entrusted with the goodwill of USSC (intangible property)
  - Whilst there is a reluctance in Australian courts to find FD in commercial dealings, it is not decisive
  - Agreed with Gibb's positive indicators (undertaking and power to affect interests)
  - However, Mason did not require that the fiduciary undertake to act *exclusively* in the principal's interest, entirely without regard for their own (possibly a broader test)

### UDC v Brian → joint venture

#### FACTS:

- UDC entered into an agreement described as a joint venture with Brian and SPL to build a shopping centre (SC), which was financed by borrowing from UDC.
- SPL owned the land on which the SC was constructed.
- The terms of the agreement provided that the shares of each party were to be repaid on the construction and ultimate sale of the SC, and that parties were to be repaid their contributions and their share of profit.
- The SC was successfully developed and realised a substantial profit, but Brian was neither repaid its financial contribution nor paid its share of the profit.

HELD: the HC held that an FR existed between Brian and UDC, breach of which meant that UDC could not rely on the mortgage to deny Brian's entitlement under the joint venture agreement.

- **Mason, Brennan, Deane JJ:** It was a fiduciary relationship because:
  - A formal agreement was executed where the participants were joint venturers in a commercial enterprise with a view to profits.
  - Profits were to be shared.
  - The joint venture property was held in trust.
  - The participants indemnified the managing participant (SPL) against losses.
  - The policy of the joint enterprise is ultimately a matter for joint decision.
  - Apart from the absence of any reference in the agreement to 'partnership' or 'partners', the relationship between the participants under the agreement exhibited all the indicia of, and plainly was, a partnership.
- UDC was a lender AND a partner = the fact that they were a lender to SPL, on behalf of the partnership, did not absolve them from the ordinary fiduciary obligations of a partner.
- FD can exist between parties who have not reached, and who may never reach, an agreement upon the consensual terms which are to govern the relationship.
- There was an FR before when SPL gave the first mortgages to UDC bc by that time the arrangements between the prospective joint venturers had passed far beyond the mere stage of negotiation.

- It doesn't matter whether the relationship is seen as that which may exist between prospective partners or joint venturers, before the terms of any partnership or joint venture agreement have been settled, or whether it is seen as a limited preliminary partnership or joint venture to investigate and explore the possibilities of an ultimate joint venture. On either approach, it was a fiduciary one.

## STEP 2: WHAT IS THE SCOPE OF THE DUTY?

ISSUE: *Even if a FR exists, it is not unlimited. The conduct must fall within the scope of the undertaking.*

RULE: *The scope of FD is prospective, not prescriptive [Breen]. It is defined by the functions and responsibilities of the fiduciary, determined by reference to the contract (none on the facts) and the course of conduct [Mason J per Hospital Products]. A person may owe FD in respect of some activities but not others [Oranje]. Together, the two core rules are: (i) the no-unauthorised profit rule; and (ii) the no-conflict rule (Zachariah).*

APPLY:

- Identify the problematic conduct.
- Identify the fiduciary's role and responsibilities.
- Ask whether the conduct arose from, or was made possible by, that role.
- *Oranje v Kuys*: the society's trusted employee was not in breach when he set up a newspaper after the society declined to do so — the conduct fell outside the scope.
- *Green v Bestobell*: a senior employee's use of insider pricing knowledge to tender against the employer was within scope — no defence that the employer may not have won, or that he had resigned by the time profits were made.

COUNTER: *The fiduciary may argue the relevant conduct was entirely independent of the relationship — the information, opportunity, or asset was not obtained by virtue of the fiduciary position. If the principal had already rejected the opportunity, the connection to the role is attenuated (Oranje v Kuys).*

REASONING: *Narrowly defining scope risks allowing fiduciaries to exploit their position incrementally. Broadly defining it risks chilling legitimate personal enterprise. Courts balance these by asking whether the undertaking realistically covered the conduct in question.*

CONCLUDE: *It is submitted that the conduct [falls within/outside] the scope of [X]'s fiduciary duty because [insert link between role and conduct].*

Proscriptive [Breen]; neither rule alone sets out the duty of the fiduciary, but together they do [Zachariah]

### No unauthorised profit rule

- A fiduciary must not derive any unauthorised profit or gain from their fiduciary position

- Doesn't matter if the principal couldn't make it [*Boardman; Keech; Chan; Green v Bestobell*]

### No conflict rule

- Fiduciary should avoid putting themselves in a position of conflict between:
- Their person interests and principal's interests (duty/interest)
  - Two principals of that fiduciary (duty/duty)

### Oranje v Kuys → employee sets up paper

Society's trusted employee set up a newspaper after the society declined to do so — conduct fell outside scope because the society decided not to pursue it. Limit: If the society had decided to set up the newspaper and K had acted on their behalf, the conduct would have been within scope.

### Green Bestobell

Senior employee used insider pricing knowledge to tender against employer — within scope. No defence that employer might not have won, or that employee had resigned before profit was made. Limit: If the information or opportunity had no connection to the employment role (e.g. discovered entirely outside of work), it may fall outside scope.

### NO UNAUTHORISED PROFIT

ISSUE: *[X] has made a financial gain in circumstances connected to their fiduciary position. The question is whether that gain was authorised.*

RULE: *A fiduciary must not derive any unauthorised profit or gain from their fiduciary position or from use of opportunities, knowledge, or information arising from it. Liability is strict — it does not matter that the principal could not have made the gain itself (Boardman v Phipps; Keech v Sandford; Chan v Zacharia; Green v Bestobell).*

APPLY:

- Identify the gain: was it obtained by virtue of the fiduciary position, or by use of information/opportunity arising from that position?
- *Boardman v Phipps*: solicitor and beneficiary used information obtained while representing the trust to buy shares — stripped of profit even though acting honestly and the trustees could not have bought the shares themselves.
- *Regal Hastings v Gulliver*: directors subscribed shares through their position — liability strict even though they acted in good faith and the company ultimately benefited.
- *Green v Bestobell*: employee used insider knowledge of pricing to tender against employer — no defence of resignation or employer's theoretical inability to win.
- *Chan v Zacharia (Deane J, obiter)*: possible qualification where a claim by the principal would be unconscionable, or where there was no possible conflict and the gain was in the principal's interests — affirmed in *Warman*.

**COUNTER:** The fiduciary may argue the gain was obtained independently of the position, relying on personal skill, effort, and capital rather than the fiduciary opportunity (*Chan v Zacharia*). They may also raise the "Robinhood" argument — that the gain ultimately benefited the principal — but note this was rejected in *Ancient Order of Foresters*.

**REASONING:** Strict liability is justified on prophylactic grounds: allowing good-faith defences would expose principals to temptation and erode trust. Courts do not inquire into whether the principal was harmed because the rule exists to prevent the occasion for abuse, not merely to compensate losses.

**CONCLUDE:** It is submitted [X] has breached the no-profit rule. The gain was made possible by [insert connection to fiduciary position] and was not authorised [in advance/by ratification]. [X] must account for the full profit to [Y].

Case	Principle	Limit
<b>Boardman v Phipps</b>	Solicitor stripped of profit from shares even though trustees couldn't have bought them and he acted honestly	If the information was not obtained by virtue of the fiduciary position, or if the principal had fully informed consent, no breach
<b>Regal Hastings</b>	Directors who subscribed shares through their position strictly liable even acting in good faith	Shareholders in general meeting could have authorised the acquisition in advance
<b>Green v Bestobell</b>	No defence of resignation, or that employer wouldn't have won	Profit genuinely independent of the role (no use of position, knowledge, or opportunity) would not be stripped
<b>Chan v Zacharia (Deane J, obiter)</b>	Possible qualification: no breach if claim by principal would be unconscionable, or no possible conflict and gain was in the principal's interests	Does not apply where fiduciary competes with the principal

**Regal Hastings v Gulliver → directors wearing 2 hats at the same time**

- Regal wanted to purchase more cinemas so set up a subsidiary company → separate legal entity but same directors (except for the one director who was the solicitor for Regal).
- Didn't have enough funds → so all directors of the new subsidiary subscribed to shares to raise money (including solicitor)
- Regal was sold to new owners; new shareholders

- The new cinemas were a successes; shares that had been subscribed for went up; directors profited
- Everyone profited including Regal; but the new owners of Regal had purchased a more valuable company as a result of these transactions
- Bought a claim against the directors of the subsidiary and the former directors saying → former directors profited from their positions as fiduciaries; they were in the position where they were profiting from their position and it wasn't authorised.
- Raised a problem for consent bc they were the directors on both teams at the same time
- Normally, Regal would've had to get consent from its directors → but couldn't because they were wearing 2 hats at the same time → what should have happened is that they should've had a meeting w/ all of its shareholders to have a vote to get authorisation
- Liability is strict → had to give their benefits up to regal

**Chan v Zacharia**

- Deane J in obiter → proposes that fiduciary arguably not in cream:
- If claim by principal would be unconscious OR
- In circumstances where no possible conflict AND in principal's interest to obtain the benefit

Affirmed in *Warman*.

**NO-CONFLICT RULE → (A) DUTY - INTEREST CONFLICT**

**ISSUE:** [X] has entered into a transaction in which their personal financial interest appears to conflict with their duty to act in [Y]'s best interests.

**RULE:** A fiduciary must not enter into transactions in which a personal interest conflicts with the interests of the person they are bound to protect. The preventative purpose is to stop the fiduciary from being swayed by personal considerations, even subconsciously (*McKenzie v McDonald*). There must be a "real, sensible possibility of conflict" — *Boardman v Phipps* (Upjohn LJ).

**APPLY:**

- Identify the competing interests.
- *McKenzie v McDonald*: agent advised client to sell farm to himself at below market value and exchange for overvalued Melbourne property — a clear conflict between agent's interest in a cheap purchase and client's interest in the highest price. Equitable compensation awarded.
- *Boardman v Phipps* (split): Upjohn found no actual conflict because the trustees had never considered wanting the shares. However, the majority found a "real, sensible possibility" existed because the solicitor represented himself as acting on behalf of the trust during negotiations.