

LAWS5103: EQUITY & TRUSTS

key

Start of topic

Section in code

Element

case

or (case)

***CF = compare

FIDUCIARY DUTIES

The framework for analysis

- Step 1: does the parties' relationship give rise to fiduciary duties?
 - Is the relationship within the accepted categories?
 - If not, does it arise on the facts and circumstances of the case?
- Step 2: what is the scope of the fiduciary duties?
- Step 3: have the fiduciary duties been breached?
- Step 4: are there any available defences?
- Step 5: what are the available remedies?

Step One: categories regarded by equity as fiduciary

“If no: The relationship between {xx} and {yy} does not fall within any categories that Equity regards as fiduciary. Although the relationship may seem similar to a {category} type relationship, it doesn't quite fit squarely within this category. This relationship will be fiduciary if it exhibits relevant common characteristics derived from the accepted categories.”

“If yes: The relationship between {xx} and {yy} falls within the accepted category of {category} (authority), however relevant indicia must still be considered.”

Two categories

- Relationships recognised by courts as accepted/established/standard categories of FD;
 1. Accepted Categories (**HP v USSC**) Trustee/beneficiary, Director/company, Agent/principal, Solicitor/client, Partner/partner, Receiver or liquidator/creditors, Executor or administrator of deceased estate/beneficiaries of estate, Stockbroker or financial adviser/client, Company promoter/investor, Employee/employer* (**Anderson v Canaccord**), and Guardian/ward
 2. What makes these relationships special? One party entrusts the other party with their decision making power, Structural vulnerability, Nature of the relationship, Often about wealth (the dividing line) and NOT disadvantage of one of the parties

Hospital Products Ltd v United States Surgical Corporation: HP distributing USSC's products as their own, causing USSC to suffer a lot of loss. USSC sues for breach of F relationship due to preferred remedy falling under equity. Duty only arises where contractual party undertakes to set aside own interests. No FD here because able to act in own interest and pursue USSC's interest.

Breen v Williams: Breen underwent breast augmentation surgery. Dr Williams later performed a corrective procedure after a silicone implant leaked. To assist in a class action against the faulty implants' US manufacturer, Breen requested full access to her medical records which had been produced and kept by Dr Williams. Dr Williams refused to grant access. Despite the contractual duty, there were no facts about the relationship, showing Dr Williams had done anything resembling a fiduciary undertaking. The right of access claimed is not one given by the contract. Nor did it arise from any undertaking, express or implied, by Dr Williams, as fiduciary, to act as Ms Breen's representative, agent, as no such undertaking was given

Step Two: common characteristics

“By weighing up all these characteristics and taking into consideration that loyalty is an overriding principle, it is {likely / unlikely} this is a fiduciary relationship.”

- Relationships that arise by virtue of the facts and circumstances of the case. Onus of showing it is a fiduciary relationship rests on the Principal (**Breen v Williams**)
 1. Identify the common characteristics of accepted categories
 - Undertaken a relationship of ‘trust and confidence’?
 - careful – contract not necessary! And controversial the extent to which one can ‘contract out of’ fiduciary duties (**ASIC v Citigroup**)
 - ‘trust’ not a subjective question - entrusted
 - Representative?
 - Acts on behalf/representative capacity
 - Exercises a power or discretion
 - Affects the legal or practical interests of Principal
 - Principal therefore vulnerable
 - Reliance?
 - Again, an objective (structural) feature of the relationship
 - Comes with the representative/influential features, affecting the Principal’s interests
 - Again emphasises the structural vulnerability of the Principal
 - Property?
 - Fiduciaries as wealth-managers
 - Is why doctor-patient, parent-child etc not generally fiduciary (compare Canadian position): **Paramisivan v Flynn; Breen v Williams**
 - Purely commercial relationship negotiated at arms length on equal footing - negative (**HP v USSC**)
 - Both parties entered into relationship for their own benefit - negative (**HP v USSC**)
 - Expectation of undivided loyalty
 - Relationship of reliance → unilateral (**solicitor in Boardman**) or mutual (**partners in Birtchnell**)
 - Vulnerability of the principal (**Hospital Products, Breen**)
 - Property or responsibility entrusted in the fiduciary (**UDC v Brian**)
 - Exercises power or discretion that affects the interest of another
 2. Examine the facts and circumstances of the case in question to see whether and how those characteristics apply (reasoning by analogy!)

United Dominion Corporation Ltd v Brian (1985)(HCA): an ‘association of persons for the purposes of a particular trading, commercial, mining or other financial undertaking or endeavour with a view to mutual profit, with each participant usually (but not necessarily) contributing money, property or skill’. Might be a partnership, or not (depends on).

Chan v Zacharia: Medical Partnership, Partnership was dissolved, Assets of the partnership had to be realised and applied in satisfaction of the partnership debts, the expenses of winding-up etc, Partnership agreement required partners to cooperate in the winding up, After dissolution, Dr Chan took the benefit of an option to renew the lease for medical premises, Was there a fiduciary relationship at that time? Dr Chan had breached his fiduciary duty - abusing his fiduciary position as a trustee and former partner to seek an advantage for himself - failed to act with fairness and good faith. Fiduciary obligations between partners may continue even after the firms business has ceased trading

Step Three: Scope

“The existence of a fiduciary relationship does not automatically define its scope (Heenan J in *WAE*). Rather, scope is moulded according to the nature of relationship and facts of the case (Mason J in *Hospital Products*). As a {job title}, {fiduciary’s} duties extend to ‘{what type of conduct does the duty cover i.e. what is their role in the company or job description or what does the business predominately do}’”

- What aspects of the relationship give rise to a fiduciary duty?
 - *if a contract exists, scope is determined by terms or agreement of what parties engaged to do

Anderson v Canaccord Genuity Financial [2023] NSWCA 294:

- All those authorities support the twin propositions that (i) every employee-employer relationship is fiduciary in nature, and (ii) it is necessary then to address the scope (or “subject matter”) over which the fiduciary relationship extends.
- In some cases ... there will only be a relatively confined field of conduct within which [the fiduciary’s] conduct must adhere to a fiduciary standard. In other cases much more will be within the scope of the fiduciary obligation. But even in paradigm cases of solicitors or partners, there will often be aspects of their conduct which is outside the scope of the fiduciary obligations owed to their clients or partners.

New Zealand Netherlands Society ‘Oranje’ Inc v Kuys: Kuys’ activities in relation to the newspaper outside the scope of his fiduciary duties. Person can be fiduciary to the extent of some activities but not others. Look at contract, course of conduct

Step Three: Breach

“Per Gibbs CJ in *Hospital Product*, someone ‘who occupies a fiduciary position may not use that position to gain advance for himself, nor may he obtain a benefit by entering into a transaction in conflict with his fiduciary duty. Therefore {fiduciary} has a duty of no conflict and no profits.’”

1. What are the fiduciary duties? (Fiduciary interest vs principals interest)

“If breach: {Fiduciary} has {describe the conduct}. This appears to breach the no conflict rule because {fiduciary}’s personal interest in the {company / product etc} {conflicts / may conflict} with the fiduciary duty owed to {principal}. {There is / This was} a ‘real, sensible possibility of conflict, not just a hypothetical, fanciful one’ (Upjohn, Dilhorne in Boardman; Chan; Hospital Products) because {...}. If no breach: {Fiduciary} has {describe the conduct}. This appears to satisfy the no conflict rule because {fiduciary}’s personal interest in the {company / product etc} does not conflict with the fiduciary duty owed to {principal}. {There is no / This was not a} ‘real, sensible possibility of conflict, not just a hypothetical, fanciful one’ (Upjohn, Dilhorne in Boardman; Chan; Hospital Products) because {...}.”

- No conflict
 - o Interest/duty: preclude fiduciary from being swayed by considerations of personal interest. Required fully informed consent: heavy burden not discharged here.
 - o Duty/duty

Farrington v Rowe McBride and Partners: Relying on his solicitors’ advice, the appellant invested his proceeds of a compensation pay-out in a mortgage. (ie lent money in exchange for secured payment of interest). He couldn’t work, so a safe investment producing a secure income were key. The land was owned by a company that was part of a large development group. That group was the largest client of the firm of solicitors, and members of the firm, and their family trusts etc had vested financial interests in its success [group channelled their channelled their funds through the first trust account]. Clearly, they would want cheapest finance available. The group collapsed. No evidence that the firm stood to benefit further than simply fees, but a problem with the duty-duty conflict!

CBA v Smith: Manager effectively inserted himself as agent for vendor of business. Adopted role of financial adviser to Smiths. Bank could not have properly acted for both sides. Role of disclosure and independent advice

- No authorised profit
- Positive (**Breen v Williams**)
- Proscriptive
 - o ‘Duty to act in the best interests...’ inaccurate!!
- Overlapping but distinct (**Chan v Zacharia**)
 - o Conflict may not involve profit to fiduciary;
 - o Any profit must be accounted for, whether or not fiduciary could ever have made it, or suffered any loss
- Irrelevant that the fiduciary acted without fraud, honesty etc. (**Chan, Boardman**)
- Irrelevant that the fiduciary made no profits (**Chan**)

Mckenzie v Mcdonald: Obvious conflict between: defendant's interest in obtaining the lowest possible purchase price for farm and highest possible sale price for Melbourne property, and plaintiff's interest in obtaining highest possible price for farm and the lowest possible price for Melbourne property.

2. What is the fiduciary's interest? (Fiduciary interest vs principals interest)
"If breach: {Fiduciary} has {describe the conduct}. This appears to breach the no conflict rule because {fiduciary} has placed {principal 1}'s interests (i.e. describe what they want) in conflict with {principal 2}'s interests (i.e. describe what they want). {There is / This was} a 'real, sensible possibility of conflict, not just a hypothetical, fanciful one' (Upjohn, Dilhorne in Boardman; Chan; Hospital Products) because {...}. If no breach: {Fiduciary} has {describe the conduct}. This appears to satisfy the no conflict rule because {fiduciary} has not placed {principal 1}'s interests (i.e. describe what they want) in conflict with {principal 2}'s interests (i.e. describe what they want). {There is no / This was not a} 'real, sensible possibility of conflict, not just a hypothetical, fanciful one' (Upjohn, Dilhorne in Boardman; Chan; Hospital Products) because {...}."
 - Must fall within duration of fiduciary duties
3. No secret/unauthorised profit (Must fall within duration of fiduciary duties)
{Fiduciary} has {describe the conduct}. This {appears / does not appear} to breach the no profit rule because...
 - (1) Needs to be a profit / gain
 - (2) Retaining a profit / gain = breach; making a profit / gain = no breach
 - (3) Unauthorised profit / gain = breach; authorised / ratified gain = no breach
 - (4) By virtue of their position as fiduciary = breach; otherwise = no breach
 - (5) By use of opportunity, knowledge or info. arising from fid. position = breach; otherwise = no breach
 - All unauthorised gains obtained from the fiduciary position must be accounted for to the Principal. Gains may arise:
 - o by virtue of fiduciary's position
 - o by use of opportunities, knowledge or information arising from position
 - Authorisation may be in advance, or subsequently ratified
 - Rationale/s? Prophylactic/deterrent, or an outcome of the representative character?
 - Really high bar/standard! See Bryan et al on this.
 - o Eg **Keech v Sandford**– trustee and lease and infant beneficiary
 - o **Chan v Zacharia**: medical lease and partnership
 - o **Boardman v Phipps**: business opportunity and beneficiaries

- Irrelevant factors
 - o Irrelevant that the trust could not have made a profit (**Boardman, Regal Hastings**)
 - o Irrelevant that the trust suffered no loss (**Boardman**)
 - o Irrelevant for the principal to benefit (**Boardman, Regal Hastings**)
 - o Irrelevant that the fiduciary acted in the principal's best interest (Boardman)
 - o Irrelevant fiduciary acted honestly/good faith (**Regal Hastings**)
 - o Irrelevant that fiduciary resigned by the time he had starting making the profit (**Bestobell**)
 - o Irrelevant that principal would not have won the contract even if fiduciary didn't directly compete (**Bestobell**)

Boardman v Phipps: Boardman was a genius. Beneficiaries couldn't possibly make the profit. Win-win. But still a breach of the no-conflict (duty-interest) rule. Boardman and Phipps made use of fiduciary position to obtain: information about company and opportunity to buy shares. No defence that: trust could not or would not have made use of information or opportunity itself, trust had not suffered loss and had profited and Boardman and Phipps acted honestly

Regal Hastings: The directors took shares in a subsidiary company when the plaintiff company could not afford to take them up. The directors made a profit when both the holding company and the subsidiary were sold to a third party. The company sued. No defence that: Directors acted honestly, in what they thought were the best interests of Regal, Regal could not have taken up the opportunity as lacked funds, Regal made a profit

Green v Bestobell: Fiduciary duty: includes a duty of looking after the employer. Here there was a clear breach of fiduciary duty by Green (manager of Bestobell) and this placed himself in a position where his duty to it conflicted with his own interests. Further because Clara knowingly and for its own benefit participated in Green's breach of duty, it was order to account to Bestobell Industries for the profit it derived.

Step Four: Defences

1. Informed consent

- if there is an authorised profit/gain/conflict
- if not director/company relationship
 - “The informed consent defence may be available. The onus is on {fiduciary} to show they made ‘full and frank disclosure’ to {principal} (Kuys).”
- Look at circumstances
 - o **Queensland Mines v Hudson** – sufficient for director to inform board not shareholders
 - o **Regal:** only shareholders in general meeting could consent to breach
- Look at sophistication and intelligence of the principal
 - o **Boardman:** you still need unanimous consent even though Principal is old and senile
- Limits
 - o Director who seeks consent holds majority of shares

- Unlawful transactions
 - Competing interests – eg, creditors
 - What must be disclosed?
 - Full and frank disclosure
 - Depends on circumstances – including sophistication and intelligence of principal (**Farah v Say-Dee**)
 - If director/company relationship

“The informed consent defence may be available. The onus on {director} to show they made ‘full and frank disclosure’ to {company}. Companies consist of shareholders and a board of directors. Only the shareholders in general meeting can consent to the breach of fiduciary duties by directors (Regal Hastings; c.f. Qld Mines). On the facts {...}”
 - Exceptions
 - Shareholders cannot consent where the director is also a shareholder & control majority of shares
 - Shareholders cannot consent where the transaction is beyond the powers of the company
 - Shareholders cannot consent where there are other interests at stake (e.g. creditors)
2. Laches
- Equitable limitation defence
 - More flexible
 - Passage of time:
 - amounting to acquiescence OR
 - cause undue prejudice now to assert rights
 - Time runs from date plaintiff acquires knowledge of facts giving rise to breach (**Twigg v Twigg**)
3. Unclean Hands
- really, a counter-claim or right of set-off
 - Excuse:
 - Statute may permit breach
 - Eg s 1318 *Corporations Act 2001* (Cth): court has power to excuse director from breach of duty where acted honestly and ought fairly to be excused
4. Ratification
5. Estoppel
6. Excuse (statue permitting breach)

Step Five: Remedies

- Start with an injunction (coercive) – restrains the breach / threatened breach
- If breach has already occurred, look to:
 - Account of profits (restitutionary) – every profit made from the breach must be paid back to the principal
 - Equitable compensation (compensatory) – seeks good any loss suffered by the principal

- Constructive trust (restitutionary) – court orders that the fiduciary holds the property acquired from the breach for the principal – use if property is on sold to a third party
- 1. The accounting process
 - An order to perform your obligations (eg replace improperly acquired property)
 - An order to compensate for loss caused by the breach
 - An order to account for gains
- 2. Recission (**Amcor Ltd v Barnes**)
- 3. Specific/perfection (injunction)
 - Direct enforcement of duty
 - Injunction: restrain threatened (or ongoing) breach
 - Specific performance: do what you promised to do
 - ‘Substitutive’ monetary awards (eg arising from wrongful disbursement of Principal’s asset)
 - Some constructive trusts
- 4. Compensatory
 - Order to make good some loss identified through the accounting process
 - Longstanding debate over whether and how compensation in equity is the counterpart of CL ‘damages’, and how ‘loss’ is measured: you will return to this in JD Remedies.
 - Suffice to say that breach of fiduciary duty can attract a generous compensatory measure!
- 5. Deterrent
 - Giving up which can be personal (an account of profits) or propriety (constructive trust)
- 6. Punitive? (Punish wrongdoer)

NATURE OF TRUSTS

- Settlor: person with the trust property
- Trustee: person who gains the legal title of the property by holding it for the settlor
- Beneficiary: person who will get the property after the trust obligations are complete

“If trust by transfer (Settlor → Trustee → Beneficiary) {Settlor} is purporting to create an express, {fixed / discretionary} trust by transfer. To be valid, the trust must satisfy the three certainties (*Knight v Knight*), any applicable statutory formalities and be completely constituted.”

“If declaration of trust (Settlor/Trustee → Beneficiary) {Settlor} is purporting to create a {type of trust e.g. sub-trust} by declaration. To be valid, the trust must satisfy the three certainties (*Knight v Knight*) and any applicable statutory formalities. Complete constitution is not an issue because {person} is both the settlor and trustee.”

“If will (validly executed) {Settlor} is purporting to create a testamentary trust. To be valid, the trust must satisfy the 3 certainties. No need to consider formalities or complete constitution because it is a ‘{validly executed will}’”

Types of trusts

- Express private trust:
 - A trust that is intended to benefit one or more persons.
- Express public trust:
 - A trust set up for a purpose recognised as charitable by law, i.e. a charitable trust.
Note: Expression public trust may be used interchangeably with charitable trust.
- Fixed Trusts
 - The trust sets out the entitlements of the beneficiaries to the trust property (‘fixed’ interest). The trustee must distribute the trust property to those persons, as allocated.
- Discretionary Trusts
 - The trust does not specify the entitlements of the beneficiaries to the trust property: the trustee has a (constrained) discretion to choose. The trustee may not be required to distribute the property to all or any beneficiaries (there may be a ‘gift over’ to an identified person if the trustee does not distribute to the beneficiaries)
- Inter vivos trust:
 - A trust created during the settlor’s lifetime. Comes into effect after signing or on a date specified in the trust instrument.
- Testamentary trust:
 - A trust created by the will of the testator/testatrix. Only comes into effect on his or her death
- Bare trust
 - Trustee’s only obligation is to distribute to the beneficiary. No active obligations
- ‘Special’ trust:
 - Trustee has active management obligations and/or discretion in management and distribution obligations
- Resulting trusts
 - ‘Automatic’ (where a settlor tries to set up a trust by transfer for a 3P Beneficiary and fails, and so the beneficial interest in the Trust ‘results’ to the settlor: *Re Vandervell’s WT*)
 - ‘Presumed’ RT (eg transfer to a stranger without value: it is presumed the stranger holds the property on trust for the beneficiary)