

MAXIMS

1. He who seeks equity must do equity
2. Must come with clean hands
3. E looks to intent rather than to form
4. E treats as done that which ought to be done
5. E acts in personam
6. E follows the law
7. E does not assist a volunteer
8. Delay defeat E

EQUITABLE PROPERTY INTERESTS (2A)

1. Types

- a. **B's interest in a fixed trust**
 - i. Fixed – B has a fixed, definable benefit to which they are entitled
 - ii. Discretionary – trustee has discretion as to which B's benefit
 - b. **Interest in a partnership**
 - c. **Proprietary interests** which are the counterparts of CL interests e.g. equitable lease, equitable fee simple
 - d. **Security interests of the same type** e.g. equitable mortgage, equitable charge
 - e. **Equitable rights over land** e.g. equitable easement or restrictive covenant over land (which unlike CL interests over land do not have to be created by deed)
2. **Creation** – agreement, express trust, CT order, operation of law
- a. Before a right or interest can be admitted into the category of property or a right affecting property **it must be definable, identifiable by 3rd parties, capable in its nature of assumption by 3rd parties and some degree of permanence/stability**
Ainsworth

3. **Enforcement** – binding except GPFVWN *Wilkes*. Purchaser bears onus of proof in showing he is not affected by an adverse equitable interest *Barclays*
- a. Notice - actual, constructive, imputed. In areas of property law, registration may be required – sometimes requires registration (Torrens) or declaration of trusts with Registrar or often protected by entry of caveat on the certificate of title

4. Nature of Equitable Ownership

- a. An absolute owner of property does not hold 2 estates. They only hold the legal interest in the property **DKLR**
- b. An equitable interest is not carved out of a legal estate, but impressed upon it **DKLR**
- c. Equitable interests > mere equities (right to rescind e.g. voidable contract) **Latec (Kitto)**
 - i. Election to rescind = D holds property on constructive trust for P subject to bars to relief **Daly**

Trustee is under a personal obligation to deal with the trust property for the benefit of the beneficiaries...attaches to the trustees in personam but it also annexed to the property so that the equitable interest resembles a right in rem **DKLR**

FIDUCIARY RELATIONSHIPS (2B/3A/3B)

1. What?

- a. A relationship of trust & confidence will be recognised as fiduciary where it arises from F undertaking to act in the interests of B in a matter which confers a discretion on F & that discretion affects B's economic interest.
- b. This is why commercial transactions outside categories usually not FRs (both intend to benefit – look after their interest)
John Alexander

2. Does FR Exist? Scope?

- a. **Recognised Categories (Presumed FRs):** *T/B, Solicitor/Client, Director/Company, Employee/Employer, Agent/Principal, Directors/Company, Partner/Co-partner, Executor/B's of deceased's estate.* The categories are not closed **Hospital Products**
 - i. E.g. client and investment advisor is a prime candidate or parent/child (Canada recognised this, but not AUS)...although the more closely it approximates to a vendor/purchaser relationship the less likely it is fiduciary
- b. **Vertical Relationships:** Undertaking Test → *critical feature of a FR is that the F undertakes 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 interests of that person in a legal or practical sense* **Hospital Products** → F acts as a representative on behalf of the other
 - i. **Smith:** LT relationship of advice with the bank, a lot of trust involved → FO → breached (no profit/conflict)
- c. **Horizontal Relationships:** Mutual Trust & Confidence Test → *whether the parties have placed a high degree of mutual trust and confidence in each other in the pursuit of their common goal.* **United Dominions**
- d. **Factual FRs:** Other Criteria: No clear rule **Hospital Products**. 3, 4, 5 usually go together – e.g. solicitor performs a task in the interest of another, where his decisions affect my rights and I am in a vulnerable position because I rely on his expertise. Unlikely to see all factors in 1 situation
 - i. Existence of a relation of confidence
 - ii. Inequality of bargaining power
 - iii. Undertaking by one party to perform a task or fulfil a duty in the interests of another party **Hospital Products**
 - iv. Scope for one party to unilaterally exercise a discretion or power which may affect the rights or interests of another **Hospital Products**
 - v. A dependence or vulnerability on the part of one party that causes that party to rely on another **Hospital Products**
- vi. **Other**
 1. Usually does not apply to banker/customer, client/accountant...but potentially for bank advising customer on the investment of customer's \$ if it has undertaken to provide wholly disinterested advice and to act exclusively in the customer's interests. **CBA v Smith**
 2. Does a DR have a FR with patient? Not on the list (but not closed). A **doctor is not a representative** (primarily) of the patient. He is acting on his own behalf doing his doctor thing...commissioned him to do it. He is not acting on your behalf. **Breen** (representative aspect from **Hospital Products**)
 3. The accountants like Williams were not representing the company. They were doing an accountancy job for the company. We're acting independently. **Not acting on your behalf Pilmer**
 4. A FR arises between a financial adviser and its client where the adviser holds itself out as an expert on financial matters and undertakes to perform a financial advisory role for the client (& act in their best interests): see **Daly v Sydney Stock Exchange**. duty is to furnish the client with all the relevant knowledge which the adviser possesses, concealing nothing that might reasonably be regarded as relevant to the making of the investment decision + reveal their interest.
 - a. Duty of investment advisor, where advisor has an interest but must give full disclosure
 - b. The fact that the employee giving advice did not know is irrelevant – standard is high
 - c. Where they undertake to give you advice + investing your money + vulnerable/rely = Financial Advisor Owe FR **Wingecarribee** (more advisor than salesman)
 - d. A stockbroker who is engaged to buy or sell shares on behalf of his client has been held to be an agent subject to a fiduciary's obligations in buying and selling
 5. Cannot use FO's to fill a gap in the contract where parties have not looked after themselves **John Alexander**
- e. **Scope:** A person may be in a fiduciary relationship as to some aspects of the relationship but not others **Citigroup**
 - i. Scope of FOs determined by the character of the venture or undertaking: **Birtchnell**. Ascertained from terms of agreement & course of dealings **News** nature of the relationship & the facts of the case **Hospital Products**
 - ii. **Fiduciaries only owe obligations in respect of their undertaking** (parts of the parties relationship may be and some aren't). E can look at the parties conduct in full (behaviour over time) **Birtchnell** + what was written
 - iii. lawyer if seeking legal advice but if about something else then it is not.

3. Enforcement?

- a. **FDs are strictly enforced Keech.** It is not enough for F to show that B could never have made that profit & caused no loss to B. It is simply → if you gain an opportunity/knowledge in position of F and used it to make a profit
- b. Good intentions will not protect against breaches **Nocton; Boardman**
- c. E presumes that any gain made by F was made from his F position **Chan**

4. **Duties?** F must act exclusively in the interests of B in matters within the scope of the relationship

a. Core Duties

- i. **No Profit Rule:** Duty to not make a profit out of the relationship (unless informed consent) *Hospital Products; Citigroup*
 1. Cannot profit (secret profits) or profit from opportunities/information acquired by being the F *Boardman; Chan*
 2. **Presumptions** *Chan*
 - a. If Trustee of a **trust** & you get a benefit resulting from position as T there is a **irrebuttable presumption**
 - b. If **ordinary than presumption is rebuttable – to prove you got it not by the use of your position as F**
 - c. F's making profit out position. If trustee cannot rebut, if F can rebut that it was not made by use of the position/opportunity/knowledge from being F
 3. If you make a profit = usually in conflict (double breach)
 4. Does not matter that it was a profit that he could never have made *Boardman*
 5. Rule of equity to make no profit from the position does not depend on fraud or absence of bona fides or whether B has been damaged or benefitted by his action. Liability arises from the mere profit being made no matter how well intentioned *Boardman*
 6. F can profit with the knowledge & informed consent of the principal, providing disclosure is sufficient *Boardman*
 - a. Need full and frank disclosure *Citigroup*. It can be implied.
- ii. **No Conflict Rule:** Duty not to place themselves in a position of conflict between self-interest and the duty owed to the beneficiary, or in a position where they owe conflicting duties to several beneficiaries *Chan*. there **must be a real sensible possibility of conflict** *Qld Mines v Hudson*
 1. Unauthorised Remuneration – obtaining a benefit that is not authorised e.g. secret profits *Redding*
 2. Assuming a Double Character – e.g. advising the person as a F to sell you the property (taking other side of transaction) *Armstrong*
 3. Benefits Derived by F to the Exclusions of the person whom the FOs are owed
 - a. Cases where F is not to derive a profit because it should have gone to the B (breach of undertaking sub rule) *Clark-Boyer*
 - b. where F has misused his position (e.g. opportunity from being an F) to make a benefit (misuse of position subR) *Cooke*

b. Particular types of F's will have additional positive duties

- i. E.g. a trustee must comply to the terms of the trust instrument & the duty to invest trust moneys

c. Exclusion

- i. MOST FOs can be excluded or modified by agreement – contract, trust instrument – e.g. contract with informed consent or ratification (after the event) – need to fully disclose the breaches
- ii. Except the duty of good faith *Armitage v Nurse*

d. Defeating a Breach of FO Claim

- i. A principal can give informed consent (before) or ratify (after) to what would otherwise be a breach of FO
 1. Prevents liability rather than a defence
 2. There must be full disclosure of the facts to B. Sufficiency depends on the intelligence of the persons to whom the disclosure must be made *Farah Constructions* (less needed for people with considerable business experience)
 - a. Have regard to knowledge & experience of the parties. *Farah*. they had business experience and intelligence – they were shrewd & astute
 - b. disclosures were at different times & in different ways *Farah*
 - c. No specific rules to test informed consent
 3. What is required to a fully informed consent is a question of fact based on the circumstances – importance of independent & skilled advice *Wingecarribee*

ii. Statutory defences to BOT available to T's (see later)

iii. Equitable Bars to Relief (see end)

e. Other

- i. *Boardman* awarded liberal remuneration for skill, risk (own \$) & effort even though they breached the 2 core duties
- ii. Good intentions will not protect against breaches *Nocton; Boardman*
- iii. F's liable for profits derived from knowledge or opportunities afforded by their position (caused to be possible)
 1. Failing to cause loss to the principal is no answer (liable on breach) *Whitehouse*
- iv. **Fiduciaries must be fair and not favour one B over another** *Whitehouse*
- v. Contract *Hospital Products* (accommodate (be consistent with) to the contract) & statute can exclude/affect FOs
 1. *Citigroup* contract excluded liability for breach of FO. FOs must conform to the terms of the contract
 2. Can exclude FOs except for fraud or deliberate dereliction of duty *Citigroup*
- vi. You can have conflicting situations. You can be a shareholder and a director in that company. Acting in different capacities. *Howard* You can be in a number of capacities, more than 1 of which can be fiduciary
- vii. After the dissolution of the partnership, the FR continues until necessary (i.e. until it is wound up). Partners owe a duty to another...when it ends there may well be partnership assets & liabilities that need to be dealt with (winding up). During the winding up, they remain in a FR *Chan*