

Trustee duties – conflict/self-dealing

Conflict of interest / self-dealing: *Fenwick v Naera*

- Fenwick was the trustee of two different trusts
- Fenwick was also the beneficiary of one of these trusts
- As trustee, she participated in the decision to enter into a joint venture agreement between the trusts i.e. self-dealing
- Some beneficiaries of the trusts opposed the joint venture, asked the courts to set aside the trustee's actions

Facts:

- 1) Whether can have less strict std than fiduciary rules around conflict with trusts over Maori land under TTWMA and 2) automatically rescind the transaction
- TTWMA is a special regime aimed at retaining and developing Maori land.
- Two different trusts to establish a power station developed by Ahu Whenua trust
- Trustees have general powers to use the land according to trust deed but also MLC sanctioned the use and development of the land for geothermal purposes
- Joint venture and new company creates.
- Some beneficiaries of one of the trusts challenged the trust deed that one trustee acted for both sides, asking for equitable remedy of setting the transaction aside due to COI
- Fenwick was beneficiary of a different trust and her family owned 20% of that trust. She was also trustee of two of the trusts in the deal which provided land
- Other side pays royalties or provides further shares in power company formed.
- Issue: equitable perspective fiduciaries do not act with a COI. If trustee of one trust acts in the same transaction as a trustee for a different trust, that is a COI as trustee supposed to act for the benefit the beneficiaries of each trust and beneficiaries of the two trusts can have different interests.
- Fenwick trying to benefit beneficiaries of both trusts and was incredulous at the claim of a COI. Strict fiduciary rule meant nothing nefarious had to be asserted i.e. that she had acted fraudulently and intended to benefit one set of beneficiaries over the other.
- MLC and MAC: no conflict – relied on Lord Upjohn: requiring a real sensible possibility of a conflict. Fenwick acted for beneficiaries in good faith in a project which benefited both beneficiaries. There was no sensible possibility of a conflict. Common sense view – Fenwick did not consciously act to benefit herself or one beneficiary over the other

Result:

- Fenwick was allowed as trustee to act for both sides of the transaction, despite a COI contravening strict equitable fiduciary obligation, because Maori trustees often trustees of other trusts permitted under s 227A TTWMA which excludes the no-conflicts rule.
- s 227A(2) trustees cannot participate or vote in the discussion of any matter which affects their remuneration and employment of the trust.
- Recognising people may have multiple roles and they cannot vote or discuss any matter which directly or indirectly affects any contract in which the person is interested.
- “Other than as a trustee of another trust” suggests trustee of two trusts in same transaction can participate fully and vote on decisions.
- Real issue is that Fenwick is a beneficiary (along with family) under one of the trusts. Not allowed to hold 5% of the beneficial shares in one of the trusts. The exception under s 227A does not protect someone acting as a trustee for the benefit of one set of beneficiaries while also retaining a beneficial interest on the other side of the transaction.

- Fenwick created a COI as she was dealing with an entity in which she had a beneficial interest in.
- In the context of Maori land trusts under TTWMA, recognition people maybe trustees of multiple trusts despite contrary to strict fiduciary rule found in equity preventing trustees acting on both sides of the transaction as trustees.
- A trustee of one trust and beneficiary of another is a clear COI under the Act.

Rescission?

- Trustees are not permitted to self-deal and once found the transaction is set aside provided no consequences for third parties.
- Fenwick: other trustees were not conflicted and this was a development of the land which would benefit the beneficiaries of three trusts. To allow one beneficiary to set the transaction aside if a COI is found would derail this.
- Considered how this trust was special i.e. under TTWMA has purpose of facilitating the development of Maori land
- Court did not impose rescission
- MLC could take into account non-exhaustive factors in deciding whether to allow a transaction stand due a COI involving a trustee and impose a different remedy, such as removing a trustee or recovering any profits made by the errant fiduciary.
 - Benefits and risks of joint venture
 - Fairness of land resources exchanged for loyalties and share options in company
 - Whether proper value give to the trust from the other side
 - Independent advice
 - Fairness to beneficiaries
- Difference between general regime of trusts and those under TTWMA:
 - Social fact of interrelationships and multiple interests under different trusts means allowing rescission by the insistence of one beneficiary could be problematic when the transaction benefits the rest of the beneficiaries.
 - Ahu Whenua Trusts are established and closely supervised by MLC
 - Given special developmental purpose of TTWMA and role of MLC, MLC can take a nuanced approach in ordering a remedy.
 - Rescission not automatic.
- General law: no conflict rule, including self-dealing where dealing on both sides of the transaction. Remedy is the beneficiary can set the transaction aside. Fenwick is an exceptional situation.