

Worthington

- Do not understand the meaning of “fiduciary”. If do not have an answer, then cannot practically determine who is a fiduciary and what they must do as a fiduciary
- Concerned about inconsistencies in the law, which may lead to judges making up the law by imposing fiduciary obligations because I know it when I see it – not the role of a judge who is meant to explain concepts to people.
- Who is a fiduciary?
- Maybe historical reasons why one is a fiduciary but Worthington prefers principles
- A fiduciary is someone who places another’s interests before their own and there is a legitimate expectation that they will act on their behalf. Eg. solicitor
- Eg. an agent is a fiduciary who takes a job working on behalf of someone else, Boardman
- Eg. joint venturers once thought to be fiduciaries due to trust and confidence in one another. This was wrong because people contracted out of being joint venturers.
- Eg. financial advisers, often paid by product providers. Not a fiduciary, can inform product provider confidential info and not in COI.
- Fiduciary as someone who we have a legitimate expectation of trusting, but this is a self-referential question.
- Eg. accountants not a proper fiduciary as not kind of person as entitled to act in their self-interest and act without utmost loyalty
- For more ordinary professions eg. investment bankers are only obligated just through contract or sometimes live up to a level of a fiduciary
- Eg is a real estate agent a fiduciary – on one hand an agent who is a fiduciary but on other hand, they are trying to match various groups of peoples with properties which may not be in their best interest
- What does it mean to be a fiduciary?
- Fiduciaries also have other types of duties eg. solicitors also owe an obligation of care and competence
- Fiduciaries duties separate from normal obligations of professionals eg. DOC
- List of things which are proscribed for a fiduciary:
 - Trustees wrongfully paying out assets to people who are not beneficiaries, can only pay assets on the instruction of the beneficiary
 - Wrongful management of investments, looks like a professional kind of duty rather than a strict fiduciary one
 - Cannot be disloyal. Cannot make a profit for yourself at the expense of the client and in Boardman, cannot make a profit for yourself even if it is for the benefit of the client and the client could not take the opportunity. Draconian rule where once there is disloyalty, not interested in excuses.
- Paul Finn: fiduciary duties are enacted in a draconian way and excuses do not exempt one from liability. Eg. Boardman – does not matter if trust made lots of money or acted honestly, there was a breach of strict fiduciary duties
- vs Negligence which is not wholly strict liability and can incorporate excuses i.e. did everything an ordinary person would do
- Common law supports capitalism, have a right to act in own self-interest. Fiduciary duties are an exception where we expect loyalty, selflessness and a suspension of normal human nature in the common law.

Keech v Sandford

- Trustee of infant is a fiduciary. He had a lease on behalf of an infant which could not be renewed by the infant
- A conflict for the trustee to renew the lease under his own name.
- Trustee acted disloyally as beneficiary could have taken advantage and made money from the trust, even though infant could not renew the lease and there was no actual conflict
- Equity is designed to be precautionary.
- The trustee did the best thing for the beneficiary by creating a constructive trust owned by the infant, if construe the trustee as someone who had acted honestly for the interest of the infant. Hence, the trustee can only be taken as holding property on behalf of the infant
- Constructive trusts construed from behaviour or from judge-created trusts which is wrong because judges do not create property rights

Who owes fiduciary obligations?

“A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.” [and it is legitimately expected that they owe another person these duties]

- Agents, Solicitors, Company directors, Partners, Trustees
- Peter Birk: impossible to predict when there will be a fiduciary relationship.
Fiduciary has discretion in the management of another’s affairs, where that other cannot be reasonably expected to monitor the fiduciary or take other precautions to protect their own interests

What are fiduciary obligations?

- Lord Millet *Bristol and West v Mothew*:
- Distinguishing obligation is loyalty
- Must act in good faith
- Must not be dishonest or lie in carrying out duties
- Must not make a profit out of trust and relationship
- Must not place themselves in a position where their duty to principal and self-interest conflict
- Must not act for their own benefit or benefit of a 3rd person without informed consent from the principal

Boardman v Phipps

- Boardman was a solicitor of a trust with trustees: Mr Fox, widow and daughter.
- Trust owned shares in Lester & Harris. Boardman became concerned with performance of Lester & Harris and suggested that the trust buy more shares so it could run the company instead of its present owners.
- Boardman’s view later shifted to taking over company to make money.
- Boardman asked the trust for consent and Mr Fox refused as trust prohibited from making more investments despite thinking it was a good idea for someone else to control the company, daughter thought it was a good idea for the trust to purchase the shares and widow’s dementia meant the trust could not reach a unanimous decision
- Boardman and Tom Phipps, who was a beneficiary, later buys the shares
- Boardman was a fiduciary when he acts as an agent of trust i.e. attend general meeting

- Held: 1) have to account for profits and hand a portion to the beneficiary of the trust and 2) have to hold the shares they own for the benefit of the trust as constructive trustees
- Remedy: fiduciary held shares in a constructive trust
- Tom is a beneficiary so may have gained info independently but he did not state that he was in a different position from Boardman.
- Unclear why Tom was considered to be a fiduciary to the trustees of the trust.
- Boardman had information about Lester and Harris which was trust property as it held shares in the company.
- **Aberdeen**: rule of universal application that fiduciaries cannot enter into arrangements where their personal interest conflicts or may conflict with the principal
- **Bray**: an inflexible rule that fiduciaries are not entitled to make a profit or put themselves in a position where their interest and duty conflict. Based on human nature and the danger of fiduciaries being swayed by their self-interest rather than acting for the principal.
- Irrelevant if fiduciary making a profit was not doing anything wrong or dishonest or did not even know they were acting in COI. Simply cannot make a profit or carry out a transaction involving a COI or possible COI. Transactions and profits made are liable at the suit of the principal to be set aside or given to the principal as fiduciary will be held to have been acting for the principal's benefit.
- **Regal Hastings v Gulliver**: Regal Hastings wanted to open another cinema using Amalgamated Ltd, but lessor of cinema building required Amalgamated to have its share capital fully paid for.
 - 1) Directors give personal guarantee on lease
 - 2) Full subscribe to Amalgamated shares which had 5000 shares at 1 pound each
 - Regal only has 2000 pounds and can only pay 2/5 of the shares. Has to find 3000 pounds to purchase remaining shares
 - Directors of Amalgamated/Regal purchase the remaining shares themselves, so become majority shareholders in Amalgamated whereas in original plan they would not have held any shares
- Directors were fiduciaries who came across a business opportunity and able to sell shares to make a profit
- New buyers of Regal and Amalgamated sued previous directors as fiduciaries who made a profit due to their role, hence have to return profits to the principal
- Viscount Sankey: No fiduciary can have a COI with those whom they are bound to protect
- Lord Russell: Liability arises from the mere fact that profit was made by the fiduciary. Honesty or good faith is irrelevant.
- Does not matter if principal could not take the opportunity themselves or if you benefited your principal
- Can only avoid liability if get prior fully informed consent from the principal

Lord Guest (majority):

- Applied strict no-profit rule from Regal. There was a profit made by Boardman due to information concerning an opportunity to bid for the shares which he received through his role as a solicitor of the trust and within the capacity of a fiduciary
- No COI can be allowed and even without a COI, no profit can be made either
- Boardman received the knowledge in the course of acting as a fiduciary and because he had no prior informed consent from the trustees, he must give up his profits

Lord Hodgson and Cohen (majority):

- Applied strict no-profit rule, as the fiduciary made a profit while acting as a fiduciary.
- Irrelevant that Mr Fox as a trustee did not want the trust to purchase the shares or could not buy the shares, or did not wish to go to court to affirm the purchase of further shares as it was not a legitimate investment for the Trust.
- Irrelevant if the principal did not want to exploit the opportunity or making a profit for the fiduciary was the only way of exploiting it for the benefit of the trust.
- Despite applying the no-profit rule, both suggest that there was the possibility of a conflict, unclear what the ratio is. Mr Fox may have changed his mind and if the trust purchased shares in the company, then he would have asked Boardman for his opinion on the shares. Possible to construct the argument that the majority saw the no-profit rule as a part of the no-conflict rule.
- Boardman: fiduciaries are supposed to look out for the trust's best interests. If apply the no-conflict and no-profit rule to certain cases, leads to a situation where the fiduciary cannot act even when though it is the only way to reorganise Leister & Harris and massively benefit the trust. John Langbein: this does not make sense when the rules are to advance the beneficiary's interests
- The rules are strict in order to ensure that fiduciaries are loyal. The rule should not be diluted so that whether was profit was made the only way to benefit the principal becomes relevant. Following Keech, it is difficult to judge people's motivations and to assess the evidence of whether this was the only way for them to benefit the principal. Fiduciaries also hold a lot of power over the interests of their principals.

How does the conflict of interest rule work? Is there a separate 'no profit rule'?

- No-conflict rule (minority):
- Strict rule may not be justified because it is too hard. The fact that Mr Fox said that under no circumstance will the trust purchase the shares matters legally as the principal knows about the opportunity and has as much information as the fiduciary about the opportunity. When the principal does not want to take the risk of exploiting the opportunity for the trust and lacked the means to exploit the opportunity, even without fully informed consent, the no-conflict rule would suggest that in the absence of any conflict, the fiduciary can undertake the opportunity for themselves.
- No-profit rule:
- If it is an independent rule, then the question is whether the fiduciary made a profit from information and an opportunity they obtained in the course of acting as a fiduciary.
- Or is it a part of the no-conflict rule which is breached when a fiduciary makes a profits. There is a COI as the fiduciary could have made the profit for the principal and the profit comes at the detriment of the principal, therefore the no-conflict rule is breached.

Viscount Dilhorne and Lord Upjohn (minority):

- The no-conflicts rule prevents fiduciary undertaking transactions where there is a COI
- Viscount Dilhorne accepted Regal Hastings as good law as an application of the no-conflicts rule applied to a particular situation where the fiduciary profited from a COI with the principal and the profit was held for the principal.
- Lord Upjohn emphasises trustees would have never purchased the shares of Lester & Harris for the trust. There was no COI as Mr Fox never contemplated purchasing the shares, a court order would have been needed and he was happy for Boardman to pursue the deal. This made the company more valuable which benefited the beneficiaries of the trust as they did not have to take any risks or use any of their money.
- Lord Upjohn also emphasised that Boardman and Phipps were “utterly honest and above board in every way” in maximising the benefits for the trust. If they were liable, then that would be because of the operation of “some harsh doctrine of equity”. This also seems contrary to what equity is about as it is applicable to people whose consciences are innocent. The rule is too rigid and equity should be looking at people’s consciences before equity steps in and gives a remedy.
- Equity has been applied to a diversity of circumstances, filling in injustices and gaps in the law. Equitable rules are stated in a general way which can be applied with particular attention to the exact circums of each case.
- “fundamental rule of equity that a person in a fiduciary capacity must not make a profit out of his trust which is part of the wider rule that a trustee must not place himself in a position where his duty and his interest may conflict.”
- This places a *limitation on the profit rule*, where there *needs to be a conflict* before the fiduciary has to give their profits to the principal
- Aberdeen: there needs to be actual or possible conflict, which a reasonable man would think there to be a real sensible possibility of occurring. This does not include a COI which one could imagine to arise in some conceivable possibility.
- On the facts there was no possibility of conflict as the principal could have never taken the opportunity which the fiduciaries took up, hence there was no competition between them. This is because Mr Fox under no circumstance would consider purchase the shares. There is only an imaginary, unrealistic situation of conflict with no relationship to the actual situation. The fiduciaries taking the opportunity in no way caused detriment to the principal and it seemed to be the only way to benefit the principal.
- Lord Upjohn makes sense of Keech and Regal as both cases required a real sensible possibility of conflict. In Regal, it was the conflict between the directors as fiduciary and the company as principal, where the directors did not have to own the shares in Amalgamated as they could have given a personal guarantee. In Keech, where was a conflict between the trustee and the infant taking over the lease.
- Lord Upjohn distinguishes Keech and Regal as in those cases, the principal could have taken the opportunity which the fiduciary took. There was a conflict and a profit, hence the remedy was given.
- Equity is about the contextual application of rules in particular cases where it is just and the doctrine should not be strained beyond its proper and due limits.

- Lord Upjohn posits that unless equity is allowed to become a discretionary kind of law, then there is a need for general rules when giving effect to the law. There are problems which can arise in the application of equity which are overbroad, leading to injustice.
- Hence, we should be using the no-conflict rule, rather than a much more easily satisfied profits rule which could lead to injustice in the absence of COI. Otherwise, there is an inequitable result where defendants with clear consciences, who only benefited the principal, caused no detriment and were not in a COI, are liable to give up their profits save for recognition of deploying skill in achieving the profit and retaining an allowance

Consent: whether transparency enables equity to intervene or should equity only intervene & require transparency if something which is a COI was consented to

- Majority: fiduciaries need to be upfront and receive fully informed consent
- Minority: if there was no COI then fiduciaries have done nothing wrong.
- Transparency did not dissuade capitalist acts which created value for the fiduciary and the principal. Even with the strict rule, Boardman wrote letters to his principal stating that he was making a profit but he did not believe that he breached a duty in doing so.
- Transparency only means that fiduciaries who have more information have to inform their principal before they engage in profit making or in anything where there is possibly a conflict, even if there is no real or substantial conflict.
- In trust, trustees must make decisions unanimously for them to be valid, otherwise it is not a valid consent
- Not enough consent because fiduciaries were not fully informed, did not have all the trustees consenting eg. widow or the principals were the trust's beneficiaries who also had not given consent.

How long are people fiduciaries?

- Minority: Boardman was a solicitor who often worked for Mr Fox who was a trustee for certain purposes but he is not generally a solicitor for the trust forever. As solicitor-client relationship is not ongoing, there was no conflict
- Majority: does not discuss this, only reason Boardman gets info is because he was acting as solicitor and agent of the trust which is enough to be a fiduciary
- Current law: no-conflict rule and independent no-profit rule which does not require reference to conflict. Only need to point to profits made by use of information or an opportunity gained while acting as a fiduciary.