FIDUCIARY OBLIGATIONS AND DUTIES

Fiduciary obligation is a significant principle of equitable jurisdiction. This article will discuss what the obligation is, what fiduciary duties are, how to avoid breaching a fiduciary obligation and the remedies available for breach of fiduciary duty.

A. WHAT IS FIDUCIARY OBLIGATION?

Fiduciary obligation is an equitable principle that is imposed upon the person known as the 'fiduciary' to act for or on behalf of another person known as the principal. This obligation is one of trust, confidence and 'undivided loyalty'.[1]

The Australian High Court has characterised that a fiduciary obligation arises when a person in a position to exercise power or discretion[2], gives an undertaking to act in another person's best interests, or in circumstances where that other person is vulnerable to an abuse of the power or discretion. There are several established categories giving rise to a fiduciary relationship, including:

- Trustee and beneficiary;
- Director and company[3];
- Lawyer and client;
- Agent and principal; and
- Business partner and business partner[4].

Situations falling outside these presumed relationships need to have the following essential elements to prove that a fiduciary relationship exists:

- The 'fiduciary' person has given an undertaking to fulfil a duty for the benefit of another person (the 'principal');
- There is a scope for the fiduciary person to unilaterally exercise power or discretion, which may affect the rights and/or interests of that other person (the principal); and
- There is evidence of the 'principal' person being dependent on and therefore relying on the fiduciary person. [5]

B. TRIBUNAL MEMBERS

Fiduciary duties include these negatives, that is, a fiduciary must not:

[1] *Beach Petroleum NL v Kennedy* (1999).
[2] *Hospital Products Ltd v United States Surgical Corp* (1984).
[3] *Regal (Hastings) Ltd v Gulliver* [1976].
[4] *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929).
[5] *Hospital Products Ltd v United States Surgical Corp* (1984).
[6] *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929).

- Make any unauthorised profit from their position (role) as a fiduciary;
- Allow any conflict of interest to occur between their duty to the principal and their personal interests; and/or
- Allow any conflicts of interest to occur between their duty to the principal and their duty to another (eg a third party or another client).

Fiduciary duties are strict duties. This means that a fiduciary's liability for breaching his or her duty is not dependent on proving that the principal suffered loss or injury as a result of the breach.[6]

As such, a fiduciary can be held to be in breach of their fiduciary duties even if the principal has not suffered any loss. [7]

C. HOW TO AVOID BREACHING A FIDUCIARY OBLIGATION?

A breach of fiduciary duty can be avoided by obtaining a fully informed consent of the person to whom the duty is owed to. This is the most reliable way for a fiduciary to escape liability. To obtain informed consent, the fiduciary needs to:

- Obtain the other party's (principal's) informed consent to the relevant conduct or action of the fiduciary;
- Disclose all relevant circumstances to the other party; and
- Ensure that the disclosure includes all material facts and information that could affect the other party's decision to give consent. [8]

Whether informed consent has been given is a factual question that depends on the specific circumstances of the matter. If it is established that full and frank disclosure of all material facts was provided to the person that the duty is owed to, then the fiduciary is absolved from his or obligation to that person.[9] It is to be noted that informed consent can only be given by persons possessing legal capacity.[10]

D. REMEDIES FOR BREACH OF FIDUCIARY DUTY

The type of remedy awarded for a breach of fiduciary duty is dependent on the circumstances of the matter and the breach. The main remedies available are discussed below.

D.1. INJUNCTION

An injunction is an equitable remedy that the court can order to make the fiduciary do something or refrain from doing something.

D.2. ACCOUNT OF PROFITS

An account of profits is a monetary remedy that is available when the fiduciary has breached his or her duty by making a profit from their wrongdoing. This remedy requires the fiduciary to account to the principal for any unauthorised benefit or gain made as a consequence of the breach of duty.[11] If the fiduciary fails to keep proper accounts or mixes personal property with the principal's, it will be presumed that all properties belong to principal unless the agent can prove otherwise.

D.3. EQUITABLE COMPENSATION

Equitable compensation is an appropriate remedy where the fiduciary has caused the other party a loss as a result of his or her breach. The purpose of this remedy is to compensate the principal for his or her loss and restore the principal to the position that he or she would have been had there been no breach.[12]

For more information on remedies, you may wish to read the following articles:

1. ***Equitable Remedies***: This article discusses equitable remedies and when and how they are granted.
2. ***Injunctions***: Discusses the nature of injunctions and how one can be applied for.

[6] *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929).
[7] *Boardman v Phipps* [1967].
[8] *Maguire v Makaronis* (1997).
[9] *Consul Development v DPC Estates* (1975).
[10] *Boardman v Phipps* [1967].
[11] *Chan v Zacharia* (1984).
[12] *Nocton v Lord Asburton* [1914].

E. CONCLUSION

Fiduciary obligations are recognised and enforced in equitable jurisdictions. Fiduciaries are required to adhere to their fiduciary duties so as to avoid breaching their obligation to the principal.

Comasters Law Firm can act for clients in starting or responding to a claim regarding a breach of fiduciary duty.

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