

Fiduciary Duties: Directors and Employees

Second Edition

Andrew Stafford QC

Stuart Ritchie QC

Published by
Jordan Publishing Limited
21 St Thomas Street, Bristol BS1 6JS

Whilst the publishers and the author have taken every care in preparing the material included in this work, any statements made as to the legal or other implications of particular transactions are made in good faith purely for general guidance and cannot be regarded as a substitute for professional advice. Consequently, no liability can be accepted for loss or expense incurred as a result of relying in particular circumstances on statements made in this work.

© Jordan Publishing Limited 2015

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any way or by any means, including photocopying or recording, without the written permission of the copyright holder, application for which should be addressed to the publisher.

Crown Copyright material is reproduced with kind permission of the Controller of Her Majesty's Stationery Office.

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN 978 1 84661 558 0

Typeset by Letterpart Limited, Caterham on the Hill, Surrey CR3 5XL

Printed in Great Britain by Hobbs the Printers Limited, Totton, Hampshire SO40 3WX

FOREWORD TO THE FIRST EDITION

The disloyal opportunist is hardly new. But the temptations to disloyalty particularly in commerce and industry have been magnified greatly by proliferation in the modern sources of wealth, by the scale and complexity of modern commerce, by the perceived ease of concealment and difficulties in detection, by the ever-growing need to rely upon others and by the potency of modern technologies. Regularly the media and the financial accounts of companies chronicle the damage wrought by the errant director or employee who sacrifices loyalty and fidelity to the pursuit of personal gain. These are the actors who are addressed in this book.

Almost thirty years ago a then Cambridge colleague and I commenced working together on the interaction of company law doctrines and those of employment and labour law as they applied to corporate officers and employees. Necessarily we intended to concern ourselves with the fiduciary principle on the one hand and the employee's contractual duty of good faith and fidelity on the other. The then orthodoxy, now all but dispelled, appeared to ascribe different regulatory provinces to equity and to contract – provinces differentiated by the status of the officer or employee concerned within the corporate hierarchy of the company in question. Our joint research project became a casualty of time and circumstance. Needless to say it is thus a matter of considerable pleasure to me that the authors of this book have persevered where we faltered. The legal landscape they have surveyed, though, has been much transformed in the interim.

It is not so long ago that English law seemed to stand apart from the debates on the reach of modern equitable doctrines that were exciting controversy in other parts of the common law world. As the pages of this book illustrate, such is no longer the case. What comes as something of a surprise to me is not only the volume of contemporary English litigation upon which the authors are able to draw, but also the relatively uncharted, or else unsettled, waters in which judges now find themselves navigating.

There is obvious volatility in the law presented and analysed in the following pages. It is unsurprising that the authors find reason to question some of the decisions and predictably they will give cause for question in some of the views they express. This highlights what I consider to be a great virtue of this book. The authors do not leave you in any doubt as to their own views on the bodies of law they have described. This is all to the good. It can only enhance debate, understanding and ordered development.

The levels of enthusiasm for the fiduciary principle, as also for an implied duty of good faith and fair dealing in contract law, vary significantly across the common law world. The authors favour the approach of caution and restraint with the fiduciary principle both in its reach and in its content. Wisely in my view, they favour a proscriptive view of the obligations it imposes. That view avoids needless and unprincipled collisions with other settled bodies of law, notably, the law of negligence. They equally have faith in the capacity of contract law to deal appropriately with what I might call fair dealing issues in employment settings. Necessarily, they accept that the boundary between the purely contractual and the contractual and fiduciary is a contested zone. Perhaps it will ever be so, especially if one accepts, as I do, that a fiduciary responsibility is ultimately imposed, not an agreed, one and that considerations of public policy can contrive its imposition.

The concern betrayed in the book with the directors' duties provisions of the Companies Act 2006 is understandable. The Act appears to have brought under the fiduciary rubric established legal principles which have quite different provenances to that of the fiduciary principle. Such seems to have been the fate, for example, of the 'fraud on the power' doctrine: cf s 171. Equally, the truncation of the 'no profit' rule in s 175(4) of the Act is likely, I suspect, to be found inconvenient over time. There is good reason why more modern formulations of the fiduciary principle have insisted that the standards of conduct it imposes extend beyond actual or potential conflicts of duty and interest or duty and duty.

It is easy to sympathise with the authors' view that the law has taken a wrong turn in discovering a 'fiduciary duty' of directors to disclose their own misconduct or, more generally, information of relevance and concern to their company. Considerable attention is given to this important subject as it is to an employee's obligation of disclosure.

There are recurrent cautionary themes across the chapters. They warrant attention. One is a warning against manipulating the fiduciary principle for expedient purposes – to contrive disclosure; to access particular remedies; etc. Another is against over much reliance upon verbal formula and upon 'tests' which may have utility in quite particular settings but not as generalisations. Again the authors emphasise the great need for close attention to the actual circumstances of the relationship in question, to the terms of the parties' contract, and to the conduct said to give rise to an alleged breach of duty. And then there is the apprehended danger of over much complexity in the law at the expense of sound underlying principle. Such was the fate of the law on dishonest participation in a breach of fiduciary duty before its liberation in *Royal Brunei Airlines v Tan* [1995] 2 AC 378. It seems likely to be the fate on the evolving law on bribes and secret commissions which the authors analyse at length.

It is pleasing to see that they have trawled the jurisprudence of other common law countries in informing their own views and criticisms. Fiduciary law, in

particular, is notable for divergences as between jurisdictions. From what those divergences reveal, as the authors demonstrate, there is instruction to be had and there are pitfalls to be avoided. By way of a parochial example, I would note that the remedial use of the constructive trust in Australia may over time be found to have as yet unappreciated attractions in this country's jurisprudence.

This is a timely, interesting and provocative publication. It is also an important one as it deals with phenomena which are corrosive of the commonplace trust and confidence reposed in, and expectations generated in consequence of, corporate and employment relationships. The book captures the law in an evolutionary phase. It will contribute positively to that process. Even if, as happens on occasion to the scholar, counsel and judge alike, some particular view expressed does not win favour, this work will have done its job and no more can be expected. I congratulate Andrew Stafford and Stuart Ritchie on their achievement.

Paul Finn
Judge's Chambers
Federal Court of Australia