

# Fiduciary obligations arising from contracts

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# Fiduciary Obligations – Quick Overview

*Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41

- Arises in equity.
- A fiduciary agrees to exercise a power or discretion exclusively in the interests of the party to whom the duty is owed and not in its own interest – ie must avoid a conflict of interests.
- Generally an element of vulnerability and reliance of one party on another.
- Arrangements of a purely commercial kind dealt with at arms length and on an equal footing generally indicate no fiduciary relationship.
- The obligation does not attach to every aspect of a fiduciary's conduct (*Breen v Williams* (1996) 186 CLR 71).

# Recognised Fiduciary Relationships

Trustee-  
Beneficiary

Solicitor-Client

Director-Company

Employee-  
Employer

Agent-Principal

Partner-Co-  
Partner

Executor-  
Beneficiaries of a  
deceased's estate

# Fiduciary relationships in contracts

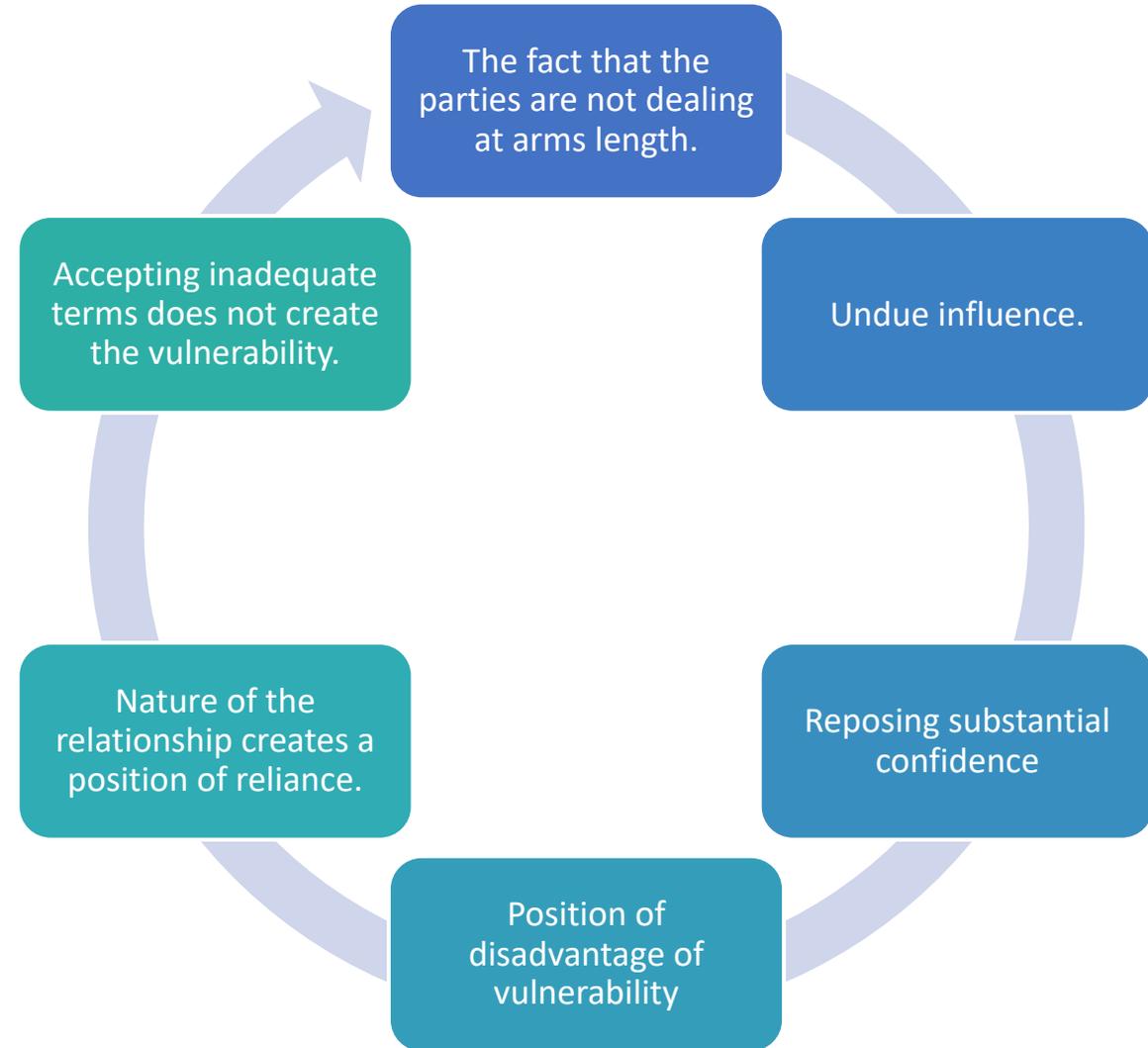
The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.

*Hospital Products at 97.*

A party can be in breach of both their contractual obligations and their duty of care but not breach a fiduciary obligation  
eg *Hill v Van Erp* [1997] HCA 9

No element of conflict of interest or unauthorized profit-making despite the contractual breaches and negligence.

Some elements required to establish a fiduciary obligation despite a commercial transaction/contractual relationship according to Hospital Products



# Why bring a claim alleging a breach of fiduciary duties in a commercial contract setting?

- The contract itself does not provide a cause of action.
- Contracting entity's solvency may be an issue, therefore, you wish to claim against a party on the basis of accessorial liability – knowingly involved in a breach of a fiduciary duty / knowing receipt of trust property.
- Kitchen sink approach.
- Remedies: eg a declaration of a constructive trust.
- Note: the Courts may be critical if the sole reason for bringing the claim is to improve the remedies compared with those available for a breach of contract.

*John Alexander's  
Clubs Pty Ltd v  
White City Tennis  
Club Ltd (2010)  
241 CLR 1*

Core Parties:

- JAC – a developer.
- The Club – tennis club which conducted its activities for a number of years pursuant to a series of leases and licenses over land which was to be sold.

# Relevant contracts

- Memorandum of understanding between JAC and the Club which contemplated the establishment of a new tennis club and the purchase of the relevant land by an entity to be established by JAC. The shareholders of the new entity would be existing members of the Club who wished to become shareholders.
- Under the MOU, JACS was to seek to obtain an option to purchase the subject land from the landholder and in the event it received an option or the right to purchase the subject land it was to exercise that option / right on behalf of the entity to be established by JAC – WCH.
- Agreement between JAC, the Club and landholder as to the sale of the subject land.

# Terms of sale contract

- JACS given an option to acquire the subject land within a specified time.
- In the event JACS did not exercise the option during the specified time, the Club would be given an option to acquire the subject land.
- The sale contract did not require JAC to exercise the option on behalf of the Club.
- To the extent of any inconsistency between the sale contract and any other agreement, the sale contract was to prevail.
- Option given to JACS did not state it was to only be done on behalf of WCH.

## What happened?

- JACS and the Club had a falling out, so when JACS exercised its option to acquire the subject land WCH did not become the owner.
- The Club alleged that JACS owed a fiduciary duty to it when exercising the option by reason of the MOU, that JACS breached its fiduciary duty when it exercised the option in its own interests and the acquirer of the land held that land on constructive trust.
- The Club did not allege any breach of the sale contract or the MOU.
- NSW Court of Appeal found in favour of the Club holding there was a breach of a fiduciary obligation.

# Matters relied upon by CoA in asserting a fiduciary duty existed

The Club's submissions in the Court of Appeal, which the Court of Appeal accepted, rested heavily on the twin ideas of vulnerability and reliance – the Club was relying on JACS to exercise its option only on behalf of WCH or not at all, and was vulnerable to JACS not doing so.

In the High Court, the Club also contended that, analogously with the reasoning of Mason J in *Hospital Products*, the MOU constituted an undertaking by JACS to acquire property on the Club's behalf and hold it for interested parties.

# High Court findings

- No fiduciary duty owed.
- Contracts to which JACS and the Club were party to are important in assessing whether a fiduciary duty was owed.
- The Club as a party to the sale contract consented to the unconditional nature of the option given to JACS. The Club could have bargained for more, it was not relying on representations by JACS, it was not overborn by some greater strength possessed by JACS, it was not trusting JACS to do anything.
- The only vulnerability of the Club was that which any contracting party has to a breach by another. The only reliance was that which any contracting party has on performance by another. If the Club could have established that JACS was in breach of contract, it had an ample array of contractual remedies to protect itself.

# High Court findings continued

- Phrases such as “for or on behalf of” and “in the interests of” of another person must be understood in a reasonably strict sense.
- The reason why commercial transactions outside the traditional categories of fiduciary relationship often do not give rise to fiduciary duties is not that they are “commercial” in nature, but that they do not meet the criteria for characterisation as fiduciary in nature.
- Applied Mason J in Hospital Products “In these situations it is the contractual foundation which is important because it is the contract that regulates the basis rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction”
- Where a term to like effect as the suggested fiduciary obligation cannot be implied, it will be very difficult to superimpose the suggested fiduciary obligation upon that limited contract.

# *Streetscape Projects (Australia) Pty Ltd v City of Sydney [2013] NSWCA 2*

## Relevant contract:

- A license agreement between Streetscape (as licensee) and City of Sydney (as licensor).
- The subject matter of the license agreement concerned the exploitation of intellectual property related to the manufacture of multi-purpose street poles known as “Smartpoles”, which could be used for streetlighting, traffic lights, street signs etc.
- The license agreement permitted Streetscape to use the intellectual property granted by the agreement exclusively in Australia and New Zealand and non-exclusively in Spain.

# What happened?

- Streetscape used the intellectual property to manufacture and sell the Smartpoles in Singapore and other countries.
- City of Sydney asserted this was done in breach of contract. Further, City of Sydney alleged that Streetscape owed the city a fiduciary duty to act for or on behalf of or in the interest of the city in respect of Streetscape's use of the intellectual property associated with the license agreement.
- The trial judge determined that Streetscape's conduct was in breach of contract, that Streetscape owed the City of Sydney a fiduciary duty and it breached that duty.

# Submissions and trial judge's findings

- The terms of the license agreement evidenced a dependence by the City of Sydney upon Streetscape using the intellectual property which the City of Sydney had provided to it in conformity with the limited purposes for which it was provided. In this respect, the City of Sydney was unable to supervise or control the manner in which the intellectual property was used by Streetscape so as to ensure that it was only used for the purposes for which it had been provided.

# Court of Appeal findings

- A fiduciary duty may exist in a contractual setting
- The contractual terms are paramount. A fiduciary duty cannot detract or contradict them. The two types of obligation – contractual and fiduciary – will, in general, coexist only if and to the extent that sanctions available for breach of contract are insufficient to deal with some possibility of unconscionable conduct to which one party is exposed.
- The adequacy of remedies for breach of contract is generally the determinant of whether there is scope for equity to play a supplementing role by way of the imposition of a fiduciary duty upon a contracting party; and the mere fact that one party puts faith and trust in the other is not of itself sufficient to bring equity to centre stage that way.
- A fact-based fiduciary duty cannot arise unless one party undertakes, expressly or impliedly, to act in the particular factual context solely in the interests of the other. The word “solely” deserves particular emphasis. That essential requirement shows why fiduciary duties on their nature do not ordinarily attend bargains struck at arm’s length between sophisticated parties with equal bargaining power who, in pursuing their own financial ends, take care to document their respective rights and obligations in a comprehensive way. A person of that kind who makes such a bargain in that way safeguards his or her own interests and aims to achieve the particular advantage sought for the person’s own benefit.

## Court of Appeal findings continued

- In awarding damages for breach of contract and equitable compensation for breach of fiduciary duty of precisely the same amount for each wrong the primary judge showed precisely why the conclusion as to existence of a fiduciary duty was flawed.
- The parties chose to protect their positions by entering into a comprehensive written contract, the case was not one of a bare and rudimentary contract that provided little by way of safeguards to the City of Sydney or a case of unequal bargaining power.
- The only vulnerability to which the City of Sydney was subject to was that which any contracting party has to breach by another.
- Primary judge did not refer to John Alexander's Clubs and therefore did not identify some foundation for a finding of fiduciary obligation going beyond the mere vulnerability to breach of contract that is the lot of every contracting party.

# Summary Table

Case Name	Facts	Finding	Noteworthy
<i>John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd</i> (2010) 241 CLR 1	Breach of fiduciary duty claim in circumstances where there was no alleged breach of contract.	No fiduciary duty.	High Court authority Vulnerability to breach of contract insufficient to make out a fiduciary duty. Imposition of fiduciary duty cannot be inconsistent with the terms of the contract. There can be a fiduciary duty in a commercial contract setting.
<i>Streetscape Projects (Australia) Pty Ltd v City of Sydney</i> [2013] NSWCA 2	Breach of fiduciary duty claim in circumstances where breach of contract claim successful.	No fiduciary duty.	There needs to be an express or implied undertaking to act solely in the interests of the other party in a particular factual circumstance. A fiduciary duty will generally only exist where the remedies available for breach of contract would be insufficient to deal with potential unconscionable conduct.

# Summary Table

Case Name	Facts	Finding	Noteworthy
<i>Baldwin &amp; Anor v Icon Energy Ltd &amp; Anor (No 2) [2015] QSC 286</i>	MOU with obligations to deal exclusively and maintain confidentiality	No fiduciary duty.	No difference between contractual claim and fiduciary claim  Fiduciary claim struck out
<i>Colyer Fehr Tallow Pty Ltd v KNZ Australia Pty Ltd [2011] NSWSC 457</i>	Oral contract to buy tallow	There was a fiduciary duty of sorts (ie to acquire sufficient product to supply the customer) but not breached.	The fiduciary obligation did not extend so far as to include an obligation to avoid a conflict of interest

# Summary Table

Case Name	Facts	Finding	Noteworthy
<i>Adventure Golf Systems Australia Pty Ltd v Belgravia Health &amp; Leisure Group Pty Ltd [2017] VSCA326</i>	Signed contract for the construction and operation of an adventure golf-course	No fiduciary duty.	Terms of agreements which clarify that the relationship between the parties was not one of partnership, employment or agency was not conclusive of the issue but tends in favour of the conclusion that no fiduciary relationship exists.
<i>Management Service Australia Pty Ltd v PM Works Pty Ltd [2017] NSWSC 1743</i>	Joint venture agreement	Fiduciary obligations owed but not breached	<p>Merely finding a joint venture is not sufficient, the form of the joint venture and the content of the obligations that each party undertakes must be examined.</p> <p>Obligation needed to be mutual and commercially realistic</p>

# Summary Table

Case Name	Facts	Finding	Noteworthy
<i>Olson v Keefe (No 2) [2017] FCA 1168</i>	Agreement of individual to be an MD, representative in Australia and be employed	No fiduciary duty.	Faith and trust are not, without more, sufficient to create fiduciary relationships. Vulnerability or reliance alone is also not sufficient.  Summary dismissal of claim
<i>Vanguard Financial Planners Pty Ltd v Ale [2018] NSWSC 314</i>	Shareholders Agreement (which provided that the parties were not partners)	No fiduciary duty	Despite there being a position of vulnerability, there was no undertaking to act in the interests of the vulnerable party.

# Baldwin & Anor v Icon Energy Ltd & Anor (No 2) [2015] QSC 286

Plaintiff pleaded breach of terms of an MOU and also that those terms amounted to fiduciary obligations:

- No relevant vulnerability.
- Content of fiduciary obligation no different from contractual obligation.
- No basis for superimposing the law of fiduciaries upon the operation of the contract.
- “In my conclusion, the fiduciary duty case is so clearly without merit that leave to amend to add that claim should be refused and the relevant parts of the pleading should be struck out.”

# Colyer Fehr Tallow Pty Ltd v KNZ Australia Pty Ltd [2011] NSWSC 457

- It was held that there was a fiduciary duty not to put itself in a position not to acquire sufficient product to supply the customer. That decision was largely because the court held that such a term could to like effect be implied in the contract itself.
- The obligation did not extend so far as to include an obligation to avoid conflicts. Such an obligation could not be implied as a term of the contract.

# Adventure Golf Systems Australia Pty Ltd v Belgravia Health & Leisure Group Pty Ltd [2017] VSCA326

- “More often than not, commercial transactions which were negotiated at arm’s length between self-interested and sophisticated parties on an equal footing do not give rise to fiduciary duties.”
- “The [agreement] is elaborate. It spells out a number of rights and obligations on the part of each of AGS and Belgravia that related to the management, maintenance, operation and development of the [facility]. Viewed as a whole, these features of the [agreement] are difficult to reconcile with an obligation that one party act for or on behalf of or in the interests of the other, except in a broad sense that each party was obliged to perform its obligations under the [agreement] in accordance with its terms. [...] Neither the terms of the [agreement] nor the way in which the parties conducted the adventure golf business thereunder suggests that one party was obliged to subordinate its own interests and to afford paramountcy to those of the other.”
- Terms of agreements which clarify that the relationship between the parties was not one of partnership, employment or agency was not conclusive of the issue but tends in favour of the conclusion that no fiduciary relationship exists.

# Management Service Australia Pty Ltd v PM Works Pty Ltd [2017] NSWSC 1743

- The terms of the contract to which a fiduciary must conform not only include the express terms but also the implied terms.
- “Where parties enter into a contract to pursue a mutual aim – one in which each of them has an interest – the situation is likely to be very different. Each of them will depend on the other – place trust and confidence in the other – to cooperate to achieve the outcome to which their contract is directed, and to do so for the benefit of each. Although, no doubt, each party has its own individual and legitimate interest in entering into the bargain, the bargain is one not merely for the achievement of that interest, but also for the achievement of the joint interest. That, I think, is one reason why parties to a contract that may properly be described as one of ‘joint venture’ have been found to owe fiduciary obligations to each other.”
- Merely finding a joint venture is not sufficient, the form of the joint venture and the content of the obligations that each party undertakes must be examined.

# Olson v Keefe (No 2) [2017] FCA 1168

- Fiduciary duties should not be superimposed on contractual duties simply to improve the nature or extent of the remedies available.
- Pleading summarily dismissed.

# Vanguard Financial Planners Pty Ltd v Ale [2018] NSWSC 314

- No fiduciary duty established.
- There was a position of vulnerability.
- No undertaking to act in the interests of the vulnerable party.

# What does this all mean?

- Breach of fiduciary duty claims in a commercial contract setting can succeed but are unlikely to.
- Vulnerability to breach of contract is insufficient.
- The contract must have room for the fiduciary requirement of loyalty, that is, an undertaking to expressly or impliedly act in a particular factual context solely in the interests of the other. This cannot be superimposed on the contract so as to alter the operation of the contract.
- The fiduciary duty claims outlined were all ambitious, which is indicative of why they failed.
- Factors that may see a breach of fiduciary duty claim in a commercial contract setting succeed are – informal contract, unequal bargaining power between the parties, an express or implied requirement to act solely in the interests of the relevant party and remedies for breach of contract being insufficient in the circumstances.

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