

## Peter Cane Legal Reasoning Prize

### **Fiduciary Law and the Fiduciary Act 2023**

Fiduciary duties have long been recognised under English common law, generally arising when one party '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'<sup>1</sup>. In being a fiduciary it is thought that one should prioritise the desires and benefits of the other party, even above one's own. This seems a logical concept when we consider certain categories of fiduciary relationship that are automatically recognised: for example, doctor and patient, solicitor and client, trustee and beneficiary. However, this is not a closed list and ad hoc fiduciary relationships can and do exist.

The Fiduciary Act 2023 (the "Act") expressly provides (in Section 1(2)) that 'Subject to this Act, fiduciary law remains in force'. The inference here is that the objective of the Act is to codify (or possibly extend) the existing law in some way. In the UK, a Court looking to interpret statutes should first attempt to give effect to the plain meaning of the words used. If plain meaning is in doubt the Court may opt for a purposive enquiry to determine the intent behind the statutory provision<sup>2</sup>. Therefore whilst the principles developed by the existing common law on fiduciary relationships may have some relevance, the starting point for the analysis of the posed case must be the wording of the Act.

### **Aparna and Beth**

In order to have a claim against Beth under the Act, Aparna must demonstrate (i) that a fiduciary relationship existed between them; (ii) that the scope of this relationship extended into the matters in dispute; (iii) that Beth breached her duty of undivided loyalty (and that no significant defences exist).

### **Duty**

Aparna and Beth have been friends for many years. Friendship is not an established category of fiduciary relationship and so the question is whether an ad hoc relationship arises in the circumstances. The main test is in Section (2) (2) of the Act which lists the factors that should be considered under sub-section (b). In applying them we can conclude whether Beth entered into a fiduciary relationship with Aparna. The case file describes Aparna and Beth as 'close friends since high school'. Bearing in mind their ages; 34 and 35, this would mean a friendship of (at least) 16 years. Therefore they do have a substantial, tangible pre-existing relationship. Additionally, it is significant that Aparna does not find herself in an arms-length dealing. That is to say that, due to her work commitments, Aparna was unavailable to attend the Pokémon society meeting and thus unable to look after her own interests in this matter, handing control over to Beth. Taken together, these factors give Aparna reasonable grounds to argue for a fiduciary relationship. However the list under (2)(b) follows the more general test in Section (2)(a) which explicitly states that there can only be a fiduciary relationship if Beth expressly or impliedly undertook to carry out her responsibility, so that a reasonable person in Aparna's position would be entitled to expect loyalty from Beth. This is an objective test and as such their subjective understandings of the situation are irrelevant. Here is

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<sup>1</sup> Bristol & West Building Society v Mothew [1998] Ch 1

<sup>2</sup> Statutory Interpretation Explained, Ross R – 5. Pey, Cambridge University Law Society

where Aparna faces a harder task as friendships are complex and not every agreement made between friends gives rise to a fiduciary relationship. Therefore the question is whether “the nature of the relationship is such that one party is entitled to repose trust and confidence in the other”<sup>3</sup>. Now a distinction must be made between the two separate dilemmas in question – the issue of £500 (which was entrusted to Beth to buy a box of vintage cards) and the issue of Presidency (of the exclusive Pokémon card club). Regarding disputes over the £500 it becomes evident to the reasonable person that Aparna had placed her trust in Beth; she had given her her own exclusive membership number and even covered food and transport cost. But more importantly that there were clear and obvious outlines for what it was that Beth was to do. Although brief, the conversation sufficiently conveyed what Beth was asked to do, with Aparna explicitly asking, ‘Please can you go to the sale for me?’, ‘I’ll give you £500 to buy the cards’, ‘purchase the exclusive cards for me’. Beth’s response ‘... I’ll go’, though not enthusiastic does suggest an agreement between them that Beth will attend the event, and purchase Aparna the box of vintage cards costing £500. Additionally due to the nature of their relationship, and their shared obsession, Beth would have understood how important the cards were to Aparna. As such, I find it likely that Beth would be bound as a fiduciary in the discrepancy over £500.

### **Scope**

Even if a fiduciary relationship did exist between Aparna and Beth concerning the purchase of the cards, we need to assess whether the scope of the duty extended to include the more monetarily significant event – the issue of Presidency? If it did, Beth should have prioritised Aparna’s ambition to become President over her own. Discussion surrounding Aparna’s desire to become President was far less explicit than the purchase of the vintage cards. Aparna texted ‘There’s rumours the President will resign soon. I’d be keen to step into his place’, saying ‘I’ll keep my phone on me, just in case anything happens’. The implication here is that, should the President resign, Aparna wanted Beth to call her. However it must be highlighted firstly that these are by no means clear instructions but rather a throw-away comment with an inferred meaning. Equally Beth did not respond to the message, meaning there was no finalised, express agreement between the pair on matters about the Presidency. Consequently it is unlikely that the scope of the fiduciary relationship extended to the Presidency.

### **Breach**

Sub-section (3) of the Act outlines that fiduciaries will breach their ‘duty of undivided loyalty’ if they violate one of two rules; the (no conflict rule) and the (no profit) rule. The no profit rule essentially prohibits a fiduciary from making any profit or gain by virtue of their fiduciary responsibilities. Initially this seems to deal entirely with the matter in question as it is evident that Beth profits £250 after the reduction in price of the vintage cards. However the Act allows for a defence where ‘the claimant [Aparna] provides informed consent’. This notion of ‘consent’ brings into question the ambiguity of Aparna saying, ‘You can keep what you don’t spend’. Here Aparna and Beth’s understandings differ wildly; for Aparna it seems to have been directly referring to the £100 she sent Beth in order to cover food and transport. Whereas Beth uses it to validate why she kept the money as her ‘commission’. To the reasonable person it does seem as though Aparna is referring to the rest

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<sup>3</sup> Al Nehayan v Kent [2018] EWHC 333

of £100; she could not have considered that there would have been any money left over after spending all £500 on the cards (as she thought Beth would have had to).

The no conflict rule outlines that a fiduciary must not place themselves in a position where their personal interests conflict with their fiduciary responsibilities. This rule would have been relevant had the matter of the Presidency been found to be likely within the scope of Beth's fiduciary duties.

Therefore, to the effect that Beth has broken the no profit rule and that no significant defences exist, we can conclude that Beth has breached her 'duty of undivided loyalty' regarding her purchase of the vintage cards.

## **Court Orders**

If Aparna establishes a claim against Beth the Act states she could be ordered to repay any profits or benefits obtained, or to hold these profits on trust for Aparna. It is likely that the Court would require Beth to refund Aparna the £250 which was obtained as profit in negation of her fiduciary duty. If the fiduciary relationship extended to the matter of Presidency then the court might have to assess an appropriate sum relevant to the £20,000 signing bonus and the benefits of being club President.

However, in its discretion, when deciding upon what orders to make the Court can consider various mitigating factors. One of which is how Aparna herself has acted. Fiduciary law essentially aims to enforce honesty and trust across relationships, but how has Aparna behaved, towards Beth, and in general? Aparna, fully knowing that one of her close friends was a similarly avid collector of Pokémon cards, deliberately chose not to invite her to, or share with her the benefits of being in such an exclusive club. Additionally, Aparna acted dishonestly in giving Beth her exclusive identification number for the day, something which was undoubtedly not allowed at a member's-only event. Therefore this raises serious questions about whether, considering her dishonesty, the court should protect Aparna in what is a matter of honesty?

Another mitigating factor is the lack of clarification about the fiduciary nature of the exchange. Beth had not intended to be in a legal relationship with Aparna and due to the ad hoc nature of their relationship Beth was not to know that she was acting under fiduciary law and that she was bound by law to fulfil certain obligations. Therefore Beth had not intended to act in defiance of the law, which might diminish the severity of her actions.

Furthermore, when we consider the way by which Beth secured presidency it was: (i) not at the convention (ii) by impressing the President with her own passion and knowledge. Both of these factors would suggest that Beth deserved the Presidency in her own right and not that she exploited Aparna to obtain it.

## **Assessing the Act**

The likely outcome in questions (1) and (2) is that Beth is found to have neglected her fiduciary duty towards Aparna, with regards to the purchase of the cards, and to have profited £250 from her misbehaviour. Thus it is likely that the Court will have ordered an account of profits and as such Beth will have to repay the £250.

The Act deals with establishing fiduciary relationships outside of the automatically recognised categories, giving useful guidance about the circumstances in which duties will arise. With regards to the hypothetical case it allows us to be very fact-specific in assessing whether this kind of relationship arose. This is important as fiduciary duties can be onerous and should not be imposed lightly, especially concerning friendships. Friends, especially close friends will often make promises to one another – to save a seat in the front row of a lecture, to keep a secret, and so on. Yet not every promise should be capable of imposing binding fiduciary obligations and it is for this reason that a reasonable expectation of loyalty, as outlined under Section 2(2)(a) is so important. Accordingly, since it seems evident that, regarding the purchase of the vintage cards, there was this reasonable expectation I agree with the likely outcomes of questions (1) and (2).

In applying the Act it becomes evident that there are many strengths in it containing a clear set of principles, perhaps the most obvious being consistency. Having a clearly defined set of principles to apply ensures that parties are treated equally across different cases and, in theory, removes the risks of personal interpretation. However, as specified above, the Act requires us to be very precise and fact-specific, meaning that, depending upon the exact wording of an Act it may be more or less up for interpretation. This is not necessarily bad though, especially as consistency is often confused with rigidity; this idea that a set of principles cannot lend themselves to every situation. Here the fact that The Act is open to interpretation is useful, as it means it can adapt to better reflect individual circumstances from case to case.