Revision Box Questions: Guidance for approach

Revision Box Chapter 13

1. In looking at the decision in Boardman v Phipps [1967] 2 AC 46, a case study for considering when liability will arise and when it should, ensure you are able to answer the following questions.

(a) What is meant by a fiduciary relationship? Explain its key features.

A fiduciary relationship is said to exist where in a relationship between two parties, one party – the fiduciary – is expected to act unequivocally in the interests of another – the principal. This relationship of utmost obligation gives rise to what is known as the duty of loyalty and from this a fiduciary is not permitted to act in ways where his personal interest could conflict with that of his principal.

(b) What does this case suggest for the status of an unauthorized gain or profit in circumstances in which there is no wrongdoing and actual conflict of interest, and even absence of scope for conflict of interest?

(c) What do the majority and dissenting judgments reveal about the proper scope of fiduciary accountability?

Boardman suggests that any in circumstances where connection can be established between occupying a fiduciary position and making a profit, liability to account to the principal for that profit will arise. The judgments collectively suggest equity will strive to ensure that fiduciaries cannot profit from a fiduciary relationship in any circumstances, even in the absence of conflict of interest with duty, or even any tangible possibility of conflict arising.

(d) What arguments can be made both in favour of liberalizing the rules relating to profit-making and in maintaining a hard line against profit-making?

Arguments in favour of a very hard line are longstanding, and traceable in the modern law to the early 18th century. The asymmetries in the relationship between fiduciary and principal have been a cornerstone justification for the principle of fiduciary integrity manifested in the duty of loyalty. Other reflections on the cases, and particularly Boardman, suggest that allowing trustees who act in good faith to profit from showing entrepreneurial endeavour can deliver real benefits for the trust, and thereby for beneficiaries, and should thus be permitted.

2. In looking at the Supreme Court decision in FHR European Ventures LLP & Ors v Cedar Capital Partners LLC [2014] UKSC 45, ensure that you are able to answer the following.

(a) What different approaches can be taken to fixing liability for an unauthorized gain by a fiduciary?
(b) What are the justifications for each of these approaches, and the merits and limitations associated with them?

These questions are encouraging you to think about the relative attractions and limitations of a personal liability framework and liability attaching by way of constructive trust for responding to breaches of fiduciary governance where a profit has been made. The former is a much less extensive remedy, being an award for equitable compensation, and is confined to the unauthorised sum made, whilst a constructive trust mechanism allows for the recovery of profits made from the application of the unauthorised gain, such as investment in a portfolio of property.

(c) What does the law concerning liability attaching to an unauthorized gain or profit by a fiduciary now appear to be, and does it appear to be settled?

With the key decisions in FHR and the earlier contentious ruling in Sinclair v Versailles (2010; 2011 in the Court of Appeal), the position of the law follows from how breaches can be categorized in one of three ways: Type A involves misappropriation of a principal’s property; Type B the misappropriation of property rightfully belonging to the principal; and Type C where a fiduciary obtains other property in breach of duty – Type C. Sinclair had ruled that Type C breaches, including secret commissions or bribes should give rise only to a claim for equitable compensation. Although the Supreme Court in FHR conceded that it wasn't possible to determine definitively the position for a secret commission conceptually as a matter of pure legal authority a strong corpus of practical considerations and ones of principle supported the case for a bribe or secret commission giving rise to a constructive trust in favour of a principal. This does appear to re-establish the orthodox position, and the contrary position in Sinclair was surprising as well as contentious for many. However, by its own admission the FHR Supreme Court ruling does not definitively clarify the position of secret commissions, and it also leaves unresolved the policy considerations attaching to cases involving an insolvency where there are likely to be competing creditor claims to an asset pool too small to satisfy all claims against it.