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Shorter Articles And Notes

Positions De Confiance Under Jersey Law

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Fiduciary obligations form part of a range of equitable doctrines, which include duress, undue influence and unconscionability, developed by the Chancery courts in England and Wales to justify intervention by the courts to prevent abuse of power and position in certain categories of a relationship between private parties. In essence, fiduciary status seeks to promote good faith and fair dealing and prevents persons from using their position to prefer their own interests over the interests of others for whom or in relation to whom they are acting.

Looking back to the Jersey case law reports of the last century, the term "fiduciary" does not seem to feature in the vocabulary of the Jersey court [\[1\]](#) . But there is ample authority and material suggesting that the fiduciary concept does form part of the Island's jurisprudence and has not just been grafted on by reception from English law in recent decades. Of course, the emergence of Jersey as a leading international finance centre responsible for managing and conserving substantial amounts of property and wealth has resulted in increasing prominence for the fiduciary concept and the importation into a growing number of modern Jersey statute laws of fiduciary rules and principles mainly derived from English law.

No comprehensive definition of what is a fiduciary has been attempted by the English courts and English case law has tended to focus on status based fiduciaries; people who by virtue of certain relationships such as trustee/beneficiary, director/company, solicitor/client, partner/co-partner and in certain instances agent/principal are considered without enquiry to be fiduciaries. Under English law it is now reasonably well established that fiduciary status gives rise to four rules or duties [\[2\]](#) : (i) the no conflict rule preventing a fiduciary placing himself in a position where his own interests conflict or may conflict with those of his client or beneficiary; (ii) the no profit rule which requires a fiduciary not to profit from his position at the expense of his client or beneficiary; (iii) the undivided loyalty rule which requires undivided loyalty from a fiduciary to his client or beneficiary; and (iv) the duty of confidentiality which prohibits the fiduciary from using information obtained in confidence from his client or beneficiary other than for the benefit of that client or beneficiary.

Under Jersey law certain categories of relationship are well accepted as being fiduciary in nature. They tend to reflect, however, reception from English law. Article 74 (1)(a) of the Companies (Jersey) Law 1991 (as amended) expressly recognises the fiduciary status of directors of Jersey companies, requiring them to act honestly and in good faith with a view to the best interests of their company. A number of Jersey reported cases illustrate the application of one or more of the four rules developed by the English courts in the context of the actions of directors of Jersey companies [\[3\]](#) . The preponderance of authorities cited in these Jersey cases, however, are English precedents and legal texts [\[4\]](#) .

The Trusts (Jersey) Law, 1984 (as amended) also succinctly summarises the fiduciary status of a Jersey trustee who must observe the utmost good faith and exercise his powers only in the interests of the beneficiaries and in accordance with the terms of the trust [5]. Again, the trusts statute encompasses, and provides certain derogations from, the no conflict and no profit rules, the undivided loyalty rule and the duty of confidentiality rule [6]. Breach of the undivided loyalty rule and the duty not to make secret profits have also been recognised locally in the master/servant relationship and in the principal/agent relationship [7]; in the latter relationship the Royal Court again applied English principles expounded in *Bowstead On Agency* [8].

Going back to the last century there are a number of records of proceedings in the Royal Court dealing with alleged breaches of duty by *procureurs* towards their constituents. It is evident from the records of these proceedings that the court accepted without question the fiduciary position of the *procureur* and in many cases the outcome of the case flowed automatically from a recognition by the court of this fiduciary status. The term used in the court records to encapsulate the fiduciary status is the "*position de confiance*" of the *procureur*. The use of this term emphasises the importance of the particular type of relationship between the parties which justifies the imposition by the court of fiduciary obligations; one involving a significant degree of trust and dependency on the part of one towards the other in the relationship. In *Ogier v Aubin* [9] a former *procureur* was actioned to appear before the *Greffier Arbitre* to give an account of his conduct as *procureur*. The Court held that the *procureur* occupied a "*position de confiance*" *vis-à-vis* his constituent and should provide copies of all documentation evidencing payments made by him for the account of his constituent. In *Blampied v Le Feuvre* [10] a former *procureur générale* of a deceased person was actioned to appear before the *Greffier Arbitre* to give an account of his management of the affairs of his deceased constituent. Amongst the payments made by the *procureur* which were challenged by the executor was the payment by the *procureur* to himself of £17.10.0. on account of a commission on the sale of a vessel. The Court held that in view of the "*position de confiance*" which the *procureur* occupied in his capacity as *procureur générale* towards his constituent, the defendant had no right to the commission and was consequently ordered to repay it. The plaintiff voluntarily offered thirteen pounds sterling to the defendant for the services he had rendered as *procureur* which was consented to by the Court. The record notes however that in so doing the Court did not make any finding on the legal position or right of the *procureur générale* to charge remuneration for his services.

The record of the proceedings in *Bott v Gorey* [11] provides a colourful account of collusion between two *procureurs* who transacted in breach of duty in immovable property to which their constituents had rights. The action centred on an application for the cancellation of an hereditary contract on the ground that it was "*dolosif, frauduleux et révocatoire, la loi ne permettant pas à un procureur de transiger à son profit par rapport aux biens de son constituant*." The plaintiff claimed that the passing of the relevant hereditary contract was the result of an "*abus evident de confiance et d'un abus du contract de mandat ou procuration*". The court held that the law does not permit a *procureur* to transact for his own account and profit in relation to the property of his constituent. In the circumstances of the case the contract was *nul ab initio* due to the lack of capacity of the contracting parties and "*comme étant contraire à la conservation de la police et de l'honnesteté publique*", language which emphasises the degree of importance attached by the court to the need to maintain and enforce the good faith and fair dealing obligations expected of fiduciaries.

While the handful of procurement cases cited above illustrate the good faith and fair dealing principles in action their application extends across a whole range of dependence relationships. Poingdestre [\[12\]](#) notes *"Tout homme qui est Administrateur du bien d'autrui, comme Tuteurs ou Meneurs, Curateurs, Procureurs, Facteurs, Recepueurs &c. sont tenus à administrer Arbitrio boni viri, au dire d'un homme de bien, c'est à dire avec autant de soing fidélité & diligence, comme un bon mesnager a de coutume de faire paroistre en ses propres affaires"*.

The particular quality of the relationship is once more emphasised in the 1771 Code on the subject of *Tuteurs*: *"Ils seront obligés de prendre le même soin des biens et des affaires des Minuers, qu'un bon Pere de famille prend des siennes"*.

Due to the relatively small body of case law generated in Jersey, it is difficult to establish with precision exactly what general rules and principles can be drawn from the reported cases on breaches of duty by fiduciaries. At one extreme, the application of the no conflict rule and the no profit rule means that a fiduciary must not purchase for his own account property under his management and control in his capacity as a fiduciary: *"L'Administrateur n'a pas le droit d'acheter ni par lui-même, ni par personne interposée le bien dont il a l'administration"* [\[13\]](#). These transactions are voidable although certain cases infer they may be void *ab initio* [\[14\]](#). This right to avoid and undo the transaction may exist even though the terms of the transaction and the price paid were fair. In other cases where the fiduciary has breached his duties he may be required by the court to account for any profit derived or to hold the same on a constructive trust for the client/beneficiary. Where losses have resulted from breach of a fiduciary duty the fiduciary will be required to make good these losses. [\[15\]](#)

Other important areas in the modern application of fiduciary law in Jersey are just beginning to be developed by case law and it is likely that further statutory clarification may be introduced in certain areas as part of the financial services legislative programme which the Island has embarked upon. The ability of fiduciaries to shelter behind limitation of liability clauses has been aired recently in the trusts context [\[16\]](#). An interesting question remains whether a fiduciary can, or to what extent it is permissible for a fiduciary to, contract out of obligations and duties which might otherwise arise from his status and whether the Jersey courts will uphold consensual arrangements to this effect between fiduciary and client/beneficiary. The Judicial Committee of the Privy Council has issued a clear signal in this context to English courts to found the judgment of commercial disputes in the law of contract. If parties enter into contractual relations at arm's length and understand what they are agreeing to there is limited scope to pray fiduciary obligations in aid to enlarge the content of contractual duties. [\[17\]](#)

Over recent years major scandals in the United Kingdom and further afield in the pensions and securities industries have focused attention on the need for transparency of dealings in the market place and accountability to investors. Jersey law has used the same broad principles for centuries to control fiduciaries.

Poingdestre describes the high degree of transparency which is required by the law of all *Administrateurs*, that is persons who have the management of property belonging to others [\[18\]](#). Firstly, on taking up their position all *Administrateurs* are required to make an inventory of all the property and assets in their charge. Secondly, they are obliged to keep proper records of every transaction into which they enter in the course of discharging their

office. Thirdly, on quitting their office and whenever they are requested to do so during their appointment, *Administrateurs* are obliged to give a true and faithful account of their administration. On leaving their office they must deliver up all the assets under their control. Poingdestre emphasises that general accounts which do not particularise details of the transactions entered in those accounts are not sufficient. A completely open-handed approach is necessary with the accounts detailing every amount which the *Administrateurs* have received and distributed together with information on the persons, places and other relevant circumstances of each transaction which will serve, as Poingdestre has it, "*a l'esclaireissement de la chose*".

It is noteworthy that Poingdestre records that any failure to maintain transparency through lack of detailed accounts and records opens the *Administrateur* up to allegations of *dol*, in the sense of equitable fraud [19]. Indeed, there may even be an inference in the language used by Poingdestre that a failure to maintain transparency gives rise to a presumption of *dol* on the part of the *Administrateur* with the evidential burden being on the *Administrateur* to displace the presumption.

These references to a remedy based on *dol* link into the examination of this concept in *West and others v Lazard Brothers and Company (Jersey) Limited and another* [20] where Hamon, Commissioner mused that Pothier, Poingdestre and Le Geyt would have understood very clearly and agreed his endorsement of the words of Lord Evershed M.R. in *Kitchen v Royal Air Force Assn.* [21] where he said "... it is, I think clear that the phrase [equitable fraud] covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other." This takes one straight back to the fundamental nature and purpose of the obligations arising from the *position de confiance*; the emphasis on good faith and fair dealing and the need to restrain human weakness in the face of temptation. As Pothier [22] remarked centuries earlier, the purpose of rendering voidable a transaction where an *Administrateur* has a personal interest "*n'est établie que pour empêcher les fraudes par lesquelles un tuteur, pour son propre intérêt pourroit ou acheter à vil prix, ou se rendre acheteur de choses qu'il n'est pas de l'intérêt de son mineur de vendre: l'effet de la loi cesse lorsqu'il n'y a aucun intérêt de soupçonner ces fraudes.*"

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Footnotes - [\(Top\)](#)

[1] - There does appear to be one reference in the *Table des Decisions de la Cour Royale de Jersey* to "*une position fiduciaire*" [1885-1888] p141 in connection with *Ogier v Aubin* (1887) 212 Ex 286 but the phrase does not appear in the actual record of the proceedings in the Samedi books of the Royal Court.

[2] - The Law Commission Consultative Paper No. 124: *Fiduciary Duties and Regulatory Rules*.

[3] - See in *Re Overseas Insurance Brokers Ltd.* 1963 JJ 349; *Viscount of the Royal Court v Woodman* 1972 JJ 2085; *Shirley v Channel Islands Knitwear Co. Ltd.* 1985-86 JLR 404; *In Re Zaki* 1987-88 JLR 244.

[4] - In *Leigh v McLinton* 1991 JLR 274, for example, the Court of Appeal analysed the concept of the presumption of undue influence in a fiduciary relationship exclusively by reference to English case law.

[5] - Article 17(1)(b) and Article 20(2) Trusts (Jersey) Law 1984 as amended.

[6] - See Articles 17(4) (b), 22 (1), 27(1) and (2) and 29 (1) TJL 1984 as amended.

[7] - *Williams v Stevens* (1866) LR 1 PC 352, *Stallard v Hodson* 1969 JJ 1175 and *Hi-Speed Freight Services Ltd. v Gaudion* 1985-86 JLR 216, *McKinley v De La Haye* 1985-86 JLR Case Note 1.

[8] - *McKinley v De La Haye* RC 1985 - 86 JLR Case Note 1.

[9] - (1887) 212 Ex 286.

[10] - (1888) 212 Ex 410.

[11] - (1884) 48H 251 and (1885) 48 H 256.

[12] - Poingdestre, *Les Lois et Coutumes de L'Isle de Jersey* at page 201.

[13] - Le Gros: *Traité du Droit Coutumier de l'Isle de Jersey* at page 91.

[14] - *Bott v Gorey* (1884) 48H 251 and (1885) 48 H 256.

[15] - *Messervy v Le Riche*, Curateur 1924 233 Ex 62.

[16] - *Midland Bank Trust Company (Jersey) Limited and others v Federated Pension Services* CA1995 JLR 352.

[17] - *Kelly v Cooper* [1993] AC 205, *Clark Boyce v Mouat* [1994] 1 AC 428.

[18] - Poingdestre, *Les Lois et Coutumes de L'Isle de Jersey*, pages 201 - 203.

[19] - The 1771 Code on the subject of *Tuteurs* also refers to a *Tuteur* being answerable for *dol* if he fails to discharge his duty of care towards the *Mineur*. Poingdestre, *Les Lois et Coutumes de L'Isle de Jersey* at pages 202 - 203.

[20] - 1993 JLR 165.

[21] - [1958] 2 All ER 241 p 249.

[22] - Pothier, *Traité du Contrat de Vente, Première Partie, Section 2, Article 1*.