1. What makes a person a fiduciary?

   Suggested Answer

   Lord Justice Millet gave a general definition in *Bristol & West Building Society v Mothew* [1998] Ch 1, that "A fiduciary is someone who has undertaken to act for our on behalf of another in a particular matter in circumstances which give rise to a relationship of confidence."
   To put this into more ordinary language, this means that a fiduciary is a person to whom property or power is entrusted for the benefit of another. Both definitions are quite vague. There are some obvious examples of fiduciaries such as such as solicitors and accountants, business partners and company directors. If, however, your friend offered to sell your car for you, they would be a fiduciary, at least for the purposes of selling the car. They would be bound to obtain the best price for you and not to make any profit for themselves, unless you had specifically authorised it. Therefore, given the right circumstances, anybody could be a fiduciary.
   The duties of a fiduciary are very strict and they are bound to restore any profit that they make from their position. If a court decides that someone is a fiduciary it will give rise to several attractive remedies, which can be used against them, such as constructive trust. Hence, claimants may try to claim that the defendant is a fiduciary, when really, they are not and the court might be tempted to agree as a way of depriving that defendant of their ill-gotten gains. *Reading v AG* [1951] AC 507 and *English v Dedham Vale* [1978] 1 WLR 93 are two such examples. See 15.1.1.The court resisted the temptation to make the defendant a fiduciary in *Lister v Stubbs* [1890] 45 Ch D 1 (see 15.3.1) and in *Halifax Building Society v Thomas* [1996] Ch 217 (see 15.4.5) even though it might have 'Just' to deprive the wrongdoer of their profits. It is submitted that *Lister* and *Thomas* are correct, but *Reading* and *English* are not.

2. What are the duties of a fiduciary?

   Suggested Answer

   The basic duty of a fiduciary is to put the interests of the person that they work for (their principal) first and their own interests second. "If you undertake to act for a man, you must act 100%, body and soul, for him": *Imageview Management v Jack* [2009] 2 All ER 666. This means that a fiduciary must not profit from their position, cannot be paid without the permission of their principal, must not purchase trust property, must avoid conflicts of interest and must not compete with any interest of their principal. They must also safeguard any confidential information that they gain from working for their principal.
   English courts have always insisted on these strict rules, so that fiduciaries are not tempted to pursue their own interests, at the expense of the person for whom they work: *Bray v Ford* [1896] AC 44 to *Boardman v Phipps* [1967] 2 AC 46.
   These fiduciary duties have been criticised as being too strict, but it is important to remember that the fiduciary can do any of the above forbidden things, if they gain the informed consent of their principal. See 15.2.

Further reading.

J. Edelman 'When do fiduciary duties arise?' (2010) 126 LQR 302.

3. What is the significance of a fiduciary holding a 'secret profit' on constructive trust?

Suggested Answer

A fiduciary has to account for any 'secret profit' that they have made. This is a personal liability to pay their principal, but the principal may want more than that, particularly if a fiduciary has become insolvent. The principal would want the right to claim the secret profit itself or anything that has been purchased with it (a proprietary remedy). This is known as a constructive trust and was denied in the case of *Lister v Stubbs* [1890] 45 Ch D 1. Stubbs had taken a bribe, but this was never the property of his employers. As he had not taken property from the fiduciary relationship, it could not be held on constructive trust.
The Privy Council disagreed in *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324. A fiduciary should not profit from his wrong and the government of Hong Kong should potentially be able to use a constructive trust to claim land purchased with the bribe money by Reid.
Finally, the Supreme Court in FHR European Ventures v Cedar Capital Partners [2014] UKSC 45 clarified the law. All secret profits, however obtained, should be held by the fiduciary on constructive trust. Wrongdoing should be punished and this simple rule could be understood by everyone. See 15.3 to 15.6.

Further reading

D. Whayman 'Proprietary Remedy Confirmed for Bribes and Secret Commissions.' (2014) Conveyancer 518-25.

4. What is the difference between an institutional and remedial constructive trust?

Suggested Answer

This distinction is made in the case of *Westdeutsche Landesbanke Girozentrale v Islington Borough Council* [1996] AC 669. Institutional constructive trusts are deliberately created by the parties, maybe because they have omitted to use the proper legal formalities, such as writing in the case of land. Good examples would be the constructive trust of the family home used in *Lloyds v Rosset* [1991] 1 AC 107, or the constructive trust that enforces a mutual will agreement (*Re Cleaver* [1981] 1 WLR 939.
Remedial constructive trusts are not created by the parties, but imposed by the courts to deal with wrongdoing, typically, the wrongful acquisition of someone else's property. We have already seen a good example of this in discussion question 3 in *FHR European Ventures v Cedar Capital Partners* [2014] UKSC 45. The courts will also impose remedial constructive trusts upon a trustee de son tort, upon a

defendant who knowingly receives trust property and a defendant who dishonestly assists in the removal of trust property: *Barnes v Addy* (1874) LR 9 Ch App 244. In some jurisdictions, such as Canada and the USA, the courts exercise a wider discretion to impose constructive trusts, to combat what they regard as unjust enrichment. Generally speaking, the English courts have rejected this wider approach and prefer to stick to the precedents: *Halifax Building Society v Thomas* [1996] Ch 217. See 15.4.

5. What is a trustee de son tort?

Suggested Answer

Literally, this means trustee of your own wrong. A person who, although not formally appointed as a trustee, acts as though they are one becomes a trustee de son tort. Then they hold the trust property on constructive trust and must hand it over to the properly appointed trustees: *Jasmine Trustees v Wells and Hind* [2007] 3 WLR 810. The same principle has been applied to those who act as a personal representative e.g. an executor, even though they have not been appointed as one: *James v Williams* [1999] 3 All ER 309. It could even apply to a solicitor, who goes beyond acting as a solicitor and acts as a trustee: *Dubai Aluminium v Salaam* [2003] 2 AC 366. See 15.5.3 to 15.5.5.

6. What has to be proved to make a defendant liable as a knowing receipt constructive trustee?

Suggested Answer

The exact level of knowledge required has been long debated by the courts and has ranged from constructive knowledge i.e. the defendant should have known that they were receiving trust property (*Polly Peck v Nadir* [1992] 4 All ER 769) to the requirement of proving actual knowledge (*Re Montague's Settlement* [1987] Ch 264. Finally, the courts seem to have settled upon a test of knowledge that makes it unconscionable for the defendant to retain the property taken from the trust: *BCCI v Akindele* [2000] 4 All ER 221. The only problem with this is that there is some uncertainty about the exact meaning of unconscionability. Does it mean looking at issues of constructive knowledge again, even though *Akindele* explicitly rejected the five levels of knowledge from *Baden, Delvaux & Lecuit v Societe Generale* [1992] 4 All ER 161? See 15.6 to 15.6.4.

Further reading

P. Shine 'Knowledge, Notice, Bad Faith and Dishonesty: Conceptual Uncertainty in Receipt Based Claims in Equitable Fraud' (2013) ICCLR 293.

7. What has to be proved to make a defendant liable as a dishonest assistance constructive trustee?

Suggested Answer

The formula for liability in the original *Barnes v Addy* (1874) LR 9 Ch App 244 is complicated. It speaks of knowing assistance in a dishonest and fraudulent design. At different periods, the courts have either stressed the knowledge part of the test or the dishonesty aspect. In older cases, knowledge had to be proved against the defendant. They knew that they were assisting in the removal of trust property. The courts were satisfied with constructive knowledge, that the defendant should have known what was going on: *Selangor United Rubber Estates v Cradock* [1968] 1 WLR 1555.

Later, the courts abandoned this test and said that it must be proved that the defendant was dishonest: the *AGIP (Africa) v Jackson* [1991] Ch 547. The Privy Council ruled in *Royal Brunei Airlines v Tan* [1995] 2 AC 378 that dishonesty was an objective test, but the court must investigate what the defendant knew and believed about the suspect transaction. So there was a subjective element. This test was possibly misunderstood by the House of Lords in *Twinsectra v Yardley* [2002] 2 All ER 377, who imported a kind of mens rea requirement into this test. It also had to be proved that defendant knew that what they had done was dishonest by the normal standards of society.

Interestingly, most courts preferred to follow *Royal Brunei* rather than *Twinsectra*, even though they should have adhered to the House of Lords precedent of the latter case: *Barlow Clowes v Eurotrust* [2006] 1 All ER 333. Finally, the Supreme Court in Ivey v Genting Casinos (UK) [2017] UKSC 67 has resolved the conflict. The defendant must be judged by an objective standard, the normal standards of ordinary decent people. It is not necessary to prove that the defendant realised that they were doing wrong. See 15.6.5 to 15.6.10.

Further Reading

P. Shine ‘Dishonesty in Civil Commercial Claims: A State of Mind or a Course of Conduct.’ (2012) JBL 29.