

Answer Guidance for Chapter 6 Practice Questions

1. 'The fiduciary duties placed upon agents are overly strict and fail to reflect the realities of modern commerce.'

Do you agree with this statement? Provide reasons for your answer.

Introduction

- As with all essays, you should begin with an introduction that sets out what the question is about, why the topic is an important one, and how your essay will go about answering the question set. By providing an outline structure of the discussion to follow, you will demonstrate to the marker that you have understood what the essay question requires you to discuss and your essay will be clearer and more structured.

Duty to avoid conflicts of interest

- There is little doubt that the duty to avoid conflicts of interest is a strict one. If the agent has a duty that conflicts with that of his principal, then, unless the principal has full knowledge of the conflict and consents to it, the agent will be in breach of duty. It matters not that the agent had no dishonest motive.
- The question, however, is whether the duty is overly strict. The duty may be strict (inasmuch as the motive of the agent is irrelevant), but it is not absolute. Breach of duty can be avoided by the agent disclosing the conflict and obtaining the principal's consent. Accordingly, it is not difficult for the agent to avoid breaching the duty and one could easily contend that the agent should disclose the conflict, so that the principal can decide whether or not he wishes to continue to engage the agent.
- It could be argued that certain aspects of the duty are too lax. For example, in *Kelly v Cooper*,¹ the agent was acting on behalf of two principals. One of the principals claimed that this placed the agent in a position of conflict and so the duty was breached. The Privy Council disagreed and held that no breach of duty had occurred.
- The Board's decision has proven controversial. Brown² has argued that an agent who continues to act for competing principals must be in breach of duty to one or both and that, to avoid a breach of duty, the agent should disclose the conflict and seek the consent of both principals. If such consent is not forthcoming, the agent should terminate both agencies, or at least one of them.
- Not all academics agree with Brown. Nolan contends that the decision of the Privy Council is in keeping with 'modern commercial pressures and practice.'³

¹ [1993] AC 205 (PC).

² Ian Brown, 'Divided Loyalties in the Law of Agency' (1993) 109 LQR 206, 208.

³ Richard C Nolan, 'Conflicts of Duty: Helping Hands From the Privy Council?' (1994) 15 Co Law 58, 58.

Duty not to profit from position

- The duty not to profit from position is another strict duty in the sense that the motive of the agent in accepting the profit is not relevant. However, like the duty to avoid conflicts of interest, the duty is not absolute and breach can be avoided if the agent discloses the profit to the principal and the principal consents to the agent keeping the profit.
- There have, however, been cases where the application of the strict duty can be viewed as harsh. An example of a case that has been viewed as harsh is *Regal (Hastings) Ltd v Gulliver*.⁴ You may remember that, in *Regal (Hastings)*, the agents acquired the profit through a scheme that the principal (namely the company they acted as directors for) could not take advantage of as it lacked the funds. Had the directors disclosed the profit and obtained consent to retain it (namely by disclosing it and obtaining consent from the general meeting), then no breach of duty would have occurred. The only reason why the directors did not do this was that they were the majority shareholders and so it was a certainty that the general meeting would consent. Despite this, and the fact that the directors acted in good faith, the House of Lords held that the duty was breached.

Duty not to accept bribes

- The duty not to accept bribes can either be regarded as a separate duty in its own right, or as a specific aspect of the agent's duty not to profit from his position.
- You will want to explain what a bribe is, as the definition for the purposes of the duty differs to the traditional everyday meaning of the word. Any payment or other inducement made to the agent without the knowledge of the principal constitutes a bribe. It matters not whether the agent was induced by the payment, or whether he or the third party had any dishonest motive in relation to the payment. Further, it is irrelevant whether or not the agent tried to conceal the existence of the bribe. The case of *Industries & General Mortgage Co Ltd v Lewis*⁵ demonstrates the breadth of what will constitute a bribe.
- From this, it is clear that the duty not to accept bribes is a strict one, as the agent will become liable merely through the acceptance of, or the agreement to accept, the bribe. Given the nature of bribes, it is unsurprising that the law takes such a dim view of bribes.
- The significant range of remedies afforded to the principal further reinforces how gravely the law views the payment of bribes.

Duty to account

⁴ [1967] 2 AC 134 (HL).

⁵ [1949] 2 All ER 573 (KB).

- The final fiduciary duty to discuss is the duty to account. As is discussed on p 136, the duty has several aspects, but it basically requires the agent (i) to keep his money/property separate from that of his principal; (ii) to return to the principal any money that the agent holds on behalf of the principal, and; (iii) to keep accurate accounts of all transactions entered into on behalf of his principal.
- The strictness of the duty is demonstrated by the consequences of its breach. If the duty is breached, then the court will be 'compelled to ... presume everything most unfavourable'⁶ to the agent.

Conclusion

- Do not forget to conclude your essay. Do the arguments presented indicate that the quote in the question is correct or not? If you feel that the arguments for one side of an argument are stronger, then say so (although be careful to voice it objectively in the third person, and not as your own personal opinion).
- It may be the case that there are sound arguments on both sides and so no definitive conclusion can be reached. Again, this is perfectly acceptable. The law is not always clear and it may not be possible to fall on one side of an argument.
- From the above, it is clear that the fiduciary duties are indeed strict. However, their strict nature can often be justified based on the relationship between principal and agent. It is right that an agent's interests should not conflict with his principal. It is right that an agent should not profit from his position and that an agent should not take a bribe. In all these cases, a breach of duty can be avoided if the agent is open and discloses the full facts to the principal, who then consents.

2. The machinery in one of ComCorp's factories is nearing the end of its operational lifespan and needs to be replaced. The machinery, if sold for scrap, would raise £5,000. Accordingly, ComCorp instructs Bruce, the manager of the factory, to sell the machinery for scrap and to 'make every effort to ensure that suitable replacement machinery is purchased and installed.' However, Bruce sells the machinery to MultiTech Ltd, a company of which his brother is the managing director. MultiTech pays £6,000 for the machinery and installs it into one of its factories. It also pays Bruce commission of £500.

Bruce is not confident that he can purchase the correct replacement machinery and so he engages the services of an expert, Oliver, who he instructs to locate and purchase suitable machinery. Oliver locates and purchases the machinery and it is installed within the factory. However, the machinery is not suitable and, as a result, the factory's production rate is diminished considerably. ComCorp refuses to pay for the machinery. Accordingly, Oliver removes the machinery from the factory and states that it

⁶ Gray v Haig (1855) 20 Beav 216, 226 (Romilly MR).

will not be returned until it is paid for.

Discuss whether or not any breaches of duty have occurred and, if a breach has occurred, discuss the likely remedies that will be available.

Introduction

- Many students think that only essay questions require an introduction, but this is not so. Answers to problem questions should also begin with a lucid and well-structured introduction that clearly highlights the area (or areas) of law to which the question relates. By doing this, you demonstrate immediately that you have understood the question and have clearly identified the relevant legal topics.

The sale of the machinery to MultiTech

- In selling the machinery to MultiTech, Bruce may have acted in breach of duty. Two duties need to be discussed, namely (i) the duty to avoid conflicts of interest, and; (ii) the duty not to accept bribes.

Duty to avoid conflicts of interest

- As Lord Cranworth LC held in *Aberdeen Railway Co v Blaikie Bros*,⁷ an agent is not permitted to have an interest that can conflict with that of his principal, unless the principal so consents. Clearly, by selling the machinery to MultiTech, Bruce's personal interests conflict with those of ComCorp.
- It should be noted that the duty to avoid conflicts of interest is a strict one, so it matters not whether Bruce's motives were dishonest. All that matters is that there was a real sensible possibility of a conflict. The onus will be on Bruce to show that there was no conflict – given the facts, this will be difficult for him to prove.
- It should be noted that the duty will not be breached if Bruce can establish that ComCorp knew of the conflict and consented to it. We are not told whether ComCorp knew of the conflict and so both outcomes should be stated.
- If the duty has been breached, then ComCorp will be able to rescind the contract between it and MultiTech.

Duty not to accept bribes

- MultiTech has paid Bruce £500 commission. Although, this could be regarded as an example of the agent's duty not to profit from his position, the nature of the payment means that the duty not to accept bribes is more appropriate (although this duty could be regarded as a specific form of the duty not to profit from position).

⁷ (1854) 1 Macq 461.

- Start out by defining what a bribe is for the purposes of the duty. Note that the bribe need not be given, or accepted, with any dishonest motive. All that is required is that the third party offered the payment that the agent accepted, or agreed to accept, and that the principal was unaware of the payment. It matters not whether the payment influenced Bruce, or whether he actively tried to conceal it from ComCorp.
- Based on the facts provided, it would appear that the payment is indeed a bribe (unless ComCorp knew of the payment and consented to it). Breach of the duty will provide ComCorp with a number of remedies (discussed on pp 133-34 of the book).

The appointment of Oliver

- Bruce has engaged Oliver to locate the relevant machinery. The issue that arises here is whether, in appointing Oliver, Bruce has breached the duty not to delegate.
- Generally, when agents such as Bruce are appointed to undertake a task on behalf of their principal, they are not permitted to engage another person to carry out that task unless they are authorized to delegate by their principal.
- The question is whether ComCorp have authorized Bruce to delegate his task to another. The only possible way that Bruce could argue that the delegation was permitted is if the instruction to 'make every effort' to ensure that suitable machinery is purchased and installed could be read to include engaging a sub-agent to help. This could be viewed as implied authorization, but such an argument would be difficult to establish successfully.
- If the duty has been breached, then several consequences may result:
 - (a) There will be no privity between ComCorp and Oliver and so Oliver's actions cannot bind ComCorp. Accordingly, there will be no contract between ComCorp and the supplier of the machinery. ComCorp can return the machinery and will not be liable to pay for it.
 - (b) Bruce will be in breach of duty and will be liable for all obligations arising under the transaction.
 - (c) ComCorp will not be obliged to pay Oliver.

The unsuitable machinery

- The machinery Oliver locates is not suitable – whether this is because the machinery specified by ComCorp is not suitable or because Oliver obtains the incorrect machinery is not stated. If it is the latter, then it is possible that Oliver could be in breach of duty himself.
- The question is, if a sub-agent fails to perform or, as may be the case here, performs inadequately, whether this affords a remedy to the principal. Where there is no privity of contract between the principal and sub-agent (as will usually be the case and appears to be the case in our problem), then the principal cannot sue the sub-agent (see the case of *Calico Printers' Association*

*Ltd v Barclays Bank Ltd*⁸ for an example of this). Accordingly, ComCorp could not sue Oliver.

- In such a case, however, the principal can sue the agent (the agent in turn may be able to sue the sub-agent). Accordingly, ComCorp could sue Bruce, and Bruce could sue Oliver.

⁸ (1930) 36 Com Cas 71 (KB).