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ASIC v Citigroup and fiduciary
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Abstract

Recent contributions to this eJournal include a Note by Thomas Ritchie on the much anticipated decision of Jacobson J in *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd* [2007] FCA 963. It remains to be seen what impact that decision will have on commercial behaviour.

Comment

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Recent contributions to this *eJournal* include a *Note* by Thomas Ritchie on the much-anticipated decision of Jacobson J in *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd* [2007] FCA 963. It remains to be seen what impact that decision will have on commercial behaviour. It may be that the concessions made by the regulator in the course of the litigation will limit its precedent value – assuming it survives an appeal. But there is one aspect of his Honour’s reasoning in particular which merits particular comment.

Jacobson J concluded (at [278]) that it is, ‘open to the parties to a contract to exclude or modify the operation of fiduciary duties’. His Honour reached that view after reviewing the authorities and referring to a consultation paper published in 1994 by the United Kingdom Law Commission. There is some danger his Honour’s remarks could be misunderstood by would-be fiduciaries who seek to avoid their obligations by inserting a cleverly-worded exclusion clause into the fine print of a contract with a view to transforming their relationship into something less demanding.

His Honour’s comments about the circumstances in which a court might recognise the existence of fiduciary obligations are uncontroversial. He acknowledged there is a range of identified relationships (eg, solicitor and client) that give rise to fiduciary obligations in the ordinary course. In other cases, it was necessary to examine all of the circumstances of the relationship and consider whether ‘a person has undertaken to act in the interests of another and not in his or her own interests’: at [272]. His Honour emphasised, ‘all of the facts and circumstances must be carefully examined to see whether the relationship is, in substance, fiduciary’: [272].

It is undoubtedly true that what the parties say in a contract between them forms part of the facts and circumstances that must be taken into account when considering whether there is a proper foundation for the ‘fiduciary expectation’: [274], citing Finn, ‘The Fiduciary Principle’ in TG Youdan (ed), *Equity Fiduciaries and Trusts* (Law Book Co, 1989) 46-7. But the existence of an exclusion clause does not, by virtue of its inclusion in the contract, automatically transform a relationship if a proper analysis of *all* the circumstances suggests the relationship is ‘in substance, fiduciary’. If a proper consideration of all the circumstances suggests there is a foundation for the ‘fiduciary expectation’ described by Professor Finn (as he then was), the court will surely recognise the obligations notwithstanding the exclusion clause.

A precisely-drawn exclusion clause in a contract between two large commercial organisations might have the effect of displacing the fiduciary expectation in a case like the one under consideration – assuming that a fiduciary expectation might otherwise arise. But it does not have that effect through the operation of the contract. It has that effect because the clause makes it unlikely that the other person would develop an expectation that the would-be fiduciary will ‘act in the interests of [that

other party] and not in his or her own interests'. It is therefore inaccurate to suggest the parties are 'contracting out' of the fiduciary relationship. Rather, the contract may have the effect of preventing the circumstances that give rise to a fiduciary relationship from arising in the first place.

An exclusion clause will presumably be given less weight when the parties to the contract are not of equal power. Indeed, in many cases it would be discounted altogether if the circumstances are such that the weaker party is not in a position to adequately understand the message the would-be fiduciary is attempting to communicate.

Fiduciary rules are not simply designed to protect the powerless. They also play an important economic function. They relieve parties to arrangements of the responsibility to work out in advance all of the detailed rules that will govern their behaviour in unexpected circumstances. If the parties can simply rely on a default rule that the person who exercises the power will exercise it according to a particular standard, transaction costs associated with doing business will fall. (If the parties have gone to the trouble of working out those detailed rules, so be it: the contract will, in that case, displace the fiduciary obligations, because the parties understand they are to look to the contract for their remedies.)

The transaction costs savings associated with fiduciary rules are potentially significant. The genius of the common law and its equitable rules ensures the savings are available to commerce. Business will become more costly if parties contemplating a relationship can avoid fiduciary obligations by manipulating the fine print of their contract.

This point has sometimes been lost by Australian commentators and courts that have justified apparent departures from the strict application of principle with references to 'commercial reality': see, for example, *Re Broadcasting Station 2GB Pty Ltd* [1964-5] NSW 1648, 1663 (Jacobs J). Large multi-group structures with wide-ranging business interests like Citigroup are undoubtedly attracted to this sort of special pleading. But *if* Citigroup were found to be subject to fiduciary obligations in the circumstances of the case, it should have been a relatively straight-forward task to obtain a waiver from the client of any conflict arising out of the bank's proprietary trading activities.

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