

LIFE IS A LOTTERY*

Introduction

The catalyst for the title of this discussion paper was a case I decided on 14 December 2016. It involved a group of persons who were factory workers. Happily for the group, they won a \$40 million Powerball. Unhappily, the question was whether there were 14 or 15 lucky people. Again unhappily for one, namely the Plaintiff, I decided there were only 14. The Court of Appeal agreed with me on 6 November 2017.

The most interesting part of the case was the Plaintiff's allegation that the First Defendant, the organiser of a factory syndicate, owed a fiduciary obligation to the Plaintiff to include or at least invite him to be included in syndicates, but most importantly the winning syndicate.

Sadly, in the true spirit of the spoilsport, the Plaintiff withdrew his arguments on fiduciary obligations in the Court of Appeal so the argument there became a rather bland argument about facts. That said, the case threw up some interesting questions especially in the rather modest domestic setting in which the case arose.

The alleged existence and/or breach of fiduciary obligations is not an uncommon phenomenon in commercial cases and for that matter other cases arising in the Equity Division. However, the alleged existence of a fiduciary relationship in the context of a lottery syndicate is on the more novel side of things, and it was this allegation which forced me to delve into the "intricate mysteries of fiduciary obligations"¹ and determine whether such an obligation existed on the facts before me.

* Justice John Sackar, Supreme & Federal Court Judges' Conference, January 2018.

¹ W.M. Gummow, *Book review: Fiduciary Obligations by P.D. Finn*, UNSW Law Journal (1978), Vol 2, pp 408-412 at 408.

This paper does not aim to bring us any closer to demystifying uncertainties in the law of fiduciary relationships, but is simply a snapshot of where, as I see it, the law of fiduciary relationships stands, and how I attempted to apply that law in the 2016 lottery case.

What is a fiduciary?

Fiduciary relationships have been recognised and regulated for over 3,000 years, from the Code of Hammurabi, to the New Testament, Shariah Law, Jewish Law and Roman Law.

However, despite its long history, and notwithstanding innumerable attempts, even the greatest legal minds have struggled to give meaning to the term “fiduciary,” or what Professor Finn once described as the “most ill-defined, if not altogether misleading terms in our law.”² That rather explains Sir Anthony Mason’s often repeated comment “the fiduciary relationship is a concept in search of a principle.”³

A starting point, and one of the best known declarations of fiduciary duty, in particular the duty of loyalty, is that articulated by Benjamin Cardozo, then Chief Judge of the New York Court of Appeals, in *Meinhard v Salmon*⁴:

“Joint adventurers, like co-partners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behaviour. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity

² P.D. Finn, *Fiduciary Obligations*, The Law Book Company Limited, Sydney, 1977, p.1.

³ Sir Anthony Mason, “Themes and Prospects” in P. D. Finn (ed) *Essays in Equity*, The Law Book Company Ltd 1985, p 246.

⁴ 164 N.E. 545 (N.Y. 1928).

when petitioned to undermine the rule of undivided loyalty by the “disintegrating erosion” of particular exceptions. Wendt v Fischer, 243 N.Y. 439, 444, 154 N.E. 303. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.”⁵

However, as Justice Lehane writing extra-judicially pointed out, when the question of who is a fiduciary arises outside of the recognised categories of fiduciary relationships - or, as I term them, the “usual suspects” - as set out in *Hospital Products Ltd v United States Surgical Corp*⁶, it becomes a more difficult process of inquiry:

“...the inevitable question therefore is how...does one determine who, outside the traditional categories, is a fiduciary, and who is not?”⁷

As suggested earlier, attempts have been made to define a fiduciary. Professor Scott, for example, writing in 1949 described a fiduciary as:

“A person who undertakes to act in the interests of another person. It is immaterial whether the undertaking is in the form of a contract. It is immaterial that the undertaking is gratuitous.”⁸

Others have employed entire theories to try to make sense of the term. A recent example of this has been the work of Professor Evan Criddle in explaining fiduciary relationships through the prism of the republican legal theory to help fiduciary jurisprudence "achieve

⁵ Id at 546.

⁶ (1984) 156 CLR 41 at 68 per Gibbs CJ.

⁷ J R F Lehane, “Fiduciaries in a Commercial Context” in PD Finn (ed) *Essays in Equity*, The Law Book. Company Ltd 1985, p 96.

⁸ A. W. Scott, “The Fiduciary Principle” (1949) 37 Cal L Rev 539 at 540.

greater coherence through deeper engagement with the republican ideal of liberty as freedom from domination."⁹ As he explains, the main message of republican legal theory is "legal norms and institutions are necessary to safeguard individuals from 'domination', understood as subjection to another's alien control."¹⁰ Further, unlike classical liberal theory which courts allegedly too often rely on to frame fiduciary obligations, Professor Criddle contends republicanism "offers a simple test for identifying fiduciary relationships: Fiduciary duties apply whenever a party has been entrusted with power over another's legal or practical interests."¹¹

As best I understand this theory, Professor Criddle believes courts must impose stricter conditions on the powers of a fiduciary, recognising fiduciaries lack the formal legal capacity to exercise arbitrary power. Republican theory "frames the fiduciary duty of loyalty as a liberty-enhancing safeguard" denying fiduciaries the power to dominate. Professor Criddle adds to this thesis in 'The Method of Fiduciary Law's Mixed Messages,' arguing courts "rarely set aside fiduciary decisions in the absence of an unauthorised conflict of interest or other flagrant abuse of power."

In my respectful view, Professor Criddle's analysis fails in its goals to add "coherence" to fiduciary jurisprudence, or provide a "simple test" for what fiduciary relationships are. As I read it, the theory operates in the abstract, and is unsupported by evidence of courts being drawn to a classic liberal way of understanding fiduciary obligations. In my view, Professor Criddle's work is an example of the academic furore surrounding the law of fiduciary obligations which struggles at times to grapple with the importance of facts in determining the existence and scope of a particular fiduciary relationship.

⁹ Evan Criddle, 'Liberty in Loyalty: A Republican Theory of Fiduciary Law' (2017) *Texas Law Review* 993 (*Liberty in Loyalty*) at 1001.

¹⁰ *Id* at 995.

¹¹ *Id* at 1000.

Outside of academia, it is clear a coherent definition of a fiduciary has not been judicially embraced. In 1984, Dawson J observed in *Hospital Products Ltd v United States Surgical Corp* "... no satisfactory single test has emerged which will serve to identify a relationship which is fiduciary."¹²

Ten years on, little progress had been made, with Sir Anthony Mason writing extra-judicially in 1994:

*"the quest for a precise definition which identifies the characteristics of the fiduciary relationship, and other relationships which attract equitable relief, continues without evident sign of success."*¹³

In 2014, Professor Finn spoke of the definition of fiduciary relationship still taunting the common law world.¹⁴ Professor Finn agrees a description rather than definition is all that is feasible and proposes the following description:

*A person will be in a fiduciary relationship with another when that other is reasonably entitled to expect that he or she will act in that other persons interest (or in their joint interests) to the exclusion of his or her own several interest, for a purpose, or for some or all purposes, of their relationship.*¹⁵

This description does appear to capture various aspects of the relationship. However, perhaps to the upset of academics,¹⁶ the courts are less enthusiastic about articulating a

¹² (1984) 156 CLR 41 at 141.

¹³ Sir Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 LQR 238 at 238.

¹⁴ P. D. Finn, "Fiduciary reflections" (2014) 88 ALJ 127 at 127.

¹⁵ *Id* at 137.

¹⁶ See, for example, P. D. Finn, "Fiduciary reflections" (2014) 88 ALJ 127 at 127.

binding principle, whether that be a definition or a description, of what a fiduciary is. As Lord Chelmsford observed in *Tate v Williamson*:

*“The Courts have always been careful not to fetter this useful jurisdiction [over fiduciary relationships] by defining the exact limits of its exercise.”*¹⁷

Lord Millet’s remarks, writing extra-judicially, are a reflection of this judicial reticence to define a fiduciary relationship:

*“In England, as usual, we have tried to muddle through without attempting a definition believing that anyone can recognise a fiduciary when he sees one.”*¹⁸

Other courts, particularly in Australia, have purported intentionally to avoid the task for the reason the term “fiduciary relationship” does not lend itself to definition. For example, in *Breen v Williams*, Gaudron and McHugh JJ said:

*“Australian courts have consciously refrained from attempting to provide a general test for determining when persons or classes of persons stand in a fiduciary relationship with one another. This is because ... the term ‘fiduciary relationship’ defies definition.”*¹⁹

Thus, operating in this definitional void, courts and academics have directed efforts towards establishing the indicia of fiduciary relationships, or circumstances where they are said to arise. As Professor Worthington suggests, “our language is impeding our analysis” when it comes to defining who a fiduciary is, and the search for a category of person is “doomed” to failure:

¹⁷ (1866) LR 2 Ch App 55 at 61.

¹⁸ Sir Peter Millett, 'Equity's Place in the Law of Commerce' (1998) 114 LQR 214 at 218.

¹⁹ (1996) 186 CLR 71 at 106.

“For good reason the law typically seeks to define categories of obligations, duties and remedies, not categories of people. It may look to relationships but generally only to explain the context in which particular obligation and duties are owed. By contrast the search for categories of people who will be obliged to ‘act in another’s interest’ makes us forget that there are very many categories of obligations which might deliver these ends.”²⁰

Indeed, Professor Finn succinctly captured this exact sentiment when he said “a fiduciary is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to fiduciary obligations that he is a fiduciary.”²¹

These remarks are reminiscent of the observations of Frankfurter J:

“To say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?”²²

Such obligations, and circumstances where these obligations may arise and cease, will now be considered.

²⁰ Professor Sarah Worthington, ‘Four Questions on Fiduciaries’ (2016) 2(2) CJCL 723 at 733.

²¹ P.D. Finn, *Fiduciary Obligations*, The Law Book Company Limited, Sydney, 1977, p. 2.

²² *Securities & Exchange Commission v Chenery Corp* 318 US 80 at 85-86 (1943).

What do fiduciaries have to do?

Again, as Professor Worthington points out, even if we cannot say precisely who is a fiduciary it may be easier to say what such a person, once identified, would have to do.²³

This certainly appears to be the approach courts have taken.

Millet LJ (as he then was) stated in *Bristol & West Building Society v Mothew*:

*“The distinguishing obligation of a fiduciary is the obligation of loyalty...this core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict...”*²⁴

As is evident in the language of Millet LJ, fiduciary rules are proscriptive, not prescriptive.

That is, the fiduciary is not positively obliged to act in the interests of the principal. What is special about the fiduciary rule is something essentially negative. As Professor Worthington puts it fiduciary relationships demand self-denial, not due care and obedience to agreed terms.²⁵

Similarly, Professor Finn notes it is axiomatic that a consequence of concluding that a relationship is fiduciary in whole or in part is, that, to that extent the fiduciary is obliged to act in the interests of the beneficiary or in their joint interest to the exclusion of his or her own self-interest and this does not give rise to any positive obligation.²⁶

²³ Professor Sarah Worthington, ‘Four Questions on Fiduciaries’ (2016) 2(2) CJCCL 723 at 737.

²⁴ [1998] Ch 1 at 18

²⁵ Professor Sarah Worthington, ‘Four Questions on Fiduciaries’ (2016) 2(2) CJCCL 723 at 739.

²⁶ P. D. Finn, “Fiduciary reflections” (2014) 88 ALJ 127 at 136.

Deane J further examined the 'negative' nature of fiduciary obligations in *Chan v Zacharia*.²⁷

"The variations between more precise formulations of the principle governing the liability to account are largely the result of the fact that what is conveniently regarded as the one 'fundamental rule' embodies two themes. The first is that which appropriates for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest. The second is that which requires the fiduciary to account for any benefit or gain obtained or received by reason of or by use of his fiduciary position or of opportunity or knowledge resulting from it: the objective is to preclude the fiduciary from actually misusing his position for his personal advantage. Notwithstanding authoritative statements to the effect that the "use of fiduciary position" doctrine is but an illustration or part of a wider "conflict of interest and duty" doctrines, the two themes, while overlapping, are distinct. Neither theme fully comprehends the other and a formulation of the principle by reference to one only of them will be incomplete."²⁸

Professor Finn further develops the description by reference to the intersecting concepts of custodianship and entrustment, although these concepts alone do not entirely delimit the extent of the relationship.²⁹

²⁷ (1984) 154 CLR 178.

²⁸ *Id* at 198-199 (citations omitted). See also *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384; *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373; *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309; *Blythe v Northwood* (2005) 63 NSWLR 531.

²⁹ P. D. Finn, "Fiduciary reflections" (2014) 88 ALJ 127 at 135.

Further, Professor Finn notes it is well accepted that fiduciary relationships, however created, are rarely fiduciary for all purposes. Indeed, most fiduciary relationships are fiduciary only in part and this is commonly so when a relationship arises in a commercial setting.³⁰ As Lord Browne-Wilkinson observed in *Henderson v Merrett Syndicates Ltd*:³¹

*“... the phrase fiduciary duties is a dangerous one giving rise to a mistaken assumption that all fiduciaries owe the same duties in all circumstances. This is not the case.”*³²

These remarks only serve to highlight the salutary warning given by the Court in *John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd*³³ about the expression “joint venture” being “often used to bolster a conclusion that a fiduciary relationship exists.”³⁴

The High Court made similar remarks in *Howard v Federal Commissioner of Taxation*³⁵ noting despite broad judicial formulations, fiduciary duties are not infinitely extensible. The limits of the duties are to be determined by the character of the venture for which the arrangement existed, any express arrangement of the parties, and the course of dealings. The scope of the duty must accommodate itself to the particulars of the underlying relationship which give rise to the duty so that it is consistent with and conforms to the scope and limits of that relationship.³⁶

³⁰ Ibid.

³¹ [1995] 2 AC 145.

³² Id at 206.

³³ (2010) 241 CLR 1.

³⁴ Id at 21.

³⁵ (2014) 253 CLR 83.

³⁶ Id at 14 per French CJ and Keane J.

When do these fiduciary obligations arise?

The early cases of fiduciary obligations in Australia enunciated principles of fiduciary relationships in the context of heavily dense facts. In *Birtchnell v Equity Trustees, Executors and Agency Co Ltd*³⁷ for example, the fiduciary obligations stemmed from the nature and purpose or “character” of a particular task that was being undertaken. As Dixon J said at 407-408:

“The relation is based, in some degree, upon a mutual confidence that the partners will engage in some particular kind of activity or transaction for the joint advantage only. In some degree it arises from the very fact that they are associated for such a common end and are agents for one another in its accomplishment. Lord Blackburn found in this consideration alone sufficient reason for the fiduciary character of the partnership relation. The subject matter over which the fiduciary obligations extend is determined by the character of the venture or undertaking for which the partnership exists, and this is to be ascertained, not merely from the express agreement of the parties, whether embodied in written instruments or not, but also from the course of dealing actually pursued by the firm.”

Similarly, The Honourable Sir Frederick Jordan, although examining the issue predominantly from the position of a trustee, did not attempt a definition of fiduciary in his lectures while the Challis Lecturer in Equity from 1909.³⁸ However, he made the point fiduciary duties had no application to a person who had not yet assumed the fiduciary office. He also commented the duties did not apply to a person who had ceased to occupy the fiduciary position unless the confidence continues in such a case. Although the fiduciary relationship may be at an

³⁷ (1929) 42 CLR 384.

³⁸ See, eg, Sir Frederick Jordan, *Chapters on Equity in New South Wales* (Law School of the University of Sydney, 6th ed, 1947) 112.

end in any subsequent dealing, there was still an obligation of full disclosure to be made of all knowledge acquired while the relationship existed.³⁹

With echoes of Sir Frederick Jordan, Professor James Edelman (as he then was) proposed:

*“We can only understand when fiduciary duties arrive if we conceive of them as obligations based upon manifestations of a voluntary undertaking to another...Fiduciary duties thus arise in the same manner as any other express or implied term: by construction of the scope of voluntary undertakings.”*⁴⁰

Professor Edelman went on to argue the classic “status” conception of a fiduciary could no longer give much meaning to the term, stating the duties were not to be seen as imposed by law nor necessarily referable to a relationship or status, but were really properly to be seen as either expressed or implied in relationships involving manifestations of voluntary undertakings.

Professor Worthington argues this conception of a “voluntary undertaking” is not a “compelling way of describing, never mind rationalizing, the imposition of fiduciary rules,” as it means trustees or company directors for example can escape fiduciary obligations by simply denying the undertaking.⁴¹ However, in my respectful view, this misconstrues Professor Edelman’s point. Pursuant to his conception of fiduciary obligations, one still needs to determine objectively whether, based on the relationship in question, there is an express or implied voluntary undertaking. The undertaking and extent of that undertaking or responsibility will clearly arise from the particular facts of the case.

³⁹ The Honourable Sir Frederick Jordan expressed the following views in *Chapters on Equity in New South Wales*, 6th ed, 1947 at 114-115.

⁴⁰ *Ibid.*

⁴¹ Professor Sarah Worthington, ‘Four Questions on Fiduciaries’ (2016) 2(2) *CJCL* 723 at 731-732.

The lottery cases

As noted, cases bringing into question these principles of fiduciary law are not uncommon to the Court, but in the Equity Division are traditionally arising in the commercial context.⁴²

Sophisticated commercial settings are complex for their own reasons, as courts have to juxtapose and therefore balance contractual obligations with fiduciary obligations. *Hospital Products*⁴³ is a prime example of this.

However, in less commercial, more “backyard” type cases, the challenge is equally complex, but for the reasons the factual context is of crucial importance. In such cases, the facts are what necessarily delimits or defines the particular scope of the fiduciary obligation. This was the category *King v Adams*,⁴⁴ the lottery case that came before me in 2016, fell into.

Before turning to *King v Adams*, it may be helpful, or at the least interesting, to provide a short overview of two other lotto cases (*Van Rassel v Kroon* and *Walsh v Walsh*) which also involved disputes over gambling proceeds.

***Van Rassel v Kroon*⁴⁵**

Van Rassel v Kroon was a High Court case where Mr Kroon sued his former friend Mr Van Rassel and Mr Quinn, the director of New South Wales Lotteries, seeking a declaration that Mr Van Rassel held a particular ticket in Special State Lottery No 99 and all rights attaching thereto and all monies payable in respect of a ticket as trustee for himself and the Plaintiff in equal shares. The Trial Judge, Richardson J, had made a declaration in those terms and

⁴² For a useful overview of fiduciary relationships arising in commercial settings, see Justice Ashley Black, ‘Modern indicia of fiduciary relationships in a commercial setting and the interaction of equity and contract,’ Supreme Court Corporate and Commercial Law Conference, 15 November 2017.

⁴³ *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41.

⁴⁴ [2016] NSWSC 1798.

⁴⁵ (1953) 87 CLR 298.

ordered Mr Van Rassel to pay Mr Kroon one half of the monies payable in respect of the ticket. Mr Van Rassel appealed directly to the High Court and the matter was heard by three judges, Dixon CJ, Webb and Taylor JJ.

Dixon CJ stated succinctly the issue. The winning ticket had been purchased on 22 March 1952 and the question was whether as a result of the arrangement Mr Van Rassel held it not for himself alone but for himself and Mr Kroon as co-owners in equal shares.

The Chief Justice then briefly stated the facts. Both Mr Van Rassel and Mr Kroon were Dutch, and although they spoke English reasonably well they conversed with each other in Dutch. Mr Van Rassel was employed in a wine cellar close to which was a kiosk selling lottery tickets. He was married and he and his wife lived in a room at Manly but they were trying to buy a house.

Mr Kroon, on the other hand, was a chief cook on a Dutch vessel called the "Nieuw Holland". The vessel traded between Singapore, Sydney and Melbourne and periodically docked in Sydney. The two had met on one such occasion and they had become friends. Mr Kroon got an ear infection. As a result he was hospitalised and he remained in Sydney and his ship sailed without him. Mr Van Rassel and his wife visited Mr Kroon whilst he was in hospital. During one such visit the two got talking. Mr Van Rassel told Mr Kroon he and his wife were desirous of buying a house and Mr Kroon proposed that he and Mr Van Rassel should buy a ticket in a big lottery. Mr Kroon produced a one pound note and handed it to Mr Van Rassel. The ticket was going to cost half that. Mr Van Rassel did not have sufficient money to provide the accurate change to Mr Kroon. Mr Kroon suggested some of the money therefore be used in buying a ticket for him in a smaller or ordinary lottery.

They then discussed what they would call the ticket, and Mr Van Rassel and Mr Kroon suggested the term "happy landing". Mr Van Rassel went to the kiosk where he first bought a ticket in an ordinary lottery in his wife's name putting her initials "CL" on the ticket.

Secondly he bought a ticket in the name of Mr Kroon in which he put the letters "NH" on the syndicate name. Thirdly he bought a ticket in the same lottery in the names "Kroon/Van Rassel" placing for the name of the syndicate the words "happy landing". Because he was short of money he decided to buy a ticket in an ordinary lottery for the syndicate of himself and Mr Kroon instead of the special one. In placing the letters "NH" on the ticket for Mr Kroon he meant to convey the words "no hope" or "no home".

Mr Van Rassel did not visit Mr Kroon during the ensuing week and he did not pay him a small amount of change to which accrues as the result of buying the tickets. He did not tell Mr Kroon that he bought a ticket in an ordinary lottery on their joint account instead in a special lottery. On 25 March the lottery was drawn and none of the tickets received a prize.

In the meantime, on 22 March Mr Van Rassel went to the same kiosk and bought a ticket in a special lottery. He placed the name "Van Rassel" on the ticket but did not indicate the gender of the person who was the owner of the ticket. He gave his Manly address and again opposite the syndicate name placed the letters "NH". The ticket won the prize of twelve thousand pounds. When it was announced in the press it was also announced that the syndicate name was "NH". Mr Kroon read the press article and tried to make contact with Mr Van Rassel. Proceedings were commenced and Mr Kroon asserted that the initials "NH" on the winning ticket stood for "Nieuw Holland". There was a dispute at the trial between the two witnesses as to what the syndicate was to be called. Mr Van Rassel and his wife had sworn that the term "happy landing" was to be used for the syndicate with Mr Kroon.

Mr Kroon on the other hand swore that Nieuw Holland was to be the name of the syndicate.

The trial judge accepted Mr Kroon's evidence not, it seems, based upon any assessment of Mr Kroon as a witness of truth, but rather because Mr Van Rassel had said that the "first thing" Mr Kroon had said to him was "happy landing". The trial judge for some extraordinary reason had determined the second thing said was "Nieuw Holland" hence explaining the

initials NH. The Chief Justice regarded the inference untenable. The Chief Justice went on to analyse the fact further and came to the view that the initials "NH" did not mean Niew Holland but either No Home or No Hope and that these initials had been used by Mr Van Rassel and his wife on other tickets. The Chief Justice therefore on the facts determined that Mr Van Rassel corroborated in part by his wife had purchased a ticket on account of himself and Mr Kroon, albeit not a lottery of the agreed description, but that Mr Kroon's money had been used for that lottery which was not successful.

In the course of his judgment the Chief Justice made the following statement:

"When one man agrees with another that he will obtain a lottery ticket for the latter or for the latter and himself jointly the identification of the lottery ticket he acquires in pursuance of the arrangement is likely to present difficulties. The person in whose name the lottery ticket issues obtains the legal title to what is a chose in action. If he is the applicant he obtains custody of the ticket and is in a position to exercise whatever rights the ticket confers and deal with it as he chooses. If the application is or must be taken to be for the benefit of another or others or of himself and another or others he has the legal title unless the ticket issues in the names of the person or persons beneficially entitled. Otherwise they have nothing but an equitable interest in the ticket and its proceeds if it wins a prize. In other words he becomes a fiduciary agent or trustee. It is not a trust or a fiduciary agency involving many duties or burdens. It is of the simplest kind and the fiduciary obligations flowing from it are few and for the most part negative, that is to say he must do nothing to impair the rights of the persons for whom he holds the ticket. But one of the duties of a person acquiring any piece of property, whether chose in action or corporeal thing, for the benefit of others as a fiduciary is to distinguish the piece of property he so acquires from other similar things which he may obtain for himself or in which he may be interested. This duty has a particular application to the acquisition of a lottery ticket.

For a lottery ticket is a chose in action possessing characteristics making the discharge of the duty specially important. When the ticket is applied for it is one of a series, very large in number, no one of which is distinguishable from the others except by the numerals they bear. Every one of them has the same value, a small uniform value. But when the lottery is drawn the value of some of the tickets will become very great indeed while most of the tickets will become valueless. The fiduciary is at perfect liberty before the drawing to acquire for himself beneficially any number of tickets in the same lottery as that in which he holds a ticket on behalf of others or of himself and others. It is evident that before the drawing the identity of the ticket which is held for others or for himself and others ought, if he fulfils his duty, to be ascertained so that it is clearly distinguished from those he holds for himself. If there is any confusion, the burden must be upon him of showing which is his property. It could not be otherwise where the duty rests upon him as a fiduciary not to confuse his own beneficial property with that which is subject to his fiduciary obligations and where at the same time his are the hands in which are placed the means of identifying the property.”⁴⁶

Taylor J came to a similar view to that of the Chief Justice on the factual issue. In addition however he formed the view that there was no trust in the true sense attached to the monies which Mr Kroon handed to Mr Van Rassel. He went further to suggest it was never the intention of the parties they should be treated as trust money, though no doubt Mr Van Rassel should become a trustee of any ticket purchased by him pursuant to their arrangement and any resultant prize money.

⁴⁶ Id at 302-303.

Walsh v Walsh⁴⁷

Jump forward more than sixty years and across to Ireland and another dispute over the proceeds of a lottery ticket is playing out in the High Court of Ireland. A son (Mr Walsh) is suing his step mother (Mrs Walsh) for a €560,000 share of a €3.38 million Lotto win.

In January 2011, six persons signed the back of the Lotto ticket which led to the €3.38 million win. These names including Mr Walsh, Mrs Walsh, Mr Walsh's late father (and thus Mrs Walsh's then husband), and three other relatives.

In the wake of the win, Mrs Walsh was nominated as the person to collect the prize, and she contended she was the sole winner and the other signatories were added to the ticket on the advice of the lottery to ensure any gifts she might make were exempt from tax.

Mrs Walsh made various distributions to the other signatories, except her stepson Mr Walsh. Mrs Walsh claims Mr Walsh was given the choice of the family house or €200,000 from the win, and Mr Walsh had chosen the house which had since been transferred to him after his father's death.

The issue of whether Mr Walsh was a beneficiary of a share in the Lotto win naturally turned on the facts of the case, which were clearly dense given the seven day length of the trial. Mr Justice Richard Humphreys considered Mr Walsh honest and generally reliable, and rejected Mrs Walsh's evidence that the Lotto ticket was hers, she had only asked the signatories to sign the ticket for gift tax purposes, and that Mr Walsh chose the family home over the €200,000.

One of the legal issues raised was whether the facts of the case gave rise to a constructive trust. Mr Justice Humphreys held:

⁴⁷ [2017] IEHC 181.

“Given that the rules of the game states that the nominated person collects on behalf of all members, it axiomatically follows that the nominated person, in this case the defendant, holds the winnings in trust for all members to the extent of their ownership. In the case of the plaintiff I hold that there is an express trust in favour of the plaintiff to the extent of one-sixth of the winnings, but even I am wrong about an express trust the defendant holds one-sixth of the winnings on a constructive trust for the plaintiff. Mr. Delaney suggested that preconditions for a constructive trust were not established, but I have regard to the view of Barron J. in N.A.D. v. T.D. [1985] I.L.R.M. 153, at p. 160, that a “constructive trust is imposed by operation of law independently of intention in order to satisfy the demands of justice and good conscience”. I accept Ms. Browne’s submission that a constructive trust is imposed in any situation or if one person is in possession of property belonging to another and does not account for that. In this situation we have the twin requirements of ownership and failure to account, and a trust is to be, and must be, imposed in that situation.”⁴⁸

An appeal has been lodged but it is not clear when it will be heard.

King v Adams

Returning to the lottery case that came before me in 2016 – *King v Adams*.⁴⁹ As I have already briefly adverted to, this case involved a practice adopted over many years by Mr Adams of organising syndicates which would buy tickets in various gambling opportunities. These, perhaps in the earlier days, were lottery tickets but graduated to Lotto, Powerball and similar activities. He kept all the relevant records in an exercise book and when he bought tickets he generally photocopied as many times as there were participants and distributed to

⁴⁸ At [62].

⁴⁹ *Brendan Wilfred King v Robert Lawrence Adams* [2016] NSWSC 1798 (***King v Adams***).

them copies of the tickets so that they could follow the events along with him. Over the years there had rarely been a large payout but when that occurred (approximately \$8,000 on one occasion) he would distribute the monies to the various persons. Otherwise he would retain monies, if they were small amounts, in a bank account he kept for that purpose and rolled those sums into another opportunity in the next little while.

In the Mothers' Day draw of 2016, Mr Adams purchased on behalf of one syndicate (called the 2016 Core Syndicate) a ticket which won \$13.65, while he also purchased on behalf of another syndicate (called the Winning Syndicate) a ticket which won the jackpot prize of \$40,455,165.25.

The primary case brought by Mr King was that Mr Adams had subjectively intended to include all members of the 2016 Core Syndicate, which included of course Mr King, in the Winning Syndicate. It was then argued the prize money was held in part on trust for the Plaintiff and that there was duty to account. This issue turned entirely upon the facts.

As a secondary case only, Mr King alleged there was a joint venture and that the arrangements led to fiduciary obligations being imposed on Mr Adams which included the "honest and fair dealing obligation", that being the obligation not to prefer the interests of himself or any member over the interests of another and not to use his powers to gain an advantage. It was therefore alleged that Mr Adams had breached his fiduciary obligation by excluding Mr King from the Winning Syndicate and therefore again held an appropriate portion of the prize money on constructive trust and was liable to account for these profits.

Further, it was submitted that the legal or equitable obligations which flowed from the arrangements prevented Mr Adams from excluding any member of the syndicate and obliged Mr Adams to act in Mr King's best interest by including him in the winning syndicate. It was further submitted Mr Adams did not have discretion unilaterally to exclude Mr King.

In addition it was pleaded the arrangements had led to a legally binding contract which contained an implied term that all relevant members of the syndicate would participate in any lottery draw conducted by Mr Adams at the factory unless they expressly opted out of the draw. Mr King also pleaded estoppel and a pooling case which again was very densely factual but turned upon mixed funds allegedly being held by Mr Adams, a portion of which it is submitted must have been used to pay for the Winning Syndicate's ticket.

In what objectively should be described as an unimaginative analysis, but very much guided by Dixon CJ, I found no fiduciary obligations, no contract, no estoppel and no pooling on the facts.

On the question of the existence and scope of an alleged fiduciary relationship, the issue was whether, as a relationship falling outside of the usual suspects, the circumstances nonetheless warranted fiduciary obligations be imposed on Mr Adams, and further that the scope of those obligations included Mr Adams being required to include Mr King in the Winning Syndicate. In my view, having the remarks of Sir Frederick Jordan at the forefront on my consideration, the relationship between Mr Adams and Mr King did not rise to a fiduciary relationship which extended to Mr Adams being obliged to include, nor ask Mr King whether he wanted to be included, in the Winning Syndicate. Relevantly, I found:

"Mr King had no difficulty with the suggestion that Mr Adams might purchase tickets on behalf of differing groups of people. The existence of fiduciary duties in respect of one draw could not involve Mr Adams breaching that duty by buying tickets for himself, for himself and family members or for himself and persons outside the factory, in the same or another draw. This is entirely consistent with Dixon CJ's analysis in Van Rassel v Kroon (1953) 87 CLR 298 at 302-303.

As I have already observed, Mr Adams simply agreed to buy lottery tickets with funds contributed by members of the 2016 Core Syndicate. There is no basis for

considering that that undertaking imposed a negative obligation or restriction upon what Mr Adams might do with other money, whether this be his own money or money contributed by other potential participants.

It is the case that Mr Adams necessarily assumed fiduciary obligations when he received money from the 2016 Core Syndicate and bought tickets in “big draws” on its behalf. However, in my view, he discharged this obligation by purchasing a ticket on behalf of the 2016 Core Syndicate in the 5 May draw. He would further discharge his fiduciary obligations to the 2016 Core Syndicate by accounting to its members for the \$13.65 winnings. However, in my view this is where his fiduciary duties relevantly ended.

In my view, it could not be said that this fiduciary obligation prevented him from buying any other tickets in any other draws. Likewise, it could not be said that this fiduciary obligation obliged Mr Adams to include the 2016 Core Syndicate members in every single lottery draw he participated in. It would be inconsistent with the current law to impose any wider fiduciary obligations upon Mr Adams.”⁵⁰

Conclusion

We may not be any closer to reaching judicial coherence on the law regarding fiduciary relationships. Nonetheless, without resorting to clichés, *King v Adams* demonstrates the facts of any given case will, unsurprisingly, always determine the existence and scope of any alleged fiduciary relationship. This is especially so when dealing with relationships outside of the usual suspects. Let the search and debate continue.

⁵⁰ Id at [347]-[50].