KEY POINTS

- The Financial Services Consumer Panel (FSCP) has proposed an amendment to the Financial Services Bill which would introduce a principle that financial services firms should be subject to a fiduciary duty "where appropriate".
- A fiduciary duty already arises where B is entitled to expect A to act with single-minded loyalty to B in providing a service to B but few would expect a profit-orientated bank to act with single-minded loyalty to its customers.
- It is to be hoped that no amendment to the Bill will undermine or erode the existing principle of "consumer responsibility", which means that there is no general obligation for businesses to protect their consumers from making unwise choices.

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Out with "TCF" and in with "fiduciary"?

Adam Phillips, chair of the Financial Services Consumer Panel (FSCP), has announced that the Financial Services Authority's Treating Customer's Fairly (TCF) initiative has failed and should be replaced with a "fiduciary duty". This article considers the power to write rules to impose a fiduciary duty on financial services firms.

THE PROPOSAL

On 23 February 2012, the FSCP proposed an amendment to the Financial Services Bill because:

> "Customers of banks should be owed the same fiduciary duty as those seeking the advice of a lawyer or an MP, with providers prohibited from profiting from conflicts of interest at the expense of their customers…The new Financial Conduct Authority (FCA) should be given powers to make rules to ensure that the industry would have to take their customers' interests into account when designing products and providing advice."

The proposed amendment is to the following effect:

> "In discharging its general functions the FCA must have regard to…the principle that, where appropriate, authorised persons should have a fiduciary duty towards the consumers who are their clients."

CONSUMER RESPONSIBILITY

The introduction of a "fiduciary duty" principle is advocated in the context of the FSCP position paper on "Consumer Responsibility". The paper concludes:

> "In an industry beset with low levels of compliance and…no agreed standards for complex and long term products, there is little case for expecting consumers of financial services to adopt a higher degree of responsibility than is already legally acknowledged…"

The FSCP seems to be interpreting the provision in the existing Bill for the FCA to have regard, in the discharge of its functions, to "the general principle that consumers should take responsibility for their decisions", as imposing a greater degree of responsibility on consumers than they have already. But nothing in the Bill suggests that the "general principle" referred to is anything other than the principle summed up by Baroness Hale in the bank charges case:

> "As a very general proposition, consumer law in this country aims to give the consumer an informed choice rather than to protect the consumer from making an unwise choice."
>
> (*Office of Fair Trading v Abbey National plc and others* [2010] 1 AC 696).

It is to be hoped, not only for consumer protection but also for the sake of compliance lawyers who have to interpret the new legislation, that the FSCP is misinterpreting the proposed requirement for the FCA to have regard to the principle of "consumer responsibility". Surely, it means no more than that the FCA is not to disregard the general principle of law that consumers are to be responsible for their own choices *and* that, accordingly, there is no general obligation for businesses to protect their customers from making unwise choices. Not even fiduciaries have to do that; yet the FSCP's reposte to the principle of consumer responsibility is to propose a principle relating to fiduciary duty.

WHAT IS A FIDUCIARY?

If the lawyers involved in the payment protection insurance (PPI) mis-selling litigation of the past four years have learnt anything from the experience, it is that the word "fiduciary" is often misunderstood. It has been repeatedly brandished in County Court claims as if it were a panacea for PPI policyholders.

Litigation over fiduciary duties in respect of PPI has been a curious phenomenon, given the opportunity for consumers to take their complaints, free of charge, to the Financial Ombudsman Service, which can order banks and brokers to pay compensation up to a limit far exceeding the amounts typically claimed in respect of PPI, simply on the basis of what is "fair and reasonable".

Rather than just looking at what is fair and reasonable, the courts have had to revisit the long-established but by no means straightforward case law on fiduciary duties. The leading case is *Bristol & West Building Society v Mothew* [1998] Ch 1:

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single minded loyalty of his fiduciary" (the judgment of Lord Justice Millet at 18).

Some fiduciary relationships are obvious: trustee and a beneficiary; solicitor and client. However, some are less clear and depend on the degree to which obligations of trust and confidence are undertaken. A broker, for example, is often described as the customer's "agent", and an agent is the paradigm fiduciary; but an agent, properly so called, is a person with authority to act on another's behalf 'so as to affect the principal's legal

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relationship with third parties' (*Bowstead and Reynolds on Agency* (18th Ed) at para 1-001).

Nevertheless, people who are less than agents may still be fiduciaries. Where a person gives consumer advice and information in circumstances where the consumer places trust in that person and relies on his advice by entering into a transaction of some sort that adviser *may* be a fiduciary. However, he will only be a fiduciary if he undertook to give the consumer his undivided loyalty.

Professor Finn, an authoritative voice on fiduciary law, has set out a clear analysis of the position of what he calls the "adviser" or "information provider' in *Commercial Aspects of Trusts and Fiduciary Obligations* (1992):

> 1. "… 'The mere giving of advice does not convert a business relationship … into a fiduciary relationship' (*Warren v Percy Wilson Mortgage and Finance Copr.* 472 NE 2d 364).
>
> 2. The expectations that can be had of the information provider/adviser may vary widely. These, for the most part, would be unrelated to any consideration of loyal service. They will demand no more than honesty, frank disclosure, care and skill or accuracy; and if they attract consequential legal responsibilities at all, these will ensue from doctrines in tort, contract or equity which are quite unrelated to fiduciary law.
>
> 3. The exception required to found a fiduciary finding requires a "crossing of the line" from that merely of honesty, care and skill and the like. It requires a factual matrix which can justify both the entitlement to expect that the adviser is acting and the consequential obligation that he must act in the other's interest in the giving of advice, information etc."

It follows from Professor Finn's analysis that:

- unless the circumstances justify the expectation that the broker will act with undivided loyalty, he will not be a fiduciary *and*
- he need not be classified as a fiduciary in order to be obliged to provide a proper service.

CONFLICTS OF INTEREST

Under the existing law, where a person (A) does take on an obligation of undivided loyalty to another (B), so as to give rise to a fiduciary relationship, A must not allow his personal interests to conflict with B's interests *unless* B gives fully informed consent to A's continuing to act as his fiduciary notwithstanding the conflict (*Boardman v Phipps* [1967] 2 AC 46):

- A is required to disclose any such conflict of interest to B, such as an interest in earning commission from a third party to a transaction in relation to which A is acting for B (*Hurstanger Ltd v Wilson* [2007] EWCA Civ 299).
- A will be liable to B for failure to disclose such a conflict of interest regardless of whether A was acting honestly or not or whether he was in fact unaffected by the commission (*Logicrose Ltd v Southend United Football Club* [1988] 1 WLR 1256 at 1260–1261).

In order to obtain B's fully informed consent:

- A must make full and frank disclosure of all material facts which *might* affect B's consent (*New Zealand Netherlands Society Oranje Inc v Kuys* [1973] 1 WLR 1126 at 1132) and the extent of disclosure required depends upon the sophistication and intelligence of B (*Farah Construction Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 at [107] to [108]).
- A must disclose the nature as well as the existence of the conflict (*Wrexham Assoc Football Club Ltd v Crucialmove Ltd* [2007] BCC 139 at [39]).
- The burden of establishing informed consent lies on the fiduciary (*Cobbetts LLP v Hodge* [2009] EWHC 786).

IS "FIDUCIARY" CLEARER THAN "FAIR"?

In the context of A providing a service for B in relation to B's transaction with C, there may be something to be said for imposing statutory remedies which are similar to those available for breach of fiduciary duty and for imposing on A the burden of proving informed consent. However, the FSCP's proposed amendment would not import any new duty: all it would do would be to require the FCA to have regard to the existing law on fiduciaries, which it has to be said does impose a fiduciary duty (in the language of the proposed amendment) "where appropriate", namely where B is entitled to expect A to act with single-minded loyalty.

If what the FSCP has in mind is a statutorily imposed duty, equivalent to fiduciary duty, in the context of a lender's relationship with its own borrowers, that would seem to go both beyond the scope of the proposed amendment and well beyond the average consumer's reasonable expectations. Few would expect a profit-orientated bank to act with single-minded loyalty to its customers, to the exclusion of its own interests, in its own two-party transactions with those customers.

It is by no means clear precisely what the FSCP has in mind and the lack of clarity in the FSCP's thinking (or use of language) is troubling. Concern about a lack of clarity in communications about financial services is such that the debates on the Financial Services Bill are peppered with remarks such as:

> "There is a lot of competition, but because people cannot understand APRs, it is irrelevant. If repayments were displayed in cash terms, competition would kick in and help consumers" (Justin Tomlinson MP).

This notwithstanding it has long been a requirement of the Consumer Credit Act 1974 (as it is now a requirement of the EU Consumer Credit Directive) that a regulated consumer credit agreement contain a statement not only of the APR but also of the repayments.

If legislators and regulators want lenders to communicate clearly, they themselves need to be clear about what is required. Attempts to introduce precise prohibitions and requirements into the Financial Services Bill, such as a cap on the price of credit, are being rebuffed (see the report stage debate on 23 April), as they were in the debates on the Consumer Credit Act 2006. The 2006 Act introduced powers to intervene in an "unfair relationship", replacing the old concept of an "extortionate credit bargain".

Replacing "extortionate" with "unfair" appears, so far, to have failed to broaden consumer protection (see *Harrison v Black Horse Limited* [2011] EWCA Civ 1128). Would "fiduciary" now succeed where "fair" has failed? ■