

# Table of Contents

Assignment of Proprietary Interests.....	2
Fiduciary Duties.....	3
Express Trusts.....	5
Trustee Duties & Powers.....	7
Trustee Rights.....	10
Beneficiary Rights.....	11
Breach of Trust.....	12
Tracing.....	13
Priorities.....	14
Third Party Liability.....	15
Remedies: Compulsion.....	16
Specific Performance.....	16
Injunctions.....	17
Remedies: Monetary.....	17
Equitable Damages.....	17
Account of Profits.....	18
Equitable Compensation.....	18
Resulting Trusts.....	19
Constructive Trusts.....	20
Bars to Relief.....	22
Table of Provisions.....	23
<i>Conveyancing Act 1919 (NSW)</i> .....	23
<i>Supreme Court Act 1970 (NSW)</i> .....	23
<i>Trustee Act 1925 (NSW)</i> .....	24
<i>Trustee Regulations 2015 (NSW)</i> .....	27

## Assignment of Proprietary Interests

Has the assignor manifested an immediate intention to transfer an existing proprietary right? Norman

### Step 1:

- Identify whether the property is legal or equitable.

### Step 2:

- Has there been any valuable consideration?

### Step 3:

- Is the property presently existing or future property?

### Legal or Equitable property?

- Legal: Enforced under Common law (e.g. title to land).
- Equitable: Enforced by Equity (e.g. equitable charge).

### Valuable consideration

- Must be valuable consideration, by deed without consideration not sufficient.

### Future Property

- Future property is only assignable for consideration Re Lind; Norman; Sheppard.
- It is then held on constructive trust by the assignor when received Norman; Sheppard.
- Present right to receive property in the future Sheppard vs Property that exists in the future Norman (Tree v Fruit: Kitto J in Sheppard).
- Dividends not property until declared Norman.

### Assignment at Law

- Only possible with strict adherence to the formalities / rules.

### Statutory assignment of debt or chose in action [Conveyancing Act 1919 (NSW) section 12]

- Must be in writing.
- Must be absolute (in full not part).
- The debtor must be given notice.
- Includes equitable chose in action FCT v Everitt.

## Equitable assignment of legal property

### For consideration (Agreement to Assign)

- Equity will compel transfer of legal title when valuable consideration is given in return Holroyd v Marshall.
- For property that is assignable, but has been ineffective at law Norman; AND
- For property that is unassignable at law William Brandt v Dunlop.

### As gift capable of assignment at law

- The assignor must have done all *they* ought to do at Law to affect the disposition Milroy v Lord; Corrin v Patton.
- Advantage: Equitable assignment will be at the time of assignment rather than when notice is given to the debtor.
- Equity will recognise when the transaction reaches the point where the assignor can no longer recall the gift (at this point the conscience is bound).

### As gift incapable of assignment at law

- Example: Partial assignment of debt or chose in action.
- Manifestation of an immediate intention to assign interest Norman.
- No Formal requirements.

### Non-Assignable Rights

- Contracts for personal service.
- Bare rights of action Equuscorp.
- Contracts can make contractual rights unassignable Linden Gardens Trust.

## Assignment of Equitable Proprietary Interests

### Assignment of equitable property

- Assignment, Agreement to assign, Direction to trustee, declaration of trust.
- Must be a clear expression of the intention to make an immediate disposition Norman.

### Statutory Formalities

[Conveyancing Act 1919 (NSW) section 23C(1)(c)]

- Assignment of equitable interests or trusts must be in writing.
- Cannot use the statutory requirements as a defence for fraud Last v Rosenfeld.

### Agreement to Assign

- Agreement to assign equitable interest can be written or oral Oughtred; Last; Bangalow.
- Because the interest is held on constructive trust section 23C(2) removes application of 23C(1)(c). Bangalow.

### Direction to Trustee

- No Assignment unless the direction relates to specific property, cannot be in general or be giving an authority to appoint. (Authority vs Direction) Howard-Smith.

# Fiduciary Duties

## 1. Does a fiduciary relationship exist between the Parties?

### Recognised fiduciary relationships

#### Hospital Products: Gibbs CJ, Mason J

- Trustee and Beneficiary.
- Solicitor and Client.
- Director and Company.
- Employee and Employer.

- Partners and Partnership.
- Principal and Agent.
- Tenant-for-life and Remainderman.
- Bailor and Bailee HP: Mason J.
- Stockbroker and client Daly.

### Establishing a fiduciary relationship “on the facts”

#### Hospital Products: Mason J

- Gibbs CJ: Hard to formulate a test for “on the facts”
- Mason J: (in dissent) identified some features describing recognised fiduciary relationships:
  - o The fiduciary “undertakes or agrees to act on behalf of or in the interest of another, in the exercise of a power or discretion that will affect the interests of that person in a legal or practical sense”.
  - o “The relationship gives the fiduciary a special opportunity to exercise a power or a discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary”.
- Subsequent cases have considered Justice Mason’s dissent in determining the existence of a fiduciary relationship “on the facts” Breen v Williams; Pilmer v Duke; ASIC v Citigroup.

#### Daly v Sydney Stock Exchange

- Holding themselves out as an advisor on matters of investment, undertake to give advice, the client relied on that advice, this gave rise to a fiduciary relationship.
- Contemplates investment/financial advice scenarios.
- Gummow J: In Breen suggested that Daly could extend to Medical advice.

#### Breen v Williams (Indicia)

- Lists what other judgments have found point towards but do not determine the existence of a fiduciary relationship.
- Existence of a relation of confidence.
  - Inequality of bargaining power.
  - Undertaking to fulfil a duty in the interests of another.
  - Unilateral power to exercise a power or discretion that may affect the rights of another.
  - Dependency or vulnerability of one party which causes them to rely on another.

### A fiduciary relationship can arise during pre-contractual dealings UDC v Brian; ASIC v Citigroup.

- Fiduciary obligations may, and ordinarily will, exist between prospective partners who have embarked upon the conduct of a partnership before the precise terms of the partnership have been settled.
  - o Contribution and pooling of resources; associated towards common end; mutual confidence that would engage in activity for joint advantage only.
  - o Trying to win financial advice business or giving advice before formal contract has been finalised.

## 2. What is the scope of the fiduciary relationship?

The scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case Hospital products: Mason J; Breen v Williams; Brennan CJ.

### Factors

- How far do the fiduciary obligations extend?
- It is erroneous to regard the duty owed by a fiduciary attaching to every aspect of the fiduciary’s conduct Breen v Williams.
- The scope of the relationship depends on the undertaking Hospital products.
- There must be some link between the fiduciary relationship and the conduct Howard v FCT.

### 3. What are the fiduciary obligations?

**\*Important note:** There is NO duty to act in the best interests of the principal, and there are no positive duties. There are TWO proscriptive fiduciary obligations, these are obligations prohibiting certain conduct Breen. A fiduciary MUST NOT: Breen v Williams; Chan v Zacharia; Pilmer v Duke.

1. Obtain any unauthorised profit or obtain any benefit by reason of or by use of their fiduciary position.
2. Allow the principal's interests to come into conflict with their own interests or a duty they owe to another.

### 4. Has the fiduciary breached those obligations?

#### Profit Rule

- Motive is irrelevant, liability arises as soon as the fiduciary has made a profit by use of or by reason of their position Keech v Sandford; Regal v Gulliver.
- Has the fiduciary made a profit by reason of their position? Regal v Gulliver; Howard v FCT.
- Can be non-monetary benefit Keech v Sandford.

#### Opportunity or Knowledge

- Has the fiduciary made a profit by use of opportunity or knowledge or information gained by reason of their fiduciary position Boardman v Phipps; Chan v Zacharia.

#### Conflict Rule: Duty vs Self Interest:

- A fiduciary cannot put himself in a position where the interests of the principal conflict with his own CBA v Smith; Breen; Pilmer; Chan.

#### Conflict Rule: Duty vs Duty:

- A fiduciary cannot put himself in a position where the interests of the principal conflict with a duty owed to another person CBA v Smith; Pilmer.

#### Actual conflict OR potential conflict:

- Demonstrate Actual conflict; OR
- A real or substantial possibility of the conflict occurring CBA v Smith; Hospital Products; Pilmer; Howard v FCT.
- Applies to both interest v duty AND duty v duty Pilmer v Duke para 78.

### 5. Informed Consent

Informed Consent is a defence to a breach of fiduciary duty Maguire v Makaronis. It requires full disclosure of the nature and extent of the breach, at the time of the breach Wingecarribee.

#### Principles

- A question of fact in all the circumstances of each case, there is no precise formula Makaronis; Re Pauling's; Life Association of Scotland.
- Requires full disclosure of the facts so the principal can decide whether or not to consent Barescape.
- Can depend on the sophistication of the principal Farah Constructions.
- Often will require the person to obtain independent advice regarding the breach CBA v Smith; Makaronis.
- Plaintiff not required to prove lack of consent, it operates as a defence if other elements proven Hasler v Singtel.

### 6. Contracting out

#### ASIC v Citigroup

- Where a contract is the basis of the relationship the contract can remove liability or limit the scope of the fiduciary obligations.
- Principle UNLIKELY to extend to recognised relationships (i.e. solicitor and client); OR
- Where fiduciary obligations arise before the contract is finalised (i.e. UDC v Brian).

#### Other principles

- The fiduciary relationship must conform to the terms of the contract Hospital products; Mason J.
- Potential for a partnership agreement to remove obligations (but not decided) Chan v Zacharia.
- Attempting to contract out of a pre-existing fiduciary relationship will likely amount to breach of the conflict rule Breen; Chan; ASIC.