

EXAM CONTEXT: non-delegation of testamentary power would be relevant if you have a will:

- Might mention Benjamin Order – might be available ex post facto if discovered certainty criteria wasn't adequate;
- *Horan v James* [1982] – even though there is a technical will which says you shouldn't be giving testamentary power to a trustee under a will, it can be validated in most instances where you can prove that what the testator has done is said 'my decision is whatever my trustees decide' – therefore it is my decision.

CHARITABLE TRUSTS

Charitable trusts are express trusts, which exist for a purpose rather than for identifiable beneficiaries. The legal definition of a charity is, in many ways, more expansive than its ordinary application because the legal criteria surpass concepts of benevolence and philanthropy. The focus is upon the articulated aims of a particular entity or institution. Ultimately, the inquiry must focus upon whether it can be said that the activities are carried on in furtherance of a charitable purpose.

Differences to Other Express Trusts:

- No beneficiary principle – Attorney-General to enforce;
- Public trusts;
- Indestructible;
- Courts and Attorney-General have the power of supervision;
- Unincorporated Associations can enforce as a charitable purpose because they have no separate legal entity – most not for profit organisations in Australia are unincorporated.

Statutory Development – 'Charitable' Purpose

Statute of Charitable Uses 1601- Statute of Elizabeth:

This Act sought to refine the notion of a charity in order to distance charitable institutions from their interconnection with religious orders and promote a broader understanding of the difference between charitable institutions and religious orders. The preamble was categorised into four heads of charity:

- The relief of poverty;
- The advancement of education;
- The advancement of religion; and
- Other purposes beneficial to the community.

Gilmour v Coats [1949] AC 426:

Facts:

- A gift to a contemplative order of the Catholic Carmelite nuns, who devoted their lives to solitary prayer, contemplation ad penance.

Issue:

- Charitable purpose?

Held:

- The trust to apply the income of a fund for the nuns was not a charitable purpose because it could not be shown that it conferred any benefit on the public or any section for the public.
- There is no proven or provable benefit to the community if the results of the contemplation are in no way communicated to the public. If religious beliefs are generally held, 'the truth or falsity of religions is not the business of the courts'. The law of charity does not favour one religion over another.
- Lord Simonds held that 'from the beginning it was the practice of the court to refer to the preamble of the statute in order to determine whether or not it was charitable. The objects there enumerated and all other objects which by analogy are 'deemed within its spirit and intendment' and no other objects are in law charitable. That is settled and familiar law.'

Royal National Agriculture and Industrial Association v Chester and Ors (1974) 3 ALR 486:

Facts:

- Edward Chester, deceased, a retired poultry farmer who was a pigeon fancier, left a will bequeathing the residue of his estate to the Royal National Agricultural and Industrial Association ('RNAIA') for the purpose of applying the income to be derived therefrom 'in improving the breeding and racing of homer pigeons'.
- The validity of the gift was challenged by the next-of-kin of the testator. It is common ground that the gift fails for perpetuity unless it is for a charitable purpose.
- The RNAIA, which is itself a charitable body, submitted to the court a wealth of evidence to the extent that homing pigeons have been and can be used in war and peace to carry messages and that their instinctive capacity to return from any point of release to their home lofts is an unsolved problem of scientific interest.

Held:

- Wanstall SPJ saw that it was not whether the income could, consistently with the will, be used for purposes charitable in a legal sense, but rather, whether the will required that the income must be used for purposes that are charitable so that its use for any other purpose would be outside the words: 'in improving the breeding and racing of homer pigeons'.
- The very wording of the bequest indicated that the testator had in mind the close relation between the breeding and the racing of pigeons, and evidence that the racing skill of the birds is the test of their good breeding and explains the necessary interaction of breeding and racing.
- His Honour found that the trust failed because there was no analogous charitable purpose in the preamble.

Council of Law Reporting for the State of Queensland v Federal Commissioner of Taxation (1971) 125 CLR 659:

Facts:

- The Law Reporting Council was incorporated for the purpose of producing law reports of decisions of the Supreme Court of Queensland in book or magazine form.
- The Council distributed its profits not among members, but as grants to the libraries of the Supreme Court.
- The Commissioner of Taxation assessed the Council as being a non-profit company and their objection was disallowed.

Issue:

- Question was whether the Council's income was exempt as income of scientific, charitable or public educational institution.

Held:

- Barwick CJ held that 'the sustenance of the law is a benefit of a material kind which ensures for the benefit of the whole community'.
- The trust was found to be charitable on the basis that the reporting of cases was fundamental to society in the same way that maintenance to roads is, and the promotion of agriculture were fundamental, and within the spirit of the preamble.

Commissioner for Special Purposes of Income Tax v Pemsell [1891] AC 531:

Held:

- Lord Macnaghten reduced the multiplicity of instances of charitable trust to four primary categories.
- His Lordship stated the legal definition of charity: 'Charity' in its legal sense comprises four principle divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under the preceding heads.'

Charities Act 2013 (Cth):

The Australian statutory developments seek to preserve the legal principle, which has evolved with respect to the categories articulated within the preamble to the Statute of Elizabeth, and to add to those principles via the incorporation of additional modifications that seek to modernise and clarify charitable purposes. An individual, a political party, or a government entity cannot also be a charity.

Section 5 – defines 'charity' as an entity that is a not-for-profit entity in which all of its purposes are:

- i. Charitable purposes that are for the public benefit; or

- ii. Incidental or ancillary to, and in furtherance or in aid of, the entity's charitable purposes that are for the public benefit.
 - None of the entity's purposes can be a disqualifying purpose.

Section 12 - extends preamble categories and connect to an underlying theme. Focuses on the spirit and intent of the preamble but also recognises expansion:

- The purposes of advancing health;
- The purpose of advancing education;
- The purpose of advancing social or public welfare;
- The purpose of advancing religion;
- The purpose of advancing culture;
- The purpose of promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia;
- The purpose of promoting or protecting human rights;
- The purpose of advancing the security or safety of Australia or the Australian public;
- The purpose of preventing or relieving the suffering of animals;
- The purpose of advancing the natural environment;
- Any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, any of the purposes mentioned in the above;
- The purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, if:
 - In the case of promoting a change – the change is in furtherance or in aid of one or more of the purposes mentioned above; or
 - In the case of opposing a change – the change is in opposition to, or in hindrance of, one or more of the purposes mentioned above.

Public Benefit

Trusts for the relief of poverty are automatically regarded as being for the public benefit, even if they relate to a limited number of people. The focus on poverty is felt to be intrinsically in the public benefit. All other categories must prove a public benefit, although determination may differ within each particular case.

1. The purpose must affect a sufficiently large number of people in the community to take it outside a private purpose.
2. The purpose must be accessible to a sufficient large number of people in the community.
3. The purpose must have a public quality about it. If the purpose is accessible to a large number of people and still essentially private (e.g. a trust to advance a large private company), then it does not satisfy the public benefit requirement.
4. Public benefit is assumed to exist where the purpose assist the poor or needy because of the inherent benefit to the community and its close connection with the statutory preamble.
5. In the UK and the US, public benefit does not exist with a purpose requiring a substantial political or legal changes, because the underlying rationale is that public benefit exists in sustaining the status quo: *McGovern v Attorney-General* [1982]. This was altered by the High Court in *Aidwatch Incorporated v Commissioner of Taxation* (2010).
6. Public benefit varies according to the charitable division in which it is considered. Essentially however, if the purpose is for education, religion, or otherwise, it is for the public interest if it promotes and disseminates this purpose throughout the community.

7. Public benefit is expanded pursuant to s 6 of the *Charities Act 2013* (Cth) to include other identifiable benefits that are tangible or intangible in nature.

National Anti-Vivisection League v Inland Revenue Commissioners [1948] AC 31:

Facts:

- The main objective of the society was political – the repeal of the Cruelty to Animals Act 1876. The question was whether they could be considered to be for the public benefit and therefore have a charitable purpose.

Held:

- The court held that the society was not established for charitable purposes only and was therefore not entitled to an exemption from tax. An organisation whose aims could be seen as harmful to the public could not be recognised as a charity.
- Seeking an amendment of acts of parliament, or even their repeal, where that is ancillary to one of the established charitable objects in common law did not deprive an organisation of its charitable status. However, this society ‘has chosen to restrict its attack upon cruelty to a narrow and peculiar field, and it has adopted as its leading purpose the suppression of vivisection by legislation’.

NOTE: the *Compton* test has been used to strike down charitable trusts when the potential recipients of the trust funds have been defined by reference to blood relation, employment or contract.

However, the requirement for public benefit does not apply to trusts for the relief of poverty: *Dingle v Turner* [1972]. Additionally, trust for people from a particular geographic locales do not offend the rule, as they can be applied regardless of inherent personal characteristics: *Re Tree* [1948]. Finally, a request by the creator that family members, or others connected by association or contract, be given preference in the administration of the charity, will not invalidate the trust.

Re Compton: Powell v Compton [1945] 1 All ER 198:

Facts:

- The court considered the charitable status of a trust ‘for the education of Compton and Powell and Montague children’.

Held:

- The court held that the trust was not charitable. If the group of beneficiaries is distinguishable from other members of the community by a relationship with a particular individual or entity, whether as a result of family ties, or through contract, or by their employment or by membership of an association, that group will not be considered to constitute the public for charitable purposes.
- The essential requirement of a public charity is that it dispenses aid to all members of the relevant class of beneficiaries irrespective of all factors other than need.
- Lord Greene MR stated a ‘gift under which the beneficiaries are defined by reference to a purely personal relationship to a named propositus cannot on principle be a valid charitable gift. And this, I think, must be the case whether the relationship be near or distant, whether it is limited to one generation or is extended to two or three or in perpetuity. The inherent vice of the personal element is present however long the chain and the claimant cannot avoid basing his claim on it.’

Dingle v Turner [1972] AC 601:

Facts:

- The testator left his residuary estate to trustees to pay pensions to poor employees of a family company.

Held:

- The House of Lords upheld the gift, though all the potential beneficiaries were defined in terms of employment by a common employer.
- The House of Lords made it clear that a trust, which is for the relief of poverty amongst particular group of people, will be charitable and the usual tests of public purposes are inapplicable. The family link between the beneficiaries does not invalidate these trusts.

Commissioner of Taxation v Word Investments Ltd (2007) 164 DCR 194:

Facts:

- Wycliffe Bible Translators Australia ('Wycliffe') was a Christian missionary organisation, which engaged in various religious activities. From 1 July 2000, Wycliffe was endorsed as an Income Tax Exempt Charity.
- Word Investments Ltd ('Word') was founded by members closely associated with Wycliffe, with the intention of using Word to raise money within Australia (through various business ventures, including an investment scheme and funeral home, and give that money to Wycliffe for the carrying out of Wycliffe's purposes.
- Word only gave its profits (less sums retained by it to cover administrative costs) to Wycliffe and other similar Christian organisations to enable the to perform these activities.
- The ATO refused to endorse Word as an Income Tax Exempt Charity. The ATO argued that commercial enterprise entities are not charities, irrespective of whether the enterprise gives its income to charitable institutions. The ATO submitted that where an institution's profit generating activity goes beyond what is incidental or ancillary to the exempt purposes, the institution loses its charitable character.

Held:

- Word was found to be charitable on the basis that its objects were not limited to making money but were directly connected to it. Not only did it have to be direct subsidiary of overarching charity, but has to have objects connected with that charitable purpose. Commercial activities were therefore one element and ancillary to the charitable purpose.
- Argument is if you have a subsidiary corporation with a commercial purpose, provided the objects of that subsidiary cohere with the objects of the broader charity, the commerciality of one of those objects does not preclude it to be charitable if the profits are taken back to the primary charity.
- The majority of the High Court concluded that the failure by Word to limit its activities or other charitable purposes did not preclude the organisation from being characterised as charitable and that to hold otherwise would impose unacceptable limitations on the broad range of charities operating within Australia.

Trusts for the Advancement of Religion

This division represents the impact of history upon charitable trusts. To come within this division, it must be shown that the particular institution is actually a religion. The criteria are as follows, as per *Church of the New Faith v Commissioner of Pay-roll Tax* (1983):

1. Belief in a supernatural being, thing or principle; and
2. The acceptance of canons of conduct in order to give effect to that belief.

Church of the New Faith v Commissioner of Pay-roll Tax (Vic) (1983) 154 CLR 120:

Facts:

- Under the Victorian Pay-Roll Tax Act 1971, there was an exemption from tax payable under the Act for wages paid by a religious institution.

Issue:

- The question considered by the High Court was 'whether the beliefs, practices and observances accepted by Scientologists, are properly to be described as a religion'.

Held:

- The High Court held that they were. The definition of religion should not be confined to theistic religions. Mason and Brennan JJ identified two criteria of religion:
 - Belief in a supernatural being, thing or principle; and
 - Acceptance of canons of conduct in order to give effect to that belief.
- Canons of conduct, which offend against ordinary law, will not be recognised as a religion. Mason and Brennan JJ further stated that 'religious belief is more than a cosmology; it is a belief in a supernatural Being, Thing or Principle. But religious belief is not by itself a religion. Religion is also concerned, at least to some extent, with a relationship between man and the supernatural order and with supernatural influence upon his life and conduct'.

Trusts for the Advancement of Education

Trusts for purposes that promote learning in a broad sense will be upheld as charitable gifts. Gifts to founding or supporting of schools or other institutions of learning fall within this category; it also includes gifts for school buildings, scholarships, professorships and prizes.

A wide variety of fields of study have been recognised as advancing education, including practical legal training, dramatic art, natural history and chess playing.

Education is taken to mean the dissemination of knowledge rather than simply the increase of knowledge. There are three primary requirements to prove under a trust for the advancement of education:

1. The purpose is learning within a recognised field. The inclusion of sport within the definition of education has been a result of the changing perspectives concerning education: it is now thought to encompass mental and physical development.
2. The purpose must be for the actual advancement of education. This means that the trust must promote rather than stifle education.
3. The purpose must be for the advancement of education, therefore knowledge or information must be disseminated amongst a sufficiently large portion of the public; private education is not eligible. Furthermore, the purpose must advance desirable public education and not education that is frivolous or irrelevant.

Re Shaw [1957] 1 All ER 745:

Facts:

- George Shaw proposed a trust in his will to promote a 40-letter alphabet.

Held:

- The trust was found not to be charitable. Harman J considered that an element of teaching was essential to the validity of a trust for educational purpose and that this trust was merely the increase of knowledge and its objectives could only be achieved with a change in law.

Attorney-General (NSW) v NSW Henry George Foundation Ltd [2002] NSWSC 1128:

Facts:

- Trust to promote the teachings, philosophies or books of Henry George.

Held:

- May be charitable notwithstanding the fact that single taxpayers may have the ultimate aim of convincing the legislature that the tax system should be changed.
- However, where the purpose of the trust goes significantly beyond an educational focus, a different result may follow. His Honour nevertheless concluded that the dominant purpose of the trust was charitable even though the ultimate purpose of this education may only be fully realised by legislation.

Trusts for Political Purposes

Many organisations have strong political purposes as their aim is to achieve political reform – e.g. Green Peace, Amnesty International – campaigning against the framework and attempting to stop the progression of particular projects or activities that can have an impact on the environment. Should we regard these bodies/organisations as charitable?

A trust will be deemed to be political when it has the primary purpose of changing the law: *Anti-Vivisection Society v Inland Revenue Commissioners* [1948] [page 122].

Aid/Watch Incorporated v Commissioner of Taxation of the Commonwealth of Australia (2010) 241 CLR 539:

Facts:

- Aid/Watch sought to promote the most effective means of delivering Australian and multinational foreign aid of relief of poverty.
- Aid/Watch argued that it came within the first, second and fourth categories of *Pemsel* (relief of poverty, advancement of education, and other purposes beneficial to the community).

Held:

- The majority of the High Court found that Aid/Watch was concerned with promoting the effectiveness of Australia and multinational aid provided in foreign countries by means of improved investment programs, projects and policies.
- The court decided that in Australia, there is no general doctrine, which excludes from charitable purposes, 'political objects'. The court held that the concern of an attempt by Aid/Watch to promote the effectiveness of aid delivery was clearly aimed at the relief of poverty and that the promotion and generation by lawful means of public debate about matters affecting the better use of and delivery of Australia aid was a matter falling within the fourth *Pemsel* head.
- The court was more prepared to overlook the political element given the primary to the connection against the relief of poverty. The court felt that it was a relief against poverty and the power of that category was overwhelming of the political connectedness.

McGovern v Attorney-General [1982] Ch 321:

Facts:

- A trust for Amnesty International, the purpose of the organisation was being to secure human rights, was held to not be charitable.

Held:

- Slade J concluded that a political trust was a trust where the primary object was to secure changes to the law, and that the objectives of Amnesty International came within this definition.
- His Honour found that although a trust set up for the relief of human suffering and distress would be capable of being charitable in nature it would not be charitable if any of its main objects were of a political nature that: trusts for the purpose of seeking to alter the laws of the United Kingdom or a foreign country or persuading a country's government to alter its policies or administrative decisions were political in nature; and that, accordingly, the object of the trust to secure the release of prisoners of conscience by procuring the reversal of governmental policy or decisions by lawful persuasion was of a political nature and since that object affected all the trusts of the trustee, the trust was not a charitable one.

Trusts for the Relief of Poverty

In order to be valid as a gift for the relief of poverty the law does not require that the persons to be benefitted should be destitute, or even on the border of destitution: *Re Gillespie* [1965]. Rather, a trust will relieve poverty when it provides money to those who would have to 'go short' because of their financial status: *Re Coulthurst (dec'd)*.

Trusts with Mixed Charitable and Non-Charitable Purposes

The equitable jurisdiction recognises a limited capacity to sever non-charitable objects from a charitable trust. If the non-charitable element cannot be severed, the trust will fail.

s 7M of the *Charities Act 1978* (Vic) covers this area → s 7M(2) gives effect to the trust so that no application of the trust funds are deemed to have been directed or allowed to any non-charitable and invalid purpose.

Where a trust is non-charitable, a court may apply the cy-pres doctrine to uphold the gift in circumstances where the gift can be applied for a purpose which is similar or as near as possible to that intended by the settlor.

Compendious gifts include gifts for 'objects of benevolence and liberty': *Morice v Bishop of Durham* [page 115]. If the gift is worded to give the trustee a discretion to choose between charitable and non-charitable purposes, the gift will fail.

Enforcement and Administration of Charitable Trusts:

- General Administrative Schemes;
- Cy-pres Schemes;
- Initial Impossibility;
- Supervening Impossibility;
- Satisfaction of Original Purpose;
- Statutory Powers.

Cy-Pres Doctrine:

The cy-pres doctrine enables a court to authorise an alteration to the purposes of a trust in order to produce a valid charitable trust. In applying the doctrine, the court must apply the trust property for a purpose as near as possible to that stipulated by the settlor in the initial gift. The underlying rationale is that the settlor's primary intention is to give to charity and not for some private purpose, and this intent should be upheld.

A distinction should be drawn for the purposes of the doctrine between:

- Initial impossibility, where it is impracticable or impossible from the outset to carry out the terms of the trust; and
- Supervening impossibility, where the gift takes effect according to its terms, but it later becomes impossible or impracticable to enforce the trust according to its terms.

Initial Impossibility:

Where a gift for charitable purposes fails at inception, the gift can be applied cy-pres provided the original gift exhibits a general charitable intent. This means that the settlor must have shown an intention to give to charity and this intention supersedes the intention to give for the particular purpose specified in the original disposition.

For cy-pres to be available, it is not necessary that actual compliance with original terms be possible; it is sufficient that the terms have ceased to provide a suitable and effective method of using the trust property. When directing a cy-pres scheme, the court must act in accordance with the spirit of the trust to apply the property to the charitable purpose in a presently effective and practical way.

Attorney-General (NSW) v Perpetual Trustee (1940) 63 CLR 209:

Facts:

- The testator left a farm and nearly 40,000 acres of land for the establishment of 'a training farm for orphan Australian lads'.
- In the opinion of a pastoral inspector and valuer, it was not practicable to use the property for that purpose.

Held:

- The High Court held, by majority, that the testatrix had shown a general intent to settle her property for charitable purposes, and this charitable motive was not limited to the specific gift she had made.
- Dixon and Evatt JJ made it clear that the general charitable intent required no more than a purpose wider than the execution of a specific plan.
- A finding of general charitable intent allowed the court to apply the property cy-pres and thereby, render valid a scheme selected by the court.

Unincorporated Associations

A non-charitable purpose trust can be validated as a gift to all present and future members of an unincorporated association. Unincorporated association is not a separate legal entity. This requires capacity to distribute to every member along with intention not to create a trust, the number and disposition of the members of the association, the subject matter of the gift and the capacity of the members to put an end to the association and distribute the assets.

NOTE: wording is critical – the courts have a disinclination to validate what is in essence a non-charitable trust by arguing that it goes over to the members, because members oscillate. The whole idea is that you are trying to support the objectives rather than current membership.

ROADMAP:

1. Is the express trust valid?
 - Was there an intention to create a trust? Answered by an intention to separate legal and equitable ownership. That means we intend that a third party have a property right, which is enforceable against the owner of the trust property. Owner of the trust property is subject to extensive legal and equitable obligations.
 - Really have to have intended to create the trust at the time of creation.
 - If we have an intention to create a trust, has there been complete constitution? Depends on the type of trust you are creating:
 - Did I intend to create a trust by declaration? Meaning, declaring that I or a third party are trustee – if yourself, the only requirement is that the declaration be clear and consistent with the intention to create a trust (not idle and loose conversation).
 - If declaring a third party then the declaration itself is insufficient – you need to transfer trust property to a third party.
 - Trust by transfer – if you are wanting this there has to be (if land) in order to obtain ownership, the trustee has to receive legal ownership of the property (or become registered or if personal property, has to be delivered to them/funds transferred). These requirements support the intention that the third party act as trustee.
 - Determine compliance with s 53 – all about timing and writing.
 - If it is land, and it is a declaration of trust, *DSS v James* gives us limited application to say that our declaration can be manifested and proved by writing after the fact.
 - If trust property is an equitable interest, declaration would have to be in writing.
 - If it involves a disposition to a third party, it has to be in writing.
 - Ask: when was the trust created, and did they write it up at that time?
 - Clarity – must make sure that the trust property itself that you've given/determined is clear. You can be reasonable with this, but you have to be clear.
 - Uncertainty or no trust property or no trust property vesting now will be problematic.
 - Say here you have a problem because you haven't identified the beneficiaries. Your trust is half set up – what will happen if you fail that certainty? It will revert back under an automatic resulting trust to the settlor or the estate.
 - Is it a purpose trust?

FIDUCIARY RELATIONSHIP

STEP 1 –

- IS THERE A PRESUMPTION OF A FIDUCIARY RELATIONSHIP?
 - There is no comprehensive or set definition of a fiduciary relationship. Fiduciary relationships supervise against the exploitation of vulnerable parties within a commercial/personal relationship.
 - Classical commercial areas where pre-established fiduciary relationships exist:
 - **Trustee and beneficiary (all trustees are fiduciaries):**
 - Implied automatic – very strong duties because vested with trust property. Applies to both express and constructive trustees.
 - *Keech v Sandford (1726)*.
 - **Solicitor and client:**
 - Implied automatic – due to the vulnerable position in which a client is generally placed.
 - *Farrington v Rowe, McBride and Partners [1985]*.
 - **Director and corporation:**
 - Implied automatic – director owes fiduciary duties to company, but not to the shareholders. No conflict and no profit rule are strictly enforced.
 - *Regal (Hastings) Ltd v Gulliver [1967]*.
 - **Partnerships:**
 - Implied automatic – duties arise due to the mutual confidence partners expect from each other in working towards the joint advantage.
 - Covers both the conduct of the business as well as assets.
 - *United Dominions Corporation v Brian Pty Ltd; Chan v Zacharia (1984)*.
 - **Employer and employee:**
 - Not automatic – generally regulated by contract and applicability will depend on the particular circumstances.
 - May cover situations where agent holds a representative role and is therefore bound to put the interest of the principal ahead of his or her own.
 - *McKenzie v McDonald; Reading v R [1951]*.
 - **Doctor and patient:**
 - NO fiduciary relationship – UNLESS doctor takes advantage of their position.
 - Usually covered by tort and contract.
 - **Banker and customer:**
 - NO fiduciary relationship – UNLESS bank manager creates in the customer an expectation that it will provide financial advice, that manager may be held to owe fiduciary duties: *Commonwealth Bank v Smith (1991)*.

Step 2 –

- DO THE FACTS SHOW CHARACTERISTICS OF A FIDUCARY RELATIONSHIP (FIDUCIARY PRINCIPLE):
 - Generally distinguishable by the following features:
 - Vulnerability – arising through trust, loyalty, and confidentiality between the parties.

- The fiduciary has undertaken to act in a representative capacity.
 - The fiduciary has a unilateral power to affect the weaker party.
- The weaker party legitimately expects that the stronger party will look after their legal/financial interest:
- *Hospital Products Ltd v United States Surgical Corporation [1984]* – ‘The critical feature of those relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of that other person in a legal or practical sense’.
- A court may impose a fiduciary relationship upon a set of circumstances:
 - In all cases, the individual circumstances of the case are predominant in determining whether there is a fiduciary relationship.
 - Whilst there are categories of presumed fiduciary relationships, these must be proven and the scope of the relationship determined.

STEP 3 –

- RELEVANCE OF AN EXISTING LEGAL CONTRACT – CONSIDERATION OF COMMERCIAL RELATIONSHIPS.
 - Is there an existing contract, which may already protect parties to the transaction?
 - Commercial contracts typically place parties on opposite sides of a transaction, and hence they are entitled to act in their own interest. The courts are unlikely to impose a fiduciary relationship as this goes against the duty of loyalty, which forms the core of the fiduciary principle.
 - A commercial contract assumes that each party has the capacity to protect their own interests – and the equitable jurisdiction should not be acting paternally to look after a party when they can protect themselves within the terms and provisions of the contract.
 - *Pilmer v Duke Group Ltd (2001)*.
 - Is there a commercial nature to the parties/problem? Is there a profit motive where the parties are acting bona fide and are at arms length?
 - Courts are generally reluctant to construe a fiduciary relationship from the circumstances of particular commercial dealings, particularly where there is a profit motive and the parties have dealt with each other at arm’s length and are bona fide.
 - If the parties have entered into an agreement to make a profit, it may be inappropriate to impose fiduciary obligations, which alter the character of the agreement.
 - *LAC Minerals Ltd v International Corona Resources Ltd (1989)*.

STEP 4 –

- HAS THERE BEEN A BREACH OF FIDUCIARY DUTIES?
 - Duties per Dean J in *Chan v Zacharia (1984)*
 - **DUTY 1** – A fiduciary must avoid a conflict of interest. A conflict of interest can arise in three situations:
 - A. Where a fiduciary enters into a transaction which constitutes a direct conflict;
 - B. Where a fiduciary enters into a transaction in which there is a substantial possibility of a conflict; and

- C. Where a fiduciary acquires knowledge or information during the course of acting as fiduciary and makes a profit from it.
- **DUTY 2** – Duty to account for any benefit or gain obtained or received by reason of or by use of the fiduciary position (account for all profits flowing from any conflict).

STEP 5 –

- THIRD PARTY LIABILITY?
 - **A. Assisting with the Fiduciary's Wrongful Design:**
 - A party who has received property in consequence of a fiduciary's breach of obligation may be held personally accountable as a constructive trustee. The levels of knowledge are restricted to the *Baden* scale:
 1. Actual knowledge;
 2. Wilful blindness;
 3. Wilful and reckless failure to make inquiries that an honest and reasonable person would;
 4. Knowledge of circumstances that would have indicated the facts to an honest and reasonable person;
 5. Knowledge of circumstances, which would have put an honest and reasonable person on inquiry.
 - A stranger can be held accountable if:
 1. The property is trust property'
 2. The stranger must hold or have held the trust property beneficially: *Agip (Africa) Ltd v Jackson* [1992];
 3. The recipient must have received the property with the requisite degree of knowledge (*Baden*).
 - *Consul Developments Pty Ltd v DPC Estates Pty Ltd* (1975).
 - *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007).
 - **B. Knowing Receipt or Dealing with Fiduciary Property:**
 - A stranger who knowingly assists in a breach of a fiduciary duty is accountable as a constructive trustee. It is not the receipt of property but rather the knowledge of the stranger about the dishonest and fraudulent design.
 - Requirements are as follows:
 - A breach of trust or other fiduciary duty;
 - Breach must be proven to be fraudulent and dishonest: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*.
 - Third party must have knowingly assisted in the fraudulent and dishonest breach.

STEP 6 –

- HAS THE BREACH BEEN VALIDATED BY FULL DISCLOSURE AND INFORMED CONSENT?
 - Fiduciaries will be exonerated from liability if they obtain the fully informed consent for their actions from their beneficiaries, who for this purpose must be adults of sound mind: *Queensland Mines v Hudson* (1978).
 - Consent may be implied through the parties' acquiescence – implied consent can only exist where the beneficiaries have full knowledge of relevant facts and acquiescence.
 - Or it can be action.

- **Corporate disclosure** – there are strong indications that effective disclosure can occur from the company only in a general meeting. If, however, the articles of association of a company so provide, disclosure may be made to the directors of a company: *Queensland Mines v Hudson* (1978).

STEP 7 –

- WHAT REMEDIES ARE AVAILABLE?
- **Equitable Compensation:**
 - Only available in the exclusive jurisdiction as it supports loss flowing from the breach of an equitable obligation.
 - The objective is to place the innocent party, as nearly as possible, in the position in which he or she would have been had there been no breach of duty.
 - Equitable compensation for breach of fiduciary duty or trust is assessed at the time of trial, with the full benefit of hindsight. It can also be awarded on terms. *Re Dawson* [1996].
 - Brickenden Principle: a breaching fiduciary should be liable for all consequential loss flowing from the breach of duty.
 - Lord Cairns Act Damages:
 - Endows equity with additional power to make a damages award.
 - Is currently embodied in s 38 of the *Supreme Court Act 1986* (Vic).
 - **RULE**: the assessment of LCA damages is that the measure of damages is to be, as far as possible, that amount of money which will put the injured party in the same position they would have been in had he not sustained the wrong: *Livingstone v Rawyards Coal Co* (1880).
 - Granted in addition to or in substitution for injunctive relief. This gives the court greater scope for imposing a damages award – they may be assessed with regard to all damage that has occurred in the past and is likely to occur in the future.
 - Can be awarded whenever the court has jurisdiction to ‘entertain’ an application or an injunction or specific performance: *Jaggard v Sawyer* [1995].
- **Account of Profits:**
- PICK ME WHEN THE FIDUCIARY HAS MADE A PROFIT FLOWING FROM A CONFLICT.
 - **NOTE** – cannot be awarded damages and an account of profits, as the two forms are mutually exclusive: *Acme Office Service Pty Ltd v Ludstrom* [2002].
 - Does not provide the plaintiff with a remedy, but enables the plaintiff to identify and quantify any deficit in the trust fund and proceed to seek the appropriate means to make good such a deficit.
 - The aim of an account of profits is to strip a defendant of profits dishonestly obtained and which would be unconscionable to retain, whether or not the principal has suffered a loss commensurate with the fiduciary’s profit: *Dart Industries Inc. v Décor Crop Pty Ltd* (1994).
- **Constructive Trust:**
 - Constructive trust is a proprietary remedy, conferring priority on the plaintiff over the defendant’s general creditors. There are three basic

requirements to establishing a constructive trust where there is a breach of fiduciary duty:

1. Breach of fiduciary duty – breach of contract alone is insufficient to generate constructive trust.
2. Proprietary connection.
3. Bona fide third parties and tracing – the property must be capable of being traced. If it has passed into the hands of a bona fide third party purchaser they may be no property over which the constructive trust can apply.

HAS THERE BEEN A:

- A) Misappropriation of an opportunity by a fiduciary:
 - *Boardman v Phipps* [1967];
 - 'A constructive trust ought not to be imposed if there are other orders capable of doing full justice' - *John Alexander's Clubs Pty Ltd v White City Tennis Clubs Limited* [2010].
 - If a money remedy secured by a lien would do full justice, the court will award in favour of a constructive trust.
- B) Fiduciary receipt of bribes and secret commissions:
 - Cases where the fiduciary makes a bribe or received a kickback. This is always a breach of fiduciary duty as it breaches the conflict rules.
 - If a fiduciary misappropriates an asset which the fiduciary had in his or her care, or was obligated by direction of the plaintiff to acquire for the plaintiff, then it is obvious that a constructive trust arises: *Lister & Co v Stubbs* (1890).
 - *Attorney-General for Hong Kong v Reid* [1994] – as soon as a secret commission or bribe is received by the agent, the fiduciary holds is as constructive trustee; if the property decreases in value, the fiduciary must pay the difference between that value and the initial amount.
 - Rejected *Lister* – did not like the fact that it allowed the errant fiduciary to keep any extra profit he makes.
- **Tracing:**
 - Where you need to follow trust property into a substitute state. The claimant holds the original property and those rights are transferred when that property is substituted for new property.
 - A) Into a mixed fund:
 - The fiduciary's money goes first and then the claimant's money. Claimant has propriety over a recipient who had notice of the claimant's beneficial interest.
 - Where there are two claimants, they share proportionately (*pari passu*).
 - B) Trustee mixing trust money with own money:
 - The first money that is deemed to be withdrawn is that held by the trustee.
 - Equity assumes that the trustee acted honestly and reasonably and has withdrawn their own money first.
 - C) Tracing to third persons:
 - Where a third party receives property in circumstances short of a bona fide purchase, they may be liable as constructive trustees.

- Monies spent on renovation, repayments of debts and other non-assessable items are not recoverable.
- **Specific Performance:**
 - Compel the defendant to perform legally enforceable obligations. Can be awarded for an actual or anticipatory breach. The court must determine if the defendant's breach is repudiatory. Requires:
 1. Breach of an enforceable contract;
 2. Damages must be inadequate;
 3. Plaintiff must be ready and willing.
 - Court will not grant for:
 - Contracts requiring constant supervision: *JC Williamson Ltd v Lukey and Mulgolland (1931)*;
 - Contracts for personal services: *CH Giles & Co Ltd v Morris [1972]*.
 - Where the plaintiff has acted unfairly in enforcing the contract.
 - Where it would cause hardship to either the defendant or third parties. Hardship must amount to an injustice: *Patel v Ali [1984]*.
 - Where the contract is uncertain (incompleteness, obscurity, illusory nature of a promise).
- **Injunctions:**
 - Injunctive relief will only be available where there is no adequate remedy at law and the plaintiff's rights have been infringed.
 - It must be 'just and convenient' for the Court to grant an injunction. 'Just and convenient' is so expansive that it allows injunctions to be granted or for final relief to be granted. Types of injunctions include:
 - Prohibitory injunctions – preventing a party from performing a particular act.
 - Mandatory injunction – compelling a party to perform an act.
 - Ex parte/inter partes injunctions – where an injunction is granted to one party in the absence of another or to an interested person who is not a party.
 - Quia Timet injunctions – injunctions against apprehended (as opposed to actual) wrongs.
 - Interlocutory injunctions – an order to preserve the status quo between parties involved in litigation (think interim).
 - **NOTE** requirements here: a prima facie case, balance of convenience, likelihood of injury and undertaking of damages.
 - Mareva Orders – an interlocutory injunction with the specific aim of preserving assets so that the infringement of the court process can be protected.