

# MLL405 ANSWER PLANS

## Equity & Trusts

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# TOPIC 2.1 – UNDUE INFLUENCE

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## STEP 1. What is undue influence? / And does Undue Influence apply to the facts?

- **Ask:** Has there been something which prevents a party from exercising free judgement/free will? If absence of free and voluntary will/consent = UNDUE INFLUENCE!
  - Focus is all about **VOLUNTARY CONSENT** of the party giving the benefit
  - Can involve cohesion, presumed relationship, proven relationship or TP's.

**Limits:** equity does not intervene to protect people from unwise or unreasonable transactions made with informed free will → **Siwicki v NAB [2010] VSC 547**

- (ie. Does not protect people from being stupid)

**IN EXAM** → In the facts at hand it is likely that it be seen that undue influence has occurred as **x (state party unable to voluntarily consent)** has been prevented from exercising **his/her** free judgement **Sexton v Titiro Trustee Company**.

## STEP 2. Which category of undue influence? (pg 15 notes)

### Category 1. Actual Undue Influence

- Must prove party was actually cohesion by other party (physically, economically ect)

### Category 2. Presumptive Relationship, Undue Influence

- Presumed relationship of influence, automatically attracted protection

### Category 2B. Proven Relationship, Undue Influence

- No actual pressure, the relationship not within presumed category
- Relationship **proven** to have influence

\***Rebuttal** to Category 2 & 2B – Independent legal advice

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Categories in detail...

### Category 1. Actual Undue Influence


- Must prove party was actually cohesion by other party
  - Physically intimidation, economic pressure, violence and threats.
  - **Farriers' Co-operative Executors v Perks**: Threats of violence by husband to wife amounted to UI
- The party claiming relief must show:
  - Such an **INFLUENCE** existed;
  - That it has been **EXERCISED**;
  - That the transaction **RESULTED** from that influence; and
  - That the transaction was manifestly to his/her **DISADVANTAGE**

## Category 2. Presumptive Relationship, Undue Influence

### Presumed special relationship of influence

- Automatically attracts protection
- Presumed special relationship = where one party has trust and confidence in the other, and in such a relationship it would not be natural for one party to give to another.

### Specific categories where presumption of influential relationship arises:

- 
- If fall under one of below categories = presumed relationship
  - If NOT, then need to move to category 2B

#### - **Child to parent**

- Includes anyone with a parental role such as a guardian.
- This relationship remains present until the emancipation of the child which is not assumed based on age or independence but IS PROVEN BY the parents: **Lamotte v Lamotte**
- Not from parent to child – this is allowed
- But may arise from child to parent: **Powell v Powell [2002]**
  - Idea that child is still under parental control/ relationship influential.

#### - **Client to solicitor**

- Relationship does not need to be permanent, or long term
- Can exist for merely one of two matters and still be caught by category

#### - **Patient to doctor**

- EG: patient transfers an asset (share) to doctor, as the patient is really happy with the doctors help. The assumption is that, even if the patient wanted to do it and give doc asset, the patient did not consent as the patient was so overwhelmed by the nature of the relationship that the benefit to the doctor from the patient is set aside.
- **Haskew v Equity Trustees [1918] VLR 571**: Can be seen to apply to the influence the attendees have over a sick person in their care.

#### - **Trustee and beneficiary**

- Where there has been an exercise of free and independent will on the part of the beneficiaries the presumption can be rebutted: **Whereat v Duff [1972] 2 NSWLR 147**

### Burden = Defendant

- Once the presumption is raised, it's up to the defendant to rebut it.
- Defendant must disprove the presumption of influence.

### How can the defendant rebut the presumption?

- Only way is by the defendant proving the plaintiff exercised "Free judgement" and "Acted voluntarily" despite the influential relationship.
  - **PROOF IS: plaintiff obtained independent legal advice**
  - EG: in case where made to sign Prenup, defendant can rebut by stating the other party got independent legal advice about it, and as a result acted freely.

**IN EXAM →** As the relationship at hand is **(state relationship)** it falls into one of the specific categories where presumptive influence arises. Thus, it is upto **(defendant)** to rebut the presumption, and here it doesn't seem possible given that no identifiable legal advice was sought by the plaintiff.

# TOPIC 2.2 – UNCONSCIENTIOUS DEALINGS

(pg 12 notes)

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Unconscientious dealing is distinguished from undue influence as it is not concerned in any way with the quality of the consent of the weaker party but rather with the conduct of the superior party

## STEP 1. Was there unconscientious dealing? Define... (pg 25 notes)

**Ask:** Has the stronger party taken advantage of the other weaker parties “special disability”?

- IF YES, then Unconscientious Dealings
- But, NEED TO MEET 3 ELEMENTS OF UNCONSCIENTIOUS DEALINGS

Overview of Unconscientious Dealings:

- focusses on **BEHAVIOUR OF THE STRONGER PARTY**
- Stronger party **knowingly taken advantage of another party’s special disability**. To exploit such a disability there needs to be an awareness of it – **FOCUS ON STRONGER PARTY TAKING ADVANTAGE.**
- NOT concerned with the consent of the weaker party
- IS concerned with the actions of the stronger party
  - EG: if you as the stronger party has taken advantage of a recognised disability (as recognised by equity) of the other transacting party = the stronger party has generated unconscientious dealing.

**IN EXAM →** Unconscientious dealing seems to be likely to have occurred given the facts at hand, as it seems **x (stronger party – name)** has taken advantage of **y (weaker party – name)** who has a special disability.

## STEP 2. Are the three elements of unconscientious dealing met? Identify and discuss... (pg 25 notes)

3 elements of unconscientious dealing were outlined in **Amadio**

1. The existence of a special disability:
2. The stronger party (defendant) is aware of the existence of the disability
3. The stronger party exploits the disability

Continued in detail, next page...

### 3 elements of unconscientious dealing, in detail...

#### 1. The existence of a special disability:

- It must be shown that a special disability exists.
- What constitutes special disadvantage may include;
  - **Information imbalance** → in **Amadio** where Bank had info re son's business performance which the other party (parents) did not have.
    - A **special disadvantage** had been created by 'reliance on' and 'confidence in' their son
  - **Son exploited weakness of his elderly, trusting, mother who lacked understanding and limited education and had strong emotional attachment with son** → **Vandenbergh**
  - **Emotional attachment/emotional dependency** → in **Louth v Diprose**, The **emotional attachment** constituted a special disadvantage in that it impaired his judgment and **created a situation of 'crisis'**
    - It was noted that Louth was aware of Diprose's special disability and manipulated the situation to her advantage to influence the respondent to make the gift of money to purchase the house
  - **Lack of business expertise** → generally this factor would need to be paired with something else to amount to unconscionability, lack of business expertise in itself may not amount to unconscionability.
  - **Gambling addiction** → **Kakavis** where he had a gambling addiction, Crown was NOT seen to have exploited it and no UD found as it was business.
  - **Gender, culture, literacy and familiarity with English, if independent legal advice was advised or obtained.**
- Mere inequality of bargaining power = not special disadvantage.
- What may constitute a special disability: **Blomley v Ryan**
  - poverty or need of any kind,
  - sickness,
  - age,
  - sex,
  - infirmity of body or mind,
  - drunkenness,
  - illiteracy or lack of education,
  - lack of assistance or explanation where assistance or explanation is necessary.
  - The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-a-vis the other.
  - It does not appear to be essential in all cases that the party at a disadvantage should suffer loss or detriment by the bargain.

**IN EXAM** → To determine whether unconscientious dealing has occurred the three essential elements must be met, as outlined in **CBA v Amadio**. The first element of **special disadvantage** has evidently been met, as the weaker party (**x, state name**) had the special disadvantage **as seen in (refer to case or eg above)**.

## 2. The stronger party (defendant) was aware or likely to have know about the weaker parties special disability...

- It must be established that the other party to the transaction was aware of the disability, or should have been aware (if a reasonable person would have been held to be aware).
  - **ACTUAL**: the other party **KNEW** of the disability under which the weaker party was operating
    - **EG: Louth v Diprose**: It was noted that Louth (**stronger party**) was aware of Diprose's special disability (**emotional attachment**) and manipulated the situation to her advantage to influence the respondent to make the gift of money to purchase the house
  - **CONSTRUCTIVE**: the other party **OUGHT** to have **KNOWN** of the disability under which the weaker was operating
    - **EG: Amadio**: The son took and even the TP bank, ought to have known the fact that the parents (**weaker party**) did not have the same information as the **stronger party, the son**, in relation to the poor performance of the business, as otherwise they would not put their house as security for the mortgage for the son.

**IN EXAM →** The second element is satisfied as the stronger party x (**state name**) knew (as per **Louth v Diprose**), or ought to have known (as per **Amadio**), about the y's (**state weaker party name**) disability. As similarly seen in, (**state a similar case^^**) or more cases pg 26 notes.

## 3. The stronger party exploits the disability

- It must be established that the **stronger party** to the transaction has actually **taken advantage of the disability**, to **obtain an identifiable benefit**.
- Exploitation goes beyond merely knowing about the disability
  - **Louth v Diprose**: It was noted that Louth (**stronger party**) was aware of Diprose's special disability (**emotional attachment**) and **manipulated the situation to her advantage to influence the respondent to make the gift of money to purchase the house**
  - **Amadio**: The son took advantage (and even the TP bank) of the fact that the parents (**weaker party**) did not have the same information as the **stronger party, the son**, in relation to the poor performance of the business **to ensure the parents (weaker party) allowed their home to be used as security to secure overdraft for son's company.**

**IN EXAM →** The final element is that x (**stronger party**) exploited the disability, this is seen here as x (**explain what stronger party did to take advantage of special disadvantage – ref case**).

Thus, as all of the 3 essential elements of unconscientious dealing have been met, it can be held the x (**stronger party**) did act in a way which constituted unconscientious dealing.

# TOPIC 3 – FIDUCIARY OBLIGATIONS & DUTIES

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**General Consideration. For equity based questions keep in mind “equitable maxims”**

It is vital, when answering a question on fiduciaries, to keep in mind the different equitable maxims.

The maxims are:

- Equity only assists those with clean hands (**Black Uhlands v NSW Crime Commission**)
- Equity follows the law
- Equity is equality
- Equity looks to intent, rather than form
- Equity deems that to be done which ought to be done
- Equity acts in personam
- Equity provides no relief if damages are adequate
- Equity will not assist a volunteer (**Redman**)
- Where equities are equal, first in time will prevail
- One who seeks equity must do equity: **Inglis v Commonwealth Trading Bank**

**IN EXAM →** Find a place to slip these in when answering questions. Particularly relevant for ‘remedies’.

## STEP 1. Define a fiduciary relationship?

**IN EXAM →** As outlined by *Mason J*, a fiduciary relationship is one of trust and confidence, where one party agrees to act on behalf of or in the interests of another person and will affect the interests of the other person in a legal or practical sense, outlined in **Hospital Products v United States Surgical Corp**

## STEP 2. Identify who the relationship is between?

**IN EXAM →** The relationship at hand is between X & Y.

## STEP 3. Is the relationship “capable” of being a fiduciary relationship?

Consider is a fiduciary relationship applicable to a particular transaction?

1. **Is it a personal transaction?** If yes, fiduciary relationship will NOT apply.

**IN EXAM →** The relationship at hand between x and y is a personal transaction, thus the fiduciary relationship does not apply.

2. **Is it a commercial relationship, involving financial or economic loss or gain?** If yes, fiduciary relationship possible.

**IN EXAM →** In the facts at hand, the relationship of focus seems to be capable of being fiduciary in nature due to financial/economic loss or gain (which relevant) incurred/suffered by X (principle/beneficiary).

## STEP 4. Is the relationship a fiduciary relationship?

Establish whether the relationship falls under either an “established category” or “non-recognised/established category”, explain why one applies to the relationship at hand and WHY...

### 1. If it is within an established category

#### 1. Trustee/beneficiary (refer to pg 32 notes)

- Trustee holds property on behalf of the beneficiary
  - Trustee has legal title to the property
- The duties of the trustee create the beneficial title
- **Keech v Sanford** - irrefutable presumption that any gain will be held on constructive trust for the beneficiaries.

#### 2. Director/company (refer to pg 32 notes)

- **Regal Hastings v Gulliver** – held that directors under a strict duty not to profit from their position as directors. By investing in a venture which would otherwise be available to their company, even though this was in the best interest of EVERYONE to obtain a profit = still a **breach**.
- **Note:** It is okay to be a director of multiple companies

#### 3. Solicitor/client (refer to pg 34 notes)

- This relationship is considered fiduciary in nature due to the vulnerable position of a client.
- Exists without a formal retainer.
- **Farrington v Rowe** – advised client to invest in company (but lawyer also represented that company) = conflict and a breach
- The solicitor must avoid all conflict of interest (**Farrington v Rowe**).
- Fiduciaries cannot profit from their breach (**Boardman v Phipps 1967**).
- Fiduciaries have a duty of confidentiality and to avoid a conflict of interest – even when Chinese walls present (**Prince Jefri Bolkiah v KPMG**).
- **NOTE:** Parents and Children / Bank and Client = no fiduciary relationship

**IN EXAM** → The relationship between x and y seem to fall under an established fiduciary relationship category, specifically x (state which one). Reason for this is (explain why)... state case.



# TOPIC 4 / 5– Equitable Remedies

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**NOTE:** Remedies **WON'T** be available if the beneficiary **CONSENTED** to the breach.

- On the exam, if it involves a breach of contract (common law) make sure you say that equitable relief only there to exist alongside equity (not over ride it).
- Concurrent jurisdiction – equitable damages only available if common law damages are not.

## STEP 1. What REMEDIES are available?

(refer to pg 46 notes)

Identify which of the follow remedies applied to the facts at hand...

1. **Equitable Compensation**
2. **Lord Cairns Act Damages**
3. **Account of Profits**
4. **Constructive trust** → where the property can be traced.
5. **Injunction**
6. **Specific performance**

**IN EXAM** – Why many plaintiffs such as **x** should be advised to take the fiduciary claims is because they are strongly driven by remedies. In the situation at hand **x** would most likely obtain the following remedy (**state which remedy applies, x**).

## STEP 2. Discuss specific remedy of focus...

### 1. **Equitable Compensation**

“remedy to get loss”

(refer to pg 47 notes)

#### Step 1. Explain what Equitable Compensation is & its aim...

- As cannot get ‘damages’ in equity for breach of fiduciary duty, as damages are purely a common law remedy, can obtain ‘equitable compensation’ in equity or Lord Cairns Act damages in equity instead.
- **Equitable compensation is a loss based, monetary award**
- Aim = To place a beneficiary in the position he or she would have been in had the fiduciary not breached their obligations **Maguire v Makarons**

**IN EXAM** – As **x** (**state beneficiary, x**) cannot claim ‘damages’ in equity, they have the decision to elect from equitable **compensation** or **account of profits** instead.

Equitable compensation is a loss based, monetary award. The aim of this type of remedy is to place the beneficiary (**state who beneficiary is in facts, x**) in the position **he or she** would have been in had the fiduciary (**state who fiduciary is in facts, x**) not had breached their obligations (**Maguire v Makarons**).

## Step 2. Explain how court would 'assess equitable compensation' / apply to facts...

- Case of importance which outlines the general principles which need to be applied when assessing equitable compensation: **Talacko v Talacko**
  - The Court, in its equitable jurisdiction, can only **award equitable compensation for breach of fiduciary duty**.
  - The award of equitable compensation is **DISCRETIONARY**
    - Equity does not need to follow precedent
    - Considers the specifics of the circumstances at hand
  - Equitable compensation is **assessed at the DATE OF RESTITUTION**
    - This means compensation be a higher award, as can consider changes in CPI increases ect since the breach has occurred.
- Case which highlights equitable compensation must be paid out on date of restitution: **Dawson**
  - This means includes increases in market values between the date of breach and the date of recovery

**IN EXAM** – As per **Talacko v Talacko** the general principles which need to be applied by the when assess **x's (state beneficiary, x)** equitable compensation would include the following;

- the court of equity has an inherent and exclusive jurisdiction to make an award of compensation for a breach of equitable obligations (fiduciary duties), thus can possibly award this type of remedy given the facts at hand (**state this if there has been a breach of fiduciary duties**).
- equity will also assess compensation on a **discretionary** case by case basis.
- Further, the court will assess the equitable compensation on the date of restitution, not on the date that **x (state trustee/fiduciary)** breached **his/her** duties.
  - As highlighted in **Dawson**, this means includes increases in market values between the date of breach and the date of recovery will need to be paid by **x (state fiduciary's name) to y (state beneficiaries name)**.

## Step 3. Explain 'scope & capacity' of equitable compensation / apply to facts ...

- **'Brickendon Principle'** has been upheld in the Australian High Court.
  - Thus, the stance in Australia is: IF fiduciary which breaches its obligations/duties should be liable for **all consequences flowing from the breach**.
- **Maguire v Makaronis** affirmed the **'Brickendon Principle'**: highlighted that where a relationship is classified as fiduciary, the delinquent fiduciary should be liable for all loss flowing from the breach, even if it results in the breaching fiduciary being liable for all consequential loss.
  - **CASE ABOVE** → **Lawyer breached fiduciary duties** by loaning former clients \$ and making financial gain. Result: Clients still had to pay back the loan but at the general market rate of interest, not the higher rate the lawyer had attached to the loan as this is a breach of fiduciary duty.
- Restitution in nature – not bound by contributory negligence: **Pilmer**
- Nature of the compensation is discretionary and flexible: **McKenzie v McDonald**

**IN EXAM** – **Maguire v Makaronis** affirmed the **'Brickendon Principle'** and highlighted that where a relationship is classified as fiduciary, the delinquent fiduciary (**state name**) should be liable for all loss flowing from the breach, even if it results in the breaching fiduciary being liable for all consequential loss. Further, even if **x (state beneficiary name)** did contribute to the loss, as per **Pilmer** equity will not accept the influence of contributory negligence in equity.

### 3. Account of Profits

“Remedy to get gain”

#### Step 1. Explain what Account of Profits is & its aim...

- Account of profits requires a plaintiff to recover/disgorge the gain or profits the defendant (breaching fiduciary) has made pursuant to a breach of fiduciary duties.
- Aim of account for profits is **not to provide an additional remedy**, but to reinforce fiduciaries obligations by **taking away any profits obtained through breach of their duty and disgorge the profit to the defendant** **(Dart Industries)**

**IN EXAM** – Account of Profits is a remedy available to the beneficiary **x (state beneficiary, name)**, not with the intention of punishing the breaching fiduciary **x (state breaching fiduciary, name)** but to prevent unjust enrichment (**Harris v Digital Pulse**), and strip the defendant from profits obtained unjustly and disgorge the profits to the defendant **x (state beneficiary, name)** **(Dart Industries)**.

#### Step 2. Explain why the breaching fiduciary should need to be stripped of profits (explain why fiduciary profits were unjustly obtained) ...

**IN EXAM** – As the fiduciary **x (state fiduciary, name)** did **x (explain conduct)**, this is seen as being disloyal and breaching fiduciary obligations, thus any profits stemmed from this breach should be accounted for.

#### Step 3. Explain and apply ‘defence for Fiduciary’ ...

It is up to the defendant to establish that it is **inequitable** to order an account of profits for the **full amount** of profits.

- **Defendant (breaching fiduciary) must be able to argue why the full gain is not completely recoverable** → i.e. ‘it is not equitable for all of the profits to be ordered as some of profits were obtained based on fiduciary’s skills’
- If defendant can prove this (that not all profits were referable to the breach) then could have only proportion of profits accounted for, as per **(Warman International)**

**Warman International**: EE breached fiduciary duties as an EE, but only some profits referable to breach, and others due to own skill, thus not all profits accounted for and only proportion disgorged and given to principle ER.

- If defendant could not prove this, then all profits seen as referable to the breach, then all profits will be accounted for and disgorged to the plaintiff, as per... **Timber Engineering v Anderson**: EE’s breached employment contract and fiduciary duties as EEs and set up business completely based on prev ER’s stuff, thus profits completely referable to breach of fiduciary duties and entire new business held on trust for principle ER.

**IN EXAM** – It is **possible/unlikely** that the defence will be applied in the breaching fiduciary’s **(state name, x)** favour.

- As seen in **Warman** (discuss this if can argue possible and can say not all profits referable to breach, some profits based on skill) **OR**
  - As seen in **Timber Engineering** (discuss this if facts seem like profits are completely referable to breach)**OR**
  - **Digital Pulse.**

## 5. Injunction

**“Court order requiring someone to do something or not to do something”**

**Restraint of trade/employment contracts apply here**

(refer to pg 69 notes)

### Step 1. What is an INJUNCTION?

- Is a type of behavioural remedy
- A court order either RESTRAINING or REQUIRING a party to perform a specific act in order to give effect to the legal rights of the applicant.
- It does not to provide remunerative remedy

**IN EXAM –** In the present facts scenario a it is likely that an injunction will be the relevant remedy to apply, as **x (plaintiff)** is seeking to have **y (other party)** either do something or restrain from doing something (**State which of the two applies given facts scenario**).

### Step 2. What JURISDICTION can grant an injunction?

- **EXCLUSIVE JURISDICTION**
  - o Infringement of an **EQUITABLE RIGHT**
- **AUXILLARY JURISDICTION**
  - o To provide assistant for the enforcement of a legal right
  - o **TWO** threshold requirements: -
    - **(1) CAUSE OF ACTION AT LAW**
    - **(2) COMMON LAW DAMAGES INADEQUATE REMEDY FOR LEGAL WRONG**
      - Q: Is it just in all circumstances that a plaintiff should be confined to his remedy in damages? **Evans v Bertola**
      - Damages will usually be inadequate where a plaintiff seeks an injunction with respect to a chattel with specific value: **Cooks v Rogers**

**IN EXAM –** For an injunction to be awarded for the benefit of **x (plaintiff)** two threshold requirements much be met, firstly that there is a cause of action which here is (**state what the cause of action is**), and secondly that common law damages are an inadequate remedy (**explain why in this scenario they are inadequate and why equity needs to step in – i.e. plaintiff is seeking injunction in respect to chattel with specific value** **Cooks v Rogers**)

## 6. Specific Performance

“Order to fulfil a contractual promise”

THERE MUST BE A CONTRACT TO HAVE SPECIFIC PERFORMANCE

DOESNOT APPLY TO CONTRACTS FOR SERVICES (EMPLOYMENT CONTRACTS)

(refer to pg 78 notes)

### Step 1. What is Specific Performance & Identify who is claim/who is breaching contract?

- A court order that makes someone perform a legally enforceable obligation
- Vendor could be breaching if does not intend to sell land
- Purchaser could be breaching if does not intend to go through with settlement

**IN EXAM** – In the present facts scenario it is likely specific performance would be the relevant remedy give **x's (state plaintiff, x)** desire to get **y (state other party to the contract)** to perform their legally enforceable obligations/s.

### Step 2. What is the basis for specific performance to be sought?

- Non-essential term of that contract or **anticipatory breach**
  - o If it is an essential term usually common law right reversion exists – this usually means a decree of specific performance is not available: **Turner v Bladin**

**IN EXAM** – In the facts scenario **x (state applicant)** is applying for specific performance on the basis of an **anticipatory breach** as (**explain situation** i.e. as he has become aware that the vendor has the intention to give land away and not proceed with settlement).

### Step 3. Are the ‘Jurisdictional Requirements’ met?

- The below 2 jurisdictional requirements must be satisfied for specific performance to be possible...
- **Jurisdictional requirements address whether the court is able to grant SP**

**Jurisdictional requirement 1. There MUST be a ‘legally enforceable contract’** (refer pg 78 notes)

- To enforce a contractual condition by specific performance, there must be an enforceable contract.
  - o Common law contract; or
  - o Equitable contract;
- Enforceable contract only applies to the parties who are privy to it
  - o **Beswick v Beswick**: A wife was able to insist of payment after the death of her husband as administratrix of his estate, rather than as third party to whom her husband wished to benefit
- For valuable consideration: **Roxborough v Rothmans**

**IN EXAM** – For specific performance to be possible, the following 2 requirements must be met; The first jurisdictional requirement is met as there is a legally enforceable contract between **x (state plaintiff)** and **y (state other)**, thus the contracts will only apply to them or (**state other party if another party is privy to it**).

[if cannot identify an enforceable contract see if either of two exceptions apply to enable first requirement to be met... next pg...]

### Step 2.1. Identify who the 'Trustee' is?

- The Trustee MUST be;
  - An individual; or
  - A corporation
- Court of equity will restrain a trustee who is vested in property from dealing with that property other than in accordance with the trust.

NOTE: if someone agrees to be a trustee and then does not want to be anymore, this DOES NOT MEAN THE TRUST WILL FAIL. There will just need to be reappointment (as per the reappointment provisions): **(Mallott and Wilson)**

**IN EXAM** – The first element of a trust is met as there is an identified trustee, in the facts at hand the **trustee is x (state trustee)**.

### Step 2.2. Identify the 'Trust Property'

- Without property there cannot be a creation of a trustee.
- The property must be;
  - capable of being held on trust
  - vested in the trustee
  - identifiable
  - presently existing
    - EG: if you expect that you will get an inheritance under your parents will, you cannot vest this one trust as you yourself are not vested with the property.
  - not condition
- **Property can be;**
  - Real/personal; and Corporeal or incorporeal

**IN EXAM** – The second element of a trust is that there is “trust property”, as without property a trust cannot be created. Here, the trust property is **x (identify what the trust property is)**.

### Step 2.3 Identify either the 'Beneficiary or Charitable Purpose' (Beneficiary Principle)

- There must be a beneficiary or a charitable purpose
  - Attorney-General will enforce a charitable trust
- If there is NOT a beneficiary which is clearly identified, then there is no one to enforce the trust or enforce the duties → thus there cannot be a trust

**IN EXAM** – The third element of a trust is met as there is an identifiable beneficiary **x (state the beneficiary)**, there must be a beneficiary as otherwise there would be no one to enforce the trust of duties.

### Step 2.4 The Trustee must be under Personal Obligation which attaches to the Trust Property

- Conferring property to a trustee and holding the other person is a beneficiary is NOT ENOUGH
  - Need to say that the trustee looks after the property for the benefit of the beneficiary
- The obligations create the property, more so than the actual property itself.

**IN EXAM** – The fourth element of a trust is met as **it is clear that x (state trustee) is holding the trust property (state what it is)** for the benefit of the **beneficiaries (state who they are)**, and thus provides that the trustee is under a personal obligation which attaches to the trust property.

# TOPIC 8 – TRUSTS

## “VALIDITY OF AN EXPRESS TRUST” A PLAN

### Statutory Formalities & Complete Constitution

(pg 122 notes)

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#### 1. Statutory Provisions

##### ‘Writing provisions’

(pg 122 notes)

**NOTE: ONLY APPLY TO TRUST RE LAND & EXPRESS TRUSTS**

#### Overview of which stat provisions apply:

ASSIGNMENT – giving legal and beneficial interest

- If land: s 52 PLA, then s 53(1)(a) PLA
- If property other than land/sub-trust: s 53(c) PLA

DECLARATION – saying holding legal interest (that already have) on trust for someone else, creating a beneficial interest for TP

- s 53(b) PLA

#### STEP 1. Identify what type of trust it is...

- Is it an EXPRESS trust? if NO, s 53 requirements do not apply: as per **s 53(1) PLA**
- Is relating to land? YES then s 53 requirements apply

#### STEP 2. If transferring legal interest/land need to ‘complete legal transfer’

\*only complete this step is LEGALLY transferring land

- **If transferring property by express trust...**
  - o **ASSIGNMENT OF PROPERTY MUST BE IN FORMAL DEED**
- **s52 PLA**: registered deed which transfers the land to the new in rem property owner (this is not about the trust but about the property interest itself)

**IN EXAM:** Given that the settlor (**x**) is transferring his legal interest in land (**his property in..**), legal transfer of the land must be complete under s 52 PLA, assigning the property to **x,y** (**state trustees**) in the form of a formal deed.

**STEP 3. Apply relevant s 53 subsection (either a, b, or c) to ensure TRUST VALIDLY CREATED trust validly created...**

S53(1) PLA	Legal interest Land	Equitable interest land	Legal interest personal property	Equitable interest personal property
Express trust by declaration	(b) DSS v James	(c)	(c)	(c)
Express trust by transfer	(a) Grey v IRC	(c)	(c)	(c)

**OPTION 1. If no trust in place and handing over legal title to tp or changing entitlement to land...**

- **s53(1)(a) PLA:** Property transfer (creating in rem property rights) = then needs to be **created in writing simultaneously** at the **time property was transferred (2 THINGS MUST)**
  - Express trust by transfer

**Timing:**

- Trust created IN WRITING at TIME OF CREATION
  - Writing must be simultaneous with creation of trust
- Settlor needs to indicate IN WRITING the terms of the trust (how the property is to be used – i.e. holding property for me for the benefit of my children)
- No need formal deed here, JUST WRITING

**When (a) applies?**

- Where no trust in place & handing over legal and beneficial title to create a trust
- i.e I own legal title, no trust in place, want to form trust and give legal title to my brother (trustee) to hold on trust for my children (beneficiaries)

**If not simultaneously IN writing?**

- THE TRUST WILL BE VOID

**Adamson v Hayes:** Confirmed s 53(a) is limited to land, and that **changing interests in entitlement to land** comes under s 53(a), thus needs to be evidenced at the time of creation/alteration for alteration to be valid. → HCA extensive review of s 34 WA (same s53 PLA)

**Khouri v Khouri (2006):** Not an immediate declaration, intention to create a trust in the future, falls under → s53(1)(a)

**IN EXAM:** s 53(1)(a) of the PLA must be complied with as the trust is in relation to land and there is an amendment of in rem entitlements (**Adamson v Hayes**)... Thus, the creation of the trust it must be simultaneously **created IN writing**.



# TOPIC 7 – TRUSTS

## “OVERALL ANSWER”

Inc. Trustee duties, rights, breaches, defences ect.

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### ISSUE 1. Express trust/set up property?

#### STEP 1. Is there an express trust? Identify the name of the Trust...

- If so, what type. If not, what other type of legal relationship could it be?

**IN EXAM:** The trust is call (**xy Trust**), which is an **express trust**.

#### STEP 2. Has the express trust been appropriately set up

##### Step 2.1 Are the 4 requirements for a trust present?

**IN EXAM:** The express trust has appropriately been set up if the following four requirements exist; **(if it does not see there is an issue with it being set up properly state – it seems the trust has been set up poperly..)**

##### 1. Is there a **trustee**?

- Note: if the trustee does not want to be a trustee, the trust will NOT be terminated. Under the appointment provisions just need to have an alternative trustee appointed (**Mallott and Wilson**)
- Does not matter that the person steps down, because the express trust is an institution it has created property, thus property will not just be revoked.

**IN EXAM:** Firstly, there must be a trustee, here the trustees are (**Bob and Bill**), they are (**individual trustees** or **Co trustees** or **corporate trustees**).

##### 2. Is there a **beneficiary**, who is identifiable?

- If it is a fix interest trust, the beneficiaries will be defined clearly
  - i.e to x for the benefit of y (beneficiaries)
  - Shareholders, family members x & y, corporations
- If it is a ‘discretionary trust’, the beneficiaries will be defined by the words used (beneficiaries may not be as clearly identifiable)
  - i.e. to all of my friends (hard to identify)

**IN EXAM:** Secondly there are identifiable beneficiaries, here they are (**X and Y**) and they are (**individual beneficiaries**, or **corporation beneficiaries**).

# CHARITABLE TRUSTS

(page 139 notes)

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## Step 1. Define a 'charitable trust'... (pg 139 notes)

- Charitable trusts are express trusts which exist for a purpose rather than for the benefit of identifiable beneficiaries.
- **High court case Attorney-General (NSW) v Perpetual Trustee Co Ltd (1940):**
  - Defined a charity to be a **trust for a purpose**, not for a person (like an express trust)

**IN EXAM:** A charitable trust is defined as existing for a **purpose** rather than for the benefit of identifiable beneficiaries, as per the identification in the High Court in **Attorney-General (NSW) v Perpetual Trustee Co Ltd (1940)**.

## Step 2. Explain brief history of what 'charitable purpose' is... (pg 141 notes)

- Charitable purposes initially defined by **Statute of Charitbal Uses 1601**, and defined a charitable purpose to include:
  - Provided relief of poverty
  - Care of aged people, and sick people
  - Care of soldiers
  - Advancement of education
  - Ect
- 4 categories of the preamble set out by the House of Lords in **Pemsel [1891]** decision:
  - Trust for the relief of poverty
  - Trusts for the advancement of education
  - Trust for the advancement of religion
  - Trust for other purposes beneficial to the community, not falling under the above categories
- **IN EXAM:** Charitable purposes were initially defined in **Statute of Charitbal Uses 1601**, and summarised to include 4 categories of the preamble set out by the House of Lords in **Pemsel [1891]**, categories included; Trust for the relief of poverty, Trusts for the advancement of education, Trust for the advancement of religion, Trust for other purposes beneficial to the community, not falling under the above categories.

### Step 3. Explain and apply 'charitable purpose' per Charities Act 2013... (pg 141 notes)

- **The Charities Act 2013**
  - o Came into effect 2014
- **Section 5 Charities Act 2013**: Defines what a charity is now;
  - o A charity is an entity that is **not-for-profit** and which has purposes including:
    - (a) charitable purposes that are **for the public benefit** or;
    - (b) incidental or ancillary to and in the furtherance or in aid of, the entity's charitable purposes are for the public benefit
      - (this part means some profit okay).
      - i.e. a not for profit organisation, but uses some of its profits for a charitable benefit
  - o An individual, political party or government entity CANNOT be a charity



**IN EXAM:** as the trust in the facts scenarios exists for a **purpose**, rather than a beneficiary, it falls within the definition of a charitable trust as per **Attorney-General (NSW) v Perpetual Trustee Co Ltd (1940)**.

Further, the purpose of the trust is specifically for a **public benefit (state purpose – eg give to poor women)** and the charity is not an individual, government entity, or political party, it falls within the definition of a 'charitable purpose' as per **Section 5 Charities Act 2013**.

### Step 4. Charitable purposes categories are now extended by s 12 CA... (pg 142 notes)

**Section 12 Charities Act 2013** - categories below are defined s 12 to be a charity...

"charitable purpose" means any of the following:

- (a) the purpose of advancing health;
- (b) the purpose of advancing education;
- (c) the purpose of advancing social or [public welfare](#);
- (d) the purpose of **advancing religion**;
- (e) the purpose of advancing culture;
- (f) the purpose of promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia;
- (g) the purpose of promoting or protecting [human rights](#);
- (h) the purpose of advancing the security or safety of Australia or the Australian public;
- (i) the purpose of preventing or relieving the suffering of animals;
- (j) the purpose of [advancing](#) the natural environment;
- (k) 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 paragraphs (a) to (j);

**IN EXAM:** The initial charitable purpose categories outlined in the preamble have been extended by **s 12 of the Charities Act 2013**, here the trust focuses on **(outline which para-graph in s 12 is the focus of the charitable trust at hand)**.

Because the trust's purpose **IS CHARITABLE** the trust can be enforced by the Attorney General (as there are no beneficiaries to enforce the trust), this is extremely important otherwise the trust would not be valid.