



MLL405

EQUITY AND TRUSTS



TABLE OF CONTENTS

TOPIC 1 – HISTORY AND ORIGIN OF EQUITY AND ITS RELATIONSHIP WITH THE COMMON

LAW Error! Bookmark not defined.

Equity and Justice Error! Bookmark not defined.

Aristotle..... Error! Bookmark not defined.

Equity as a body of law..... Error! Bookmark not defined.

Equity corrects the law..... Error! Bookmark not defined.

Form and Substance..... Error! Bookmark not defined.

Standards of conduct Error! Bookmark not defined.

Unconscionability..... Error! Bookmark not defined.

Distrust of equity Error! Bookmark not defined.

Equitable relief is Discretionary Error! Bookmark not defined.

Equitable Maxims Error! Bookmark not defined.

One who seeks equity must do equity - This is a FUNDAMENTAL MAXIM Error! Bookmark not defined.

Equity will only assist those with clean hands..... Error! Bookmark not defined.

Equity follows the law Error! Bookmark not defined.

Equity is Equality Error! Bookmark not defined.

Equity acts in personam Error! Bookmark not defined.

Equity does not assist a volunteer Error! Bookmark not defined.

No relief if damages are adequate Error! Bookmark not defined.

Equity does not suffer a wrong without a remedy..... Error! Bookmark not defined.

Equity looks to intent, rather than form Error! Bookmark not defined.

Where equalities are equal the first in time will prevail Error! Bookmark not defined.

Where equalities are equal the law will prevail Error! Bookmark not defined.

Equity aids the vigilant, not those who sleep on their rights Error! Bookmark not defined.

Equity imputes an intention to fulfil an obligation Error! Bookmark not defined.

Equity looks to intent rather than form Error! Bookmark not defined.

Equity deems that to be done which ought to be done..... Error! Bookmark not defined.

The Origins of Equity Error! Bookmark not defined.

The Medieval Period (13th–15th centuries) Error! Bookmark not defined.

Equity and precedent..... Error! Bookmark not defined.

The Formative Period (16th–17th centuries)..... Error! Bookmark not defined.

The Period of Systemisation (17th–19th centuries)..... Error! Bookmark not defined.

The Relationship between Common Law and Equity Error! Bookmark not defined.

The Exclusive Jurisdiction Error! Bookmark not defined.

The Concurrent Jurisdiction Error! Bookmark not defined.

The Auxiliary Jurisdiction..... Error! Bookmark not defined.

The Judicature System..... Error! Bookmark not defined.

Problems with Separate Courts..... Error! Bookmark not defined.

The Reform Movement Error! Bookmark not defined.

Conflict or Variance Error! Bookmark not defined.

Fusion Fallacies (1873) Error! Bookmark not defined.

Legitimate fusion developments..... Error! Bookmark not defined.

Legitimate Fusion Developments: Exemplary Damages	Error! Bookmark not defined.
Legitimate fusion developments: contributory negligence	Error! Bookmark not defined.
Legitimate fusion developments: causation and remoteness	Error! Bookmark not defined.
Fusion and Account of Profit.....	Error! Bookmark not defined.
TOPIC 2 – UNDUE INFLUENCE AND UNCONSCIONABLE DEALING	Error! Bookmark not defined.
Introduction	Error! Bookmark not defined.
Pressure as unfairness at law and in equity	Error! Bookmark not defined.
The position at common law: Duress.....	Error! Bookmark not defined.
Undue influence in equity.....	Error! Bookmark not defined.
Categories of Undue Influence	Error! Bookmark not defined.
Actual pressure (Category 1).....	Error! Bookmark not defined.
Presumed influence (Category 2A).....	Error! Bookmark not defined.
Proven influence (Category 2B).....	Error! Bookmark not defined.
REBUTTAL: Independent legal advice.....	Error! Bookmark not defined.
Undue influence and third parties	Error! Bookmark not defined.
1 - Third party agents	Error! Bookmark not defined.
2 - Third party actual/Constructive notice	Error! Bookmark not defined.
3 - Yerkey v Jones (Current) / Garcia: Special Wives Equity	Error! Bookmark not defined.
Married Womens Equity (2nd Leg)	Error! Bookmark not defined.
<i>Altercation of Yerkey in Australia</i>	Error! Bookmark not defined.
<i>Garcia v NAB [1998]</i>	Error! Bookmark not defined.
4 - The English Position	Error! Bookmark not defined.
Unconscientious Dealing	Error! Bookmark not defined.
Evolution of the Doctrine	Error! Bookmark not defined.
Information imbalance	Error! Bookmark not defined.
Emotional dependence	Error! Bookmark not defined.
Knowledge by the Stronger Party	Error! Bookmark not defined.
Unconscionable conduct and statutory provisions	Error! Bookmark not defined.
Defences: Independent Legal Advice	Error! Bookmark not defined.
<i>Recent Applications of Unconscientious Dealing</i>	Error! Bookmark not defined.
TOPIC 3 – FIDUCIARY OBLIGATIONS	18
Definition and Scope	18
When will a Fiduciary Relationship Arise?	18
No pre-existing legal relationship.....	19
<i>Characteristics</i>	19
<i>The Hospital Products decision</i>	20
Fiduciary Duties	21
Scope.....	21
Unauthorised Remuneration	Error! Bookmark not defined.
Assuming a Double Character	Error! Bookmark not defined.
Benefits derived by a fiduciary to the exclusion of another	Error! Bookmark not defined.
Established Fiduciary Categories	Error! Bookmark not defined.
Trustee and beneficiary (Implied Automatically)	Error! Bookmark not defined.
Solicitor and client (Implied Automatically)	Error! Bookmark not defined.
Partnerships and Joint ventures (Implied Automatically)	Error! Bookmark not defined.
Director and company (Implied Automatically)	Error! Bookmark not defined.

Principal and agent (not automatic).....	Error! Bookmark not defined.
Employer and employee (Not automatic).....	Error! Bookmark not defined.
Other Fiduciary Relationships	Error! Bookmark not defined.

Fiduciary Principles in Commercial Transactions.....Error! Bookmark not defined.

Personal Relationships	Error! Bookmark not defined.
The defence of Consent	Error! Bookmark not defined.
The Defence of Authorisation	Error! Bookmark not defined.
The Defence of Proof	Error! Bookmark not defined.
Other Defence	Error! Bookmark not defined.

TOPIC 4 – EQUITABLE REMEDIES: CONSTRUCTIVE TRUST AND TRACING .. Error! Bookmark not defined.

Equitable CompensationError! Bookmark not defined.

Equitable Compensation and Restitution	Error! Bookmark not defined.
Equitable compensation and common law damages.....	Error! Bookmark not defined.
The Scope of Compensation: Brickenden Principle.....	Error! Bookmark not defined.
Equitable Compensation and Contributory Negligence	Error! Bookmark not defined.

Equitable Lord Cairns' Act Damages Chancery Amendment act 1858 (UK).....Error! Bookmark not defined.

Discretionary factors:	Error! Bookmark not defined.
The time for the assessment of damages	Error! Bookmark not defined.
<i>Threatened wrongs under Lord Cairns Act</i>	<i>Error! Bookmark not defined.</i>
Claims under Lord Cairns Act	Error! Bookmark not defined.
<i>The Act authorises equitable damages for pure equitable claims</i>	<i>Error! Bookmark not defined.</i>
<i>Lord Cairns Act does not create private rights. Must be based on an existing right..</i>	<i>Error! Bookmark not defined.</i>

Account of profitsError! Bookmark not defined.

Quantifying the profit.....	Error! Bookmark not defined.
Constructive Trusts	Error! Bookmark not defined.
Secret Bribes	Error! Bookmark not defined.
Third parties as constructive trustees	Error! Bookmark not defined.
Recipient Liability: Knowing Receipt	Error! Bookmark not defined.
<i>Types of Knowledge</i>	<i>Error! Bookmark not defined.</i>
Accessory Liability: Knowing Assistance.....	Error! Bookmark not defined.
<i>Knowingly Assisting a Breach Of Trust Requirements.....</i>	<i>Error! Bookmark not defined.</i>

Tracing the trust propertyError! Bookmark not defined.

Tracing in equity.....	Error! Bookmark not defined.
Process of Identification.....	Error! Bookmark not defined.
Tracing into a Mixed Fund.....	Error! Bookmark not defined.
<i>Mixed Substitutions</i>	<i>Error! Bookmark not defined.</i>
<i>Where Mixed Funds are Mixed</i>	<i>Error! Bookmark not defined.</i>
Tracing property to third parties.....	Error! Bookmark not defined.
<i>The trustee pays the beneficiary's money to an honest volunteer who mixes the money with his own in his bank account</i>	<i>Error! Bookmark not defined.</i>

TOPIC 5 – EQUITABLE REMEDIES: SPECIFIC PERFORMANCE AND INJUNCTIONS Error! Bookmark not defined.

DefinitionError! Bookmark not defined.

Equitable Compensation	Error! Bookmark not defined.
------------------------------	------------------------------

A personal remedy	Error! Bookmark not defined.
Jurisdictional requirements before a Decree of Specific Performance may be Awarded ..	Error! Bookmark not defined.
Breach of an Enforceable Contract	Error! Bookmark not defined.
<i>Does there need to be a contract?</i>	Error! Bookmark not defined.
Part Performance	Error! Bookmark not defined.
Inadequacy of damages.....	Error! Bookmark not defined.
When will damages be inadequate?	Error! Bookmark not defined.
Doctrine of Mutuality	Error! Bookmark not defined.
<i>When must mutuality be present?</i>	Error! Bookmark not defined.
Contract to Pay a third Party	Error! Bookmark not defined.
Discretionary considerations.....	Error! Bookmark not defined.
<i>Readiness and willingness of the plaintiff (Able/ Being ready to perform) "RWA" ...</i>	Error! Bookmark not defined.
<i>Other Discretionary Considerations</i>	Error! Bookmark not defined.
<i>Contracts Requiring Constant Supervision</i>	Error! Bookmark not defined.
Personal Service Contracts	Error! Bookmark not defined.
Other Discretionary Factors	Error! Bookmark not defined.
Futility and Uncertainty	Error! Bookmark not defined.
What is an injunction?.....	Error! Bookmark not defined.
Jurisdiction to Grant Injunctions	Error! Bookmark not defined.
Cause of Action at Law	Error! Bookmark not defined.
Common Law Damages are an Inadequate Remedy for the Legal Wrong.....	Error! Bookmark not defined.
Different types of injunctions.....	Error! Bookmark not defined.
Injunction to enforce a negative covenant	Error! Bookmark not defined.
Contracts and the need for supervision	Error! Bookmark not defined.
Ex parte/inter partes/Quia Timet injunction.....	Error! Bookmark not defined.
Interlocutory injunction	Error! Bookmark not defined.
Balance of convenience.....	Error! Bookmark not defined.
Undertakings as to damages	Error! Bookmark not defined.
<i>Mareva Injunction/Asset Preservation Order</i>	Error! Bookmark not defined.
<i>Requirements for plaintiff</i>	Error! Bookmark not defined.
ABC v O'Neill	Error! Bookmark not defined.
Balance of convenience.....	Error! Bookmark not defined.
TOPIC 6 – THE NATURE OF A TRUST	Error! Bookmark not defined.
Elements of a Trust.....	Error! Bookmark not defined.
A Brief History of the Trust.....	Error! Bookmark not defined.
Nature and Classification of Trusts.....	Error! Bookmark not defined.
Commercial, domestic and social uses of the trust.....	Error! Bookmark not defined.
Superannuation and pension funds	Error! Bookmark not defined.
Public Unit Trusts	Error! Bookmark not defined.
<i>Family financial planning</i>	Error! Bookmark not defined.
Trusts and Similar Legal Relationships	Error! Bookmark not defined.
<i>Trust and Fiduciary Relationships</i>	Error! Bookmark not defined.
Trust and bailment	Error! Bookmark not defined.
Trust and agency	Error! Bookmark not defined.

Trust and contract	Error! Bookmark not defined.
Trust, charge, condition and equitable obligation	Error! Bookmark not defined.
Categorisation of Trusts	Error! Bookmark not defined.
Express trust	Error! Bookmark not defined.
<i>Express trust by Transfer</i>	Error! Bookmark not defined.
<i>Express trust by Declaration</i>	Error! Bookmark not defined.
<i>Discretionary Express trusts</i>	Error! Bookmark not defined.
Resulting trust	Error! Bookmark not defined.
<i>Automatic Resulting Trust</i>	Error! Bookmark not defined.
<i>Presumed Resulting Trust</i>	Error! Bookmark not defined.
The Quistclose Trust	Error! Bookmark not defined.
Constructive trust	Error! Bookmark not defined.
TOPIC 7 – TRUSTEE DUTIES	Error! Bookmark not defined.
Strict Fiduciary Duties	Error! Bookmark not defined.
Trustee Duties	Error! Bookmark not defined.
Duty to act with reasonable prudence	Error! Bookmark not defined.
Duty to act in the interests of the beneficiaries	Error! Bookmark not defined.
Duty to keep trust funds separate	Error! Bookmark not defined.
Duty to act gratuitously	Error! Bookmark not defined.
<i>Exceptions:</i>	Error! Bookmark not defined.
Duty to invest in authorised securities	Error! Bookmark not defined.
Duty not to purchase trust property	Error! Bookmark not defined.
Duty to keep proper accounts	Error! Bookmark not defined.
Duty to allow beneficiaries access to trust documents	Error! Bookmark not defined.
Statutory Defence: Where the Trustee has Acted Honestly and Reasonably	Error! Bookmark not defined.
TOPIC 8 – STATUTORY FORMALITIES AND COMPLETE CONSTITUTION OF EXPRESS TRUSTS	Error! Bookmark not defined.
Relevant statutory provisions	Error! Bookmark not defined.
Statute of Frauds	Error! Bookmark not defined.
Property Law Act provisions	Error! Bookmark not defined.
The advantages of the requirement of writing	Error! Bookmark not defined.
The application of s 53	Error! Bookmark not defined.
<i>Legal interest or subsisting equitable interest</i>	Error! Bookmark not defined.
<i>Real or personal property</i>	Error! Bookmark not defined.
<i>Declaration or disposition</i>	Error! Bookmark not defined.
Declaration of Trusts	Error! Bookmark not defined.
A declaration of trust refers to the creation of a new interest. Declarations include: ..	Error! Bookmark not defined.
Disposition	Error! Bookmark not defined.
<i>Overlap between the sub-sections</i>	Error! Bookmark not defined.
Cases dealing with the application of s 53(1)	Error! Bookmark not defined.
Exceptions to the application of s 53	Error! Bookmark not defined.
Secret trusts	Error! Bookmark not defined.
TOPIC 9 – CERTAINTY REQUIREMENTS FOR EXPRESS TRUSTS	Error! Bookmark not defined.
Methods of creation	Error! Bookmark not defined.

The Certainty of Intention	Error! Bookmark not defined.
Intention Without Knowledge	Error! Bookmark not defined.
Nature of the intention	Error! Bookmark not defined.
Where Intention does not amount to trust	Error! Bookmark not defined.
An imperfect gift is not a valid trust.....	Error! Bookmark not defined.
Intention to create a trust by declaration	Error! Bookmark not defined.
Personal Obligation	Error! Bookmark not defined.
Equitable Charge	Error! Bookmark not defined.
Conditional Gift	Error! Bookmark not defined.
Unclear cases.....	Error! Bookmark not defined.
Certainty of subject matter	Error! Bookmark not defined.
Fixed-Interest trusts	Error! Bookmark not defined.
Discretionary trusts	Error! Bookmark not defined.
<i>Exhaustive and non-exhaustive discretionary trusts</i>	Error! Bookmark not defined.
Gifts over in default.....	Error! Bookmark not defined.
The beneficiary principle	Error! Bookmark not defined.
Certainty in fixed-interest trusts	Error! Bookmark not defined.
Certainty in non-exhaustive discretionary trusts	Error! Bookmark not defined.
Certainty in exhaustive discretionary trusts.....	Error! Bookmark not defined.
<i>Administratively Unworkable</i>	Error! Bookmark not defined.
Test for a fixed interest trust.....	Error! Bookmark not defined.
Test for Discretionary Trust.....	Error! Bookmark not defined.
TOPIC 10 – CHARITABLE TRUSTS	Error! Bookmark not defined.
Defining a charity	Error! Bookmark not defined.
Public Benefit.....	Error! Bookmark not defined.
Scenarios	Error! Bookmark not defined.
Trusts for political purpose	Error! Bookmark not defined.
Trusts for the relief of poverty	Error! Bookmark not defined.
Trusts for the advancement of education	Error! Bookmark not defined.
Trusts for the advancement of religion	Error! Bookmark not defined.
Trusts for other purposes beneficial to the community	Error! Bookmark not defined.
Mixed Charitable and Non-charitable Trusts and the Cy-Pres Doctrine .	Error! Bookmark not defined.
Unincorporated associations	Error! Bookmark not defined.
The two limbs of <i>Barnes v Addy</i>	Error! Bookmark not defined.
<i>What is required to be proved</i>	Error! Bookmark not defined.
<i>ABC v O'Neill</i>	Error! Bookmark not defined.
Balance of convenience.....	Error! Bookmark not defined.
<i>ABC v Lenah Meats</i>	Error! Bookmark not defined.
Facts	Error! Bookmark not defined.
Confidentiality	Error! Bookmark not defined.
Unconscionability.....	Error! Bookmark not defined.
Privacy	Error! Bookmark not defined.
SUMMARIES.....	22

TOPIC 1 SUMMARY – HISTORY AND ORIGIN OF EQUITY AND ITS RELATIONSHIP WITH THE COMMON LAW Error! Bookmark not defined.

Equity as a body of law Error! Bookmark not defined.

Equity corrects the law Error! Bookmark not defined.

Standards of conduct..... Error! Bookmark not defined.

Unconscionability Error! Bookmark not defined.

Equitable Maxims Error! Bookmark not defined.

One who seeks equity must do equity - FUNDAMENTAL MAXIM..... **Error! Bookmark not defined.**

Equity will only assist those with clean hands..... **Error! Bookmark not defined.**

Equity follows the law **Error! Bookmark not defined.**

Equity is Equality **Error! Bookmark not defined.**

Equity acts in personam **Error! Bookmark not defined.**

Equity does not assist a volunteer **Error! Bookmark not defined.**

No relief if damages are adequate **Error! Bookmark not defined.**

Equity does not suffer a wrong without a remedy..... **Error! Bookmark not defined.**

Equity looks to intent, rather than form **Error! Bookmark not defined.**

Where equalities are equal the first in time will prevail **Error! Bookmark not defined.**

Where equalities are equal the law will prevail **Error! Bookmark not defined.**

Equity aids the vigilant, not those who sleep on their rights **Error! Bookmark not defined.**

Equity imputes an intention to fulfil an obligation **Error! Bookmark not defined.**

Equity looks to intent rather than form **Error! Bookmark not defined.**

Equity deems that to be done which ought to be done..... **Error! Bookmark not defined.**

The Judicature System..... Error! Bookmark not defined.

Problems with Separate Courts..... **Error! Bookmark not defined.**

The Reform Movement **Error! Bookmark not defined.**

Conflict or Variance **Error! Bookmark not defined.**

Fusion Fallacies (1873) Error! Bookmark not defined.

Legitimate fusion developments..... **Error! Bookmark not defined.**

Legitimate Fusion Developments: Exemplary Damages **Error! Bookmark not defined.**

Legitimate fusion developments: contributory negligence **Error! Bookmark not defined.**

Legitimate fusion developments: causation and remoteness **Error! Bookmark not defined.**

Quick Summaries Error! Bookmark not defined.

Can equity issue injunctive relief to prevent a person from disclosing any further information?. **Error! Bookmark not defined.**

Will the fact that someone delayed seeing the patent attorney for a couple of months affect the measure of relief granted?..... **Error! Bookmark not defined.**

How would the rights of person A differ if the facts are slightly altered so that person B had actually entered into a contract whereby she agreed not to disclose any part of her conversation with Jack and Anne? Would equitable relief still be available? **Error! Bookmark not defined.**

Would exemplary damages be available against Person B? What are the arguments for and against such an award? **Error! Bookmark not defined.**

TOPIC 2 SUMMARY – UNDUE INFLUENCE AND UNCONSCIONABLE DEALING ..Error! Bookmark not defined.

Introduction Error! Bookmark not defined.

Pressure as unfairness at law and in equity..... Error! Bookmark not defined.

The position at common law: Duress	Error! Bookmark not defined.
Undue influence in equity	Error! Bookmark not defined.
Categories of Undue Influence	Error! Bookmark not defined.
REBUTTAL: Independent legal advice	Error! Bookmark not defined.
Undue influence and third parties	Error! Bookmark not defined.
Third party agents	Error! Bookmark not defined.
Third party actual/Constructive notice	Error! Bookmark not defined.
Yerkey v Jones (Current) / Garcia: Special Wives Equity	Error! Bookmark not defined.
Married Womens Equity (2nd Leg)	Error! Bookmark not defined.
Summary	Error! Bookmark not defined.
Unconscientious Dealing	Error! Bookmark not defined.
What are the requirements for establishing unconscientious dealing? .	Error! Bookmark not defined.
Evolution of the Doctrine	Error! Bookmark not defined.
Information imbalance	Error! Bookmark not defined.
Emotional dependence	Error! Bookmark not defined.
Unconscionable conduct and statutory provisions	Error! Bookmark not defined.
Defences: Independent Legal Advice	Error! Bookmark not defined.
Summary	Error! Bookmark not defined.
Quick Summaries	Error! Bookmark not defined.
What is the difference between undue influence and unconscientious dealing? .	Error! Bookmark not defined.
What is the difference between unconscionability as an informing concept and the unconscientious dealing doctrine?.....	Error! Bookmark not defined.
How was unconscientious dealing made out in Louth v Diprose?	Error! Bookmark not defined.
What was the nature of the special disability in Bridgewater v Leahy?..	Error! Bookmark not defined.
Would unconscientious dealing be made out where the defendant reasonably believed that the plaintiff had received independent legal advice and therefore acted willingly? ...	Error! Bookmark not defined.
Why did the plurality in Thorne v Kennedy [2017] HCA 49 decide that the facts raised undue influence?	Error! Bookmark not defined.
TOPIC 3 SUMMARY – FIDUCIARY OBLIGATIONS	Error! Bookmark not defined.
Definition and Scope	Error! Bookmark not defined.
When will a Fiduciary Relationship Arise?	Error! Bookmark not defined.
No pre-existing legal relationship.....	Error! Bookmark not defined.
Characteristics	Error! Bookmark not defined.
The Hospital Products decision	Error! Bookmark not defined.
To what extent will the commercial nature of a contract preclude it from becoming a fiduciary relationship?	Error! Bookmark not defined.
How important was the representative nature of the contract in Hospital Products?.	Error! Bookmark not defined.
How did Gibbs, CJ differ from Mason, J in Hospital Products?	Error! Bookmark not defined.
How could Deane, J find a constructive trust in Hospital Products?.....	Error! Bookmark not defined.
Fiduciary Duties	Error! Bookmark not defined.
Scope	Error! Bookmark not defined.
Unauthorised Remuneration	Error! Bookmark not defined.
Benefits derived by a fiduciary to the exclusion of another	Error! Bookmark not defined.

Established Fiduciary Categories.....	Error! Bookmark not defined.
Trustee and beneficiary (Implied Automatically)	Error! Bookmark not defined.
Solicitor and client (Implied Automatically)	Error! Bookmark not defined.
Partnerships and Joint ventures (Implied Automatically)	Error! Bookmark not defined.
Director and company (Implied Automatically)	Error! Bookmark not defined.
Principal and agent (not automatic).....	Error! Bookmark not defined.
Employer and employee (Not automatic).....	Error! Bookmark not defined.
Other Fiduciary Relationships	Error! Bookmark not defined.
Fiduciary Principles in Commercial Transactions.....	Error! Bookmark not defined.
Personal Relationships	Error! Bookmark not defined.
The defence of Consent	Error! Bookmark not defined.
The Defence of Authorisation	Error! Bookmark not defined.
Other Defence	Error! Bookmark not defined.
Quick Summaries	Error! Bookmark not defined.
Why was Dr Chan a fiduciary in Chan v Zacharia?.....	Error! Bookmark not defined.
What are the Basic fiduciary duties set out by Deane, J in Chan v Zacharia?	Error! Bookmark not defined.
Why did Murphy, J dissent in Chan v Zacharia?	Error! Bookmark not defined.
Will an agent automatically be a fiduciary if in acting on your behalf he sets out to make as much money as possible?	Error! Bookmark not defined.
Why was Boardman held to be a fiduciary when he was not a trustee?	Error! Bookmark not defined.
Why do the “automatic” categories of fiduciary relationship carry that consequence?	Error! Bookmark not defined.
Why are fiduciary duties important for trustee?	Error! Bookmark not defined.
Would it have made a difference in Reading if the Crown had not entrusted property to the defendant?	Error! Bookmark not defined.
When the courts talk about imposing a constructive trust, is this different from the imposition of a fiduciary obligation, and if so, how?	Error! Bookmark not defined.
Do you think the imposition of a purely contractual relationship between employer and employee is adequate protection where an employee is receiving secret profits?....	Error! Bookmark not defined.
Do you think it fair that a bank should be under fiduciary obligations towards its customers?....	Error! Bookmark not defined.
What were the primary factors in Commonwealth Bank v Smith prompting the court to impose a fiduciary obligation?.....	Error! Bookmark not defined.
Can you think of any other relationship where a party, acting in self-interest, could become a fiduciary? Is the fiduciary relationship an adequate protection?	Error! Bookmark not defined.
What type of disclosure will raise the defence of consent? Why is consent a defence?.....	Error! Bookmark not defined.
Should the mere fact that a corporation does not pursue a venture be taken to mean that it consents to a director taking up the opportunity? How was this issue dealt with in Queensland Mines?...	Error! Bookmark not defined.
TOPIC 4 SUMMARY – EQUITABLE REMEDIES: CONSTRUCTIVE TRUST AND TRACING.....	Error! Bookmark not defined.
Equitable Compensation	Error! Bookmark not defined.
Equitable Compensation and Restitution	Error! Bookmark not defined.
Equitable compensation and common law damages.....	Error! Bookmark not defined.
Equitable Compensation and Contributory Negligence	Error! Bookmark not defined.
Equitable Lord Cairns’ Act Damages Chancery Amendment act 1858 (UK).....	Error! Bookmark not defined.

The time for the assessment of damages **Error! Bookmark not defined.**
 Claims under Lord Cairns Act **Error! Bookmark not defined.**
The Act authorises equitable damages for pure equitable claims **Error! Bookmark not defined.**

Account of profits **Error! Bookmark not defined.**

Quantifying the profit..... **Error! Bookmark not defined.**
 Constructive Trusts **Error! Bookmark not defined.**
 Secret Bribes **Error! Bookmark not defined.**
 Third parties as constructive trustees **Error! Bookmark not defined.**
 Recipient Liability: Knowing Receipt **Error! Bookmark not defined.**
Types of Knowledge **Error! Bookmark not defined.**
 Accessory Liability: Knowing Assistance..... **Error! Bookmark not defined.**
Knowingly Assisting a Breach Of Trust Requirements..... **Error! Bookmark not defined.**

Tracing the trust property **Error! Bookmark not defined.**

Tracing in equity..... **Error! Bookmark not defined.**
 Process of Identification..... **Error! Bookmark not defined.**
 Tracing into a Mixed Fund..... **Error! Bookmark not defined.**
Where Mixed Funds are Mixed **Error! Bookmark not defined.**
 Tracing property to third parties..... **Error! Bookmark not defined.**
The trustee pays the beneficiary's money to an honest volunteer who mixes the money with his own in his bank account **Error! Bookmark not defined.**

Quick Summaries **Error! Bookmark not defined.**

When is equitable compensation generally awarded? **Error! Bookmark not defined.**
 Why is equitable compensation generally regarded as a more absolute obligation? ..**Error! Bookmark not defined.**

Does the Brickenden principle include 'speculative' assessment as to what might have happened following a breach? Explain..... **Error! Bookmark not defined.**
 How, if at all, did the Lord Cairns' Act widen the power of the court to grant damages? **Error! Bookmark not defined.**

Why did the court refuse to allow Lord Cairns' Act damages in King v Poggioli? .. **Error! Bookmark not defined.**

What is the difference, if any, between common-law damages and equitable Lord Cairns' Act damages? **Error! Bookmark not defined.**

How does the account for profit differ from equitable compensation? . **Error! Bookmark not defined.**

What would happen if the account was proven to be initiated by (the defendant's) fraud?..... **Error! Bookmark not defined.**

What is the difference between the two tests set out in Barnes v Addy allowing third parties to become constructive trustees? **Error! Bookmark not defined.**

What was the justification given by the majority of the High Court in Farah Constructions v Say-Dee for rejecting the knowing receipt constructive trust?..... **Error! Bookmark not defined.**

Is the label 'constructive trustee' appropriate to the second limb of the Barnes v Addy test where the stranger may not actually hold any property capable of forming the subject matter of the trust?

..... **Error! Bookmark not defined.**

Why have the courts felt that a pre-existing fiduciary relationship was necessary before property could be traced?..... **Error! Bookmark not defined.**

What are the limitations on tracing property held in the hands of a third party?. **Error! Bookmark not defined.**

TOPIC 5 SUMMARY– EQUITABLE REMEDIES: SPECIFIC PERFORMANCE AND INJUNCTIONS

..... **Error! Bookmark not defined.**

Jurisdictional requirements before a Decree of Specific Performance may be Awarded.. Error!
Bookmark not defined.

Breach of an Enforceable Contract Error! Bookmark not defined.
Part Performance Error! Bookmark not defined.

Inadequacy of damages.....Error! Bookmark not defined.

When will damages be inadequate?Error! Bookmark not defined.

Doctrine of Mutuality Error! Bookmark not defined.

When must mutuality be present? Error! Bookmark not defined.

Discretionary considerations..... Error! Bookmark not defined.

Readiness and willingness of the plaintiff (Able/ Being ready to perform) "RWA" ...Error! Bookmark not defined.

Other Discretionary Considerations..... Error! Bookmark not defined.

Personal Service Contracts..... Error! Bookmark not defined.

Other Discretionary Factors Error! Bookmark not defined.

What is an injunction?..... Error! Bookmark not defined.

Jurisdiction to Grant InjunctionsError! Bookmark not defined.

Cause of Action at Law Error! Bookmark not defined.

Common Law Damages are an Inadequate Remedy for the Legal Wrong..... Error! Bookmark not defined.

Different types of injunctions.....Error! Bookmark not defined.

Injunction to enforce a negative covenant Error! Bookmark not defined.

Contracts and the need for supervision Error! Bookmark not defined.

Ex parte/inter partes/Quia Timet injunction..... Error! Bookmark not defined.

Interlocutory injunction Error! Bookmark not defined.

Balance of convenience..... Error! Bookmark not defined.

Undertakings as to damages Error! Bookmark not defined.

Mareva Injunction/Asset Preservation Order Error! Bookmark not defined.

Requirements for plaintiff..... Error! Bookmark not defined.

ABC v O'NeillError! Bookmark not defined.

Balance of convenience..... Error! Bookmark not defined.

Quick SummariesError! Bookmark not defined.

What is the difference between specific performance of an executory contract and specific performance of an executed contract?..... Error! Bookmark not defined.

In what way is the decree of specific performance to be regarded as a personal remedy?..... Error! Bookmark not defined.

What type of contractual breach is sufficient to justify an award of specific performance? Error! Bookmark not defined.

What is the basis for equity granting a decree of specific performance as relief against forfeiture? Error! Bookmark not defined.

Why were damages inadequate in ANZ Executors and Trustees v Humes? Error! Bookmark not defined.

What conclusions can be drawn about the adequacy of damages where the contract is for goods not readily available in the market? Error! Bookmark not defined.

Why is it important for a plaintiff to be 'ready and willing' to perform the contract if a decree of specific performance is sought?..... Error! Bookmark not defined.

Why will a plaintiff who has breached an essential term be regarded as not 'ready and willing' to perform? Error! Bookmark not defined.

What is the policy justification underlying the principle that a court will not decree an award of specific performance for a contract that requires constant supervision? **Error! Bookmark not defined.**

What is the difference between jurisdictional requirements for the award of specific performance and discretionary factors? **Error! Bookmark not defined.**

What is the justification underlying the court's refusal to award specific performance of a contract for personal services? **Error! Bookmark not defined.**

What is the difference between impossibility to perform a contract and futility of performance? **Error! Bookmark not defined.**

Who has the jurisdiction to issue injunctive relief and upon what grounds? **Error! Bookmark not defined.**

What are the vital prerequisites where injunctive relief is granted in the auxiliary jurisdiction? . **Error! Bookmark not defined.**

What is the basic test for establishing a right to an interlocutory injunction? **Error! Bookmark not defined.**

TOPIC 6 SUMMARY– THE NATURE OF A TRUST **Error! Bookmark not defined.**

Elements of a Trust **Error! Bookmark not defined.**

Categorisation of Trusts **Error! Bookmark not defined.**

Express trust **Error! Bookmark not defined.**

Express trust by Transfer **Error! Bookmark not defined.**

Express trust by Declaration **Error! Bookmark not defined.**

Discretionary Express trusts **Error! Bookmark not defined.**

Resulting trust **Error! Bookmark not defined.**

Automatic Resulting Trust **Error! Bookmark not defined.**

Presumed Resulting Trust **Error! Bookmark not defined.**

The Quistclose Trust **Error! Bookmark not defined.**

How did the resulting and constructive trust arise in Barclays Bank v Quistclose Ltd? **Error! Bookmark not defined.**

Constructive trust **Error! Bookmark not defined.**

Quick Summaries **Error! Bookmark not defined.**

Is it possible to create a trust where the trustee is the sole beneficiary? **Error! Bookmark not defined.**

Where an equitable interest is the subject matter of a trust, how is legal and equitable title divided between the trustee and beneficiary? **Error! Bookmark not defined.**

What will happen to a trust if, following creation of the trust, the trustee refuses office? **Error! Bookmark not defined.**

What is the primary difference between a trust and a contract? **Error! Bookmark not defined.**

What is the difference between a resulting trust and a constructive trust? **Error! Bookmark not defined.**

In what situation might a constructive trust be imposed without the need to identify any specific trust property? **Error! Bookmark not defined.**

TOPIC 7 SUMMARY – TRUSTEE DUTIES **Error! Bookmark not defined.**

Strict Fiduciary Duties **Error! Bookmark not defined.**

Trustee Duties **Error! Bookmark not defined.**

Duty to act with reasonable prudence **Error! Bookmark not defined.**

Duty to act in the interests of the beneficiaries **Error! Bookmark not defined.**

Duty to keep trust funds separate **Error! Bookmark not defined.**

Duty to act gratuitously **Error! Bookmark not defined.**

Exceptions:.....	Error! Bookmark not defined.
Duty to invest in authorised securities.....	Error! Bookmark not defined.
Duty not to purchase trust property	Error! Bookmark not defined.
Duty to keep proper accounts.....	Error! Bookmark not defined.
Duty to allow beneficiaries access to trust documents.....	Error! Bookmark not defined.
Statutory Defence: Where the Trustee has Acted Honestly and Reasonably	Error! Bookmark not defined.

Quick Summary **Error! Bookmark not defined.**

When will property be 'readily divisible' according to the decision in *Re Marshall*? **Error! Bookmark not defined.**

When considering whether a s 67 defence applies, should the court take into account the interests of the beneficiaries? **Error! Bookmark not defined.**

Is a trustee acting reasonably if they fail to diversify the trust's investment strategies in order to recoup a higher profit for the beneficiaries? **Error! Bookmark not defined.**

Why is it necessary for a trustee to compensate for any loss before the right of indemnity arises? **Error! Bookmark not defined.**

What is the difference between an 'unrelated breach' and a breach which does not cause any loss? **Error! Bookmark not defined.**

What are the requirements set out in *Broomhead* for several beneficiaries to be personally liable to indemnify the trustee? **Error! Bookmark not defined.**

TOPIC 8 SUMMARY – STATUTORY FORMALITIES AND COMPLETE CONSTITUTION OF EXPRESS TRUSTS 23

Relevant statutory provisions 23

Property Law Act provisions..... 23

The application of s 53 23

Legal interest or subsisting equitable interest..... 23

Declaration of Trusts 24

A declaration of trust refers to the creation of a new interest. Declarations include: 24

Disposition..... 24

Cases dealing with the application of s 53(1)..... 25

Exceptions to the application of s 53 26

Secret trusts 26

Quick Summaries 26

What is the difference between a legal interest and a subsisting equitable interest? 26

Why was it that the interest in *Grey v IRC* could be classified as 'subsisting'? 26

Are the formality requirements for the creation of an express trust over 'subsisting equitable interests' different from those with respect to legal interests? 26

Does a direction to a trustee to pass an existing beneficial interest to a third party constitute a declaration or a disposition or both? What are the formality requirements?..... **Error! Bookmark not defined.**

Why is it that a declaration of trust over property that is legally owned is not regarded as a disposition? **Error! Bookmark not defined.**

Can you think of a situation where only s 53(1)(b) of the Property Law Act would apply? If not, what do you think is the purpose of this subsection?..... **Error! Bookmark not defined.**

Will all dispositions of subsisting equitable interests be covered by both s 53(1)(a) and s 53(1)(c)? **Error! Bookmark not defined.**

Is the interpretation of s 53(1)(b) (the Victorian equivalent of the Western Australian Act) in *DSS v James* justified by the wording of the subsection? **Error! Bookmark not defined.**

If s 53(1)(b) was not given an independent operation, what would be the effect on the statutory formality requirements? **Error! Bookmark not defined.**
 In what situations will an express trust be excluded from the statutory requirements under the fraud exception? **Error! Bookmark not defined.**
 Why did the court find no fraud in Wratten v Hunter? **Error! Bookmark not defined.**

TOPIC 9 SUMMARY – CERTAINTY REQUIREMENTS FOR EXPRESS TRUSTS . **Error! Bookmark not defined.**

Methods of creation **Error! Bookmark not defined.**

The Certainty of Intention **Error! Bookmark not defined.**

Intention Without Knowledge **Error! Bookmark not defined.**

Nature of the intention **Error! Bookmark not defined.**

Where Intention does not amount to trust **Error! Bookmark not defined.**

An imperfect gift is not a valid trust **Error! Bookmark not defined.**

Intention to create a trust by declaration **Error! Bookmark not defined.**

Personal Obligation **Error! Bookmark not defined.**

Equitable Charge **Error! Bookmark not defined.**

Conditional Gift **Error! Bookmark not defined.**

Unclear cases **Error! Bookmark not defined.**

Certainty of subject matter **Error! Bookmark not defined.**

Fixed–Interest trusts **Error! Bookmark not defined.**

Discretionary trusts **Error! Bookmark not defined.**

Exhaustive and non–exhaustive discretionary trusts **Error! Bookmark not defined.**

Gifts over in default **Error! Bookmark not defined.**

The beneficiary principle **Error! Bookmark not defined.**

Certainty in fixed–interest trusts **Error! Bookmark not defined.**

Certainty in non–exhaustive discretionary trusts **Error! Bookmark not defined.**

Certainty in exhaustive discretionary trusts **Error! Bookmark not defined.**

Administratively Unworkable **Error! Bookmark not defined.**

Test for a fixed interest trust **Error! Bookmark not defined.**

Test for Discretionary Trust **Error! Bookmark not defined.**

Quick Summaries **Error! Bookmark not defined.**

What sort of considerations will a court take into account in determining whether a trust is created in circumstances where the parties have already entered into a contract? **Error! Bookmark not defined.**

Why is it important, in the absence of express words, to ensure that the parties intended unequivocally to make a declaration of trust? **Error! Bookmark not defined.**

Is it necessary for a person to understand a trust in order to create a trust? **Error! Bookmark not defined.**

What is the difference between an equitable charge and a trust? **Error! Bookmark not defined.**

Do you think a settlor should be able to disclaim a trust after they have shown an intention to create one? **Error! Bookmark not defined.**

Why is it important for trust property to be defined with reasonable clarity? How will this requirement vary according to different types of trust property? **Error! Bookmark not defined.**

What is the difference between a fixed–interest trust and a discretionary trust? **Error! Bookmark not defined.**

What is the difference between an exhaustive discretionary trust and a non-exhaustive discretionary trust? Do the fiduciary duties of the trustee differ in each case? **Error! Bookmark not defined.**

Why is it that a discretionary trust with a gift over in default always constitutes a non-exhaustive discretionary trust? **Error! Bookmark not defined.**

Why should the certainty test for a non-exhaustive discretionary trust differ from the test for a fixed-interest trust? **Error! Bookmark not defined.**

Do you think that criterion certainty should be the certainty test for both exhaustive and non-exhaustive discretionary trusts? **Error! Bookmark not defined.**

What is the difference between linguistic uncertainty and evidential uncertainty? **Error! Bookmark not defined.**

What does 'administratively unworkable' means? **Error! Bookmark not defined.**

TOPIC 10 SUMMARY – CHARITABLE TRUSTS **Error! Bookmark not defined.**

Defining a charity **Error! Bookmark not defined.**

Public Benefit **Error! Bookmark not defined.**

Scenarios **Error! Bookmark not defined.**

Trusts for political purpose **Error! Bookmark not defined.**

Trusts for the relief of poverty **Error! Bookmark not defined.**

Trusts for the advancement of education **Error! Bookmark not defined.**

Trusts for the advancement of religion **Error! Bookmark not defined.**

Trusts for other purposes beneficial to the community **Error! Bookmark not defined.**

Mixed Charitable and Non-charitable Trusts and the Cy-Pres Doctrine . **Error! Bookmark not defined.**

Unincorporated associations **Error! Bookmark not defined.**

Quick Summaries **Error! Bookmark not defined.**

How is a charity defined? Do you think that it is appropriate to define charity in accordance with the preamble or do you agree with Kirby J in Central Bayside General Practice Association Ltd v

Commissioner of State Revenue that it 'defies commonsense' to approach the modern definition by reference to an early 17th century statute? **Error! Bookmark not defined.**

Why is it necessary to prove 'public benefit'? How has public benefit been defined? **Error! Bookmark not defined.**

Should an institution with mutual profit and charitable purposes come within the definition of a charity? How has this been changed by the provisions within the Charities Act 2013 (Cth)? **Error! Bookmark not defined.**

The dissolution clause **Error! Bookmark not defined.**

The DGR revocation clause **Error! Bookmark not defined.**

What sort of considerations does a court take into account in determining whether a trust to an unincorporated association is a trust to its individual members? **Error! Bookmark not defined.**

How does the enforcement of trusts to unincorporated associations work with the beneficiary principle? **Error! Bookmark not defined.**

Interlocutory Injunction and ABC Case **Error! Bookmark not defined.**

Does the balance of convenience favour granting the injunction? **Error! Bookmark not defined.**

Fiduciary relationship, duties and obligations **Error! Bookmark not defined.**

Fiduciary obligations **Error! Bookmark not defined.**

The two limbs of Barnes v Addy **Error! Bookmark not defined.**

What is required to be proved **Error! Bookmark not defined.**

ABC v Lenah Meats **Error! Bookmark not defined.**

Facts **Error! Bookmark not defined.**

Confidentiality **Error! Bookmark not defined.**

Unconscionability **Error! Bookmark not defined.**

Privacy..... **Error! Bookmark not defined.**

TOPIC 3 – FIDUCIARY OBLIGATIONS

Definition and Scope

Fiduciary duties in equity refer to the obligations of trust and confidence which equity imposes on a particular person, where that person is in a particular relationship with another, making them bound to act for the benefit of the other. The fiduciary relationship is dependent upon an analysis of dominance. Where one person is capable of adversely affecting the interests of another because of their superior bargaining position, equity assumes what can be described as a 'watchdog' function and imposes strict obligations upon that person. *Any benefit gained is breach of fiduciary duty. Remedy will be account for profit.*

Not every relationship of trust and confidence has fiduciary obligations imposed upon it.

Much depends on the individual circumstances. The position has been well summarised by Mason J (as he then was) in *Hospital Products Ltd v United States Surgical Corporation* [1984] 156 common lawR 41 at 54:

The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations; viz trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these 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. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.

According to Mason J then, one of the most important features of a relationship attracting the fiduciary aspect is the 'representative capacity' which one party assumes. Proof that actual trust or confidence exists is not a vital feature of these relationships. The distinguishing characteristic of a relationship which equity deems to be fiduciary is that its essence, or purpose, is to serve exclusively the interests of a person or group of persons. Hence, within a trust relationship, the essence of the arrangement is that a trustee holds and deals with property in the interest of beneficiaries, and the purpose of a partnership is to conduct a business in the joint interest of the partners.

When will a Fiduciary Relationship Arise?

- No Comprehensive definition
- Operates as a Protective Shield
- Supervises against the exploitation of vulnerable parties within a commercial/personal relationship

The relationships are generally distinguished by the following features:

- *vulnerability* arising through trust, loyalty and confidentiality between the parties – the 'golden thread'
- The fiduciary has undertaken to act in a representative capacity
- The fiduciary has unilateral power to affect the weaker party (trustee v beneficiary)
- The weaker party legitimately expects that the stronger party will look after their legal/financial interests. Is this expectation reasonable?

It is possible for a fiduciary relationship to arise between parties who have not reached, and who may never reach, agreement on the consensual terms which are to govern the arrangement between them: *United Dominions Corporation Ltd v Brian Pty Ltd* (1985)

There is a reasonable expectation to act on another's behalf without any personal interest –*Farah Constructions*

1. **Is there a fiduciary relationship?** Go through the above factors. If the category already exists do not go through factors **IE** trustee and beneficiary. See recognised categories.
2. Is there a breach? Look at nature and scope of duties
3. *Fiduciary* Remedy (Account of Profit; Equitable Compensation; and Constructive Trust where the property can be Traced)

No pre-existing legal relationship

The concept of fiduciary is not simply restricted to the identification of a particular relationship; attention must also be given to the scope of the particular fiduciary relationship in the sense that the nature of the obligations must be considered. It is not necessary for the creation of a fiduciary relationship that the parties involved be within a concluded legal relationship.

A fiduciary relationship can arise and fiduciary duties can exist between parties who have not reached, and who may never reach, a particular agreement concerning the actual terms which are to govern their transaction. The fiduciary question does not, therefore, depend in any way upon a contractual or other legal obligation. The nature and extent of the duties assumed by a fiduciary are a question of fact in each case. A relationship may be fiduciary as to all, or as to only some, of its aspects.

Furthermore, the simple statement that a relationship is fiduciary does not provide a complete description of the legal nature of the relationship. Aspects of the relationship may also be governed by statute, common law (such as contractual or tortious obligations) and other equitable principles.

Characteristics

The fiduciary relationship, then, is a set of duties imposed by equity where equity deems them to be fair due to the particular nature of the relationship. Particular attention is given to relationships where one person acts as a representative of another, and is thereby placed in a superior position, making the other person vulnerable to abuse. (This often occurs where trust and confidence exist, but it is not confined to that situation.)

Equity will generally hold that such a relationship is fiduciary in nature. Equity watches over the conduct of the superior party and imposes certain duties and obligations upon the superior party. The scope of the duties and obligations depends on the individual circumstances, although there are, as we shall see, some basic duties that apply in all fiduciary relationships.

<i>LAC Minerals (Canadian case):</i> Does a fiduciary duty arise in pre-duty relationships (negotiation stage)	
Facts:	<p>International Corona was a junior mining company that was investigating the mineral potential of a property at Hemlo in Northern Ontario. LAC Minerals, a senior mining company, heard of Corona's activity and arranged to visit the site. Corona gratuitously showed LAC's representatives detailed information about their geological findings, together with their underlying theory about its mineral potential and importance (potential joint venture project). In further discussions about development and financing options, detailed private information was disclosed. Corona was advised by LAC to aggressively pursue the Williams property. The matter of confidentiality was not raised.</p> <p><i>There were three questions before the Supreme Court of Canada:</i></p> <ul style="list-style-type: none">• Did a fiduciary relationship exist between Corona and LAC which was breached by Lac's acquisition of the property?• Did LAC misuse confidential information obtained by it from Corona and thereby deprive Corona of the property
Held:	<p>The court ruled unanimously that there had been a breach of confidence, and by 3-2 it was held that no fiduciary duty existed in this case, and by 3-2 that the imposition of a constructive trust on Lac in favour of Corona was the appropriate.</p> <p><i>There are three conditions that must be present for a fiduciary relationship to exist:</i></p> <ul style="list-style-type: none">- the fiduciary has scope for the exercise of some discretion or power;- the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and- the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. <p>There was no element of dependency shown in this case.</p>

<i>Howard v Commissioner of Taxation</i> Does a fiduciary duty arise in pre-duty relationships (negotiation stage)	
Facts:	<p>Mr Howard was a director of Discronics Ltd. In early 2005, he participated in a proceeding concerning a joint venture involving a purchase, lease and on-sale of a golf course. Whilst the joint venture was on foot, Mr Howard and two other directors of Discronics, who were also members of the joint venture, endeavoured to have Discronics become the purchaser of the golf course, although two other members of the joint venture did not agree.</p> <p>Subsequently, two other members diverted to their own use the business opportunity pursued by the joint venture. These two were later found in breach of their fiduciary duties owed to Mr Howard. Mr Howard was awarded equitable compensation following this.</p> <p>Upon the assessment of Mr Howard's income for the year 2005, the Commissioner of Taxation found that his share of the equitable compensation was part of his assessable income. Mr Howard argued that he received the compensation as constructive trustee of Discronics and therefore the sum should not be included as part of his assessable income.</p>
Held:	<p>HC found that the amount of equitable compensation received by Mr Howard was not received by him as constructive trustee of Discronics. The Court found that at the time Mr Howard obtained or became entitled to that amount, there was no actual conflict, and no real possibility of conflict, between his personal interests and his duties as a director of Discronics. The Court ultimately found that the proceeds of the action were income in his hands and thus correctly assessed as assessable income</p> <p>Dismissing the appeal, HC held that Mr Howard did not receive the amount of equitable compensation as constructive trustee for Discronics because, at the time Mr Howard obtained or became entitled to that amount, there was no actual conflict, and no real possibility of conflict, between his personal interests and his duties as a director of Discronics. As to the litigation agreement, the Court held that as it provided for the assignment of Mr Howard's future income, rather than his underlying rights to receive those sums, the proceeds of the action were income in his hands. The sum received was correctly included in his assessable income.</p>

The Hospital Products decision

One of the most important cases dealing with the actual creation and imposition of a fiduciary relationship is ***Hospital Products Ltd v United States Surgical Corporation (1984)***. This decision along with a number of subsequent HC decisions examine the relevance of contractual relationships to the imposition of fiduciary obligations. In particular, the commerciality of the agreement can often be found to preclude the existence of fiduciary duties.

<i>Hospital Products Ltd v United States Surgical Corporation</i> Does a fiduciary relationship exist? Or is it purely commercial?	
Held:	<p>HC unanimously held that Blackman had breached his contract. Maj held that he did not owe fiduciary obligations to USSC.</p> <p>HC unanimously held that there was a breach of contract but – by a majority, rejected the argument that the relationship was fiduciary.</p> <ul style="list-style-type: none"> - Parties were at arms length - USSC in a position to protect itself - USSC not powerless or vulnerable when negotiating initial distributor contract - Breach of contract available - Strong bias against the importation of equitable standards into commercial transactions - Each party has a profit motive <p>Mason J dissented on the ground that Ds were under a limited fiduciary obligation to protect USSC's Australian product goodwill. Mason thought that in circumstances equity could superimpose on contract. The parties could not see who was at arms length in the future. All factors indicated that the defendants were free to promote their own commercial interests and had not exclusively agreed to act in the interest of the USSC.</p>

<i>Korda v Australian Executor Trustees (SA):</i> An express trust	
Facts:	<p>AET, the corporate trustee of the trust scheme, claimed on behalf of the investors that the proceeds of a sale of standing timber and scheme land, which were payable to the companies, were subject to an express trust in their hands in favour of the investors. If correct, the proceeds were not available to newly appointed receivers.</p> <p>Pursuant to the terms of the commercial agreement, money received by the milling company from the sale of the timber had to be retained and applied as determined by the tripartite agreement. The net proceeds received were to be paid by instalments to the forest company, which in turn was to pay it to the trustee for distribution amongst the entitled covenant holders. Each company was required to maintain accounts and records specifying the class of covenant holders, the series of covenants to which the net proceeds were to be allocated and apportioned, and in the proportions in which those proceeds were to be distributed. Further the Milling company was required to submit its books and annual accounts for audit by the forest company's auditors.</p> <p>AET argued that these obligations, combined with the fact that the forests company and the milling company were to treat the proceeds as a whole fund kept separately from other funds, suggested an intention to create an express trust over the fund.</p>
Held:	<p>The arrangement did not create an express trust. The agreement did not specifically oblige the Milling company to keep the sale proceeds intact as a fund. Further, the accounting arrangements themselves were explicable by reference to the statutory and contractual obligations of AET.</p> <p>French CJ felt it was inappropriate to deduce an intention to generate the institutional consequences of the express trust purely for the purposes of reinforcing marketing promises contained in the initial prospectus.</p> <p>The critical matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship. It must so implicate that party in the other's affairs or so align him with the protection or advancement of that other's interests that foundation exists for the 'fiduciary expectation.'</p>

Fiduciary Duties

There are two essential duties that are imposed over a fiduciary relationship: the duty to avoid a conflict of interest, and the duty to account for any profit made. To some extent these duties overlap. Essentially, the duty to avoid a conflict of interest refers to the duty to avoid entering into a situation where personal and fiduciary duty conflict. In this respect, some attention needs to be given to the scope of the fiduciary's powers.

Scope

Not all actions that are carried out by a fiduciary are carried out in the course of performing fiduciary duties. These actions are outside the scope of the fiduciary relationships; they cannot constitute a breach, and are not accountable for any profit.

Determining the scope of the fiduciary's powers is a question of fact in each case. For example, a company director who is a fiduciary is not liable to the company for any private property purchases made or private investments entered into. In order to determine what is private, some consideration must be given to the nature of the business carried on by the company and the similarity of the business to the investments or transactions entered into.

SUMMARIES

TOPIC 8 SUMMARY – STATUTORY FORMALITIES AND COMPLETE CONSTITUTION OF EXPRESS TRUSTS

This looks at how express trusts are created, there are two types; express trust by transfer and express trust by declaration. The formalities look at what is required to make the trust effective.

This includes the following elements:

- Instruments required to be in writing this is not a deed refers to the equitable interest itself
- Time when the writing must be performed i.e. do you evidence it and then put it in writing or do you put it in writing straight away
- Note however where formalities do not apply i.e. transfer of shares, to a trust that does not exist (**s. 53, 1A and s. 53 1B** would not apply) the trust can be created outside the realm of formalities - must establish the three certainties

Unenforceable: This is active until it is challenged, at which time it will fail and becomes unenforceable. Trustee duties are owed until it fails.

Void: The trust is never valid from creation

Relevant statutory provisions

Property Law Act provisions

The current statutory formality provisions are set out in s 53(1) of the Property Law Act 1958 (Vic):

PROPERTY LAW ACT 1958 - SECT 53 – Instruments required to be in writing

(1) Subject to the provisions hereinafter contained with respect to the creation of interest in land by parol—

(a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorized in writing, or by will, or by operation of law;

(b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;

(c) a disposition of an equitable interest or trust subsisting at the time of the disposition must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorized in writing or by will.

(2) This section shall not affect the creation or operation of resulting, implied or constructive trusts.

The application of s 53

Section 53(1) of the Property Law Act applies to all attempts to create a trust expressly, whether by transfer or declaration (it will not, however, apply to resulting or constructive trusts per **s 53(2)**). The issue is not so much whether s 53(1) applies, but which sub-section of it applies. This is particularly important where the trust has not been created in writing for some reason. Where the trust has been created in writing, **s 53(1)** is complied with, and there is no need to consider the fine distinctions between the sub-sections.

Legal interest or subsisting equitable interest

The next consideration when determining which sub-section applies is whether or not the interest which is being dealt with is legal or a 'subsisting equitable' interest.

- Section 53(1)(a) applies to any interest (legal or equitable);
- Section 53(1)(b) applies to any interest (legal or equitable); and
- Section 53(1)(c) applies *only* to subsisting equitable interests.

Grey v IRC House of Lords [1960] AC 1, and PT Ltd v Maradona Pty Ltd (1992) 27 NSWLR 241

In *Grey* the word disposition was given a very broad meaning. The court stated: 'The word *disposition* is apt to include an act by an owner of property, the legal effect of which is that he ceases to be the owner of that property'. The direction to trustees here was regarded as an assignment of an equitable interest, which was subsisting because it had already been separated from the legal interest in the first transfer. Hence, the direction amounted to a declaration of trust and a disposition of a subsisting equitable interest. To amount to a disposition, no special words are required. It was found that it was a false distinction to differentiate between a document or act that is, and one that operates as, a disposition. This means that any act to get rid of the property, which is owned is regarded as a disposition. It is not restricted to acts that are direct assignments but includes clear directions to hold on trust, as long as such directions are irrevocable.

Declaration of Trusts

Declaration of trusts were initially itemized by Dixon J in *Comptroller of Stamps VIC v Howard-Smith*.

- A declaration of trust over a subsisting equitable interest
- An assignment of a subsisting equitable interest
- A direction to a trustee to hold a beneficial interest on trust for another party

A direction by a beneficiary to a trustee, for the beneficial interest to be held on behalf of a different party, can be a disposition or an assignment of that equitable interest, to which para (1)(c) of the writing provisions would apply.

A declaration of trust refers to the creation of a new interest. Declarations include:

1. An oral statement that property is to be held on trust for the benefit of another; if the declaration of trust is given over property which the settlor owns, the creation of trust always constitutes a declaration. A legal owner with full ownership is not thought to own two estates, one legal and the other equitable. If the legal owner declares a trust, an equitable interest may be created but it is purely a creation at this stage. See *DKLR Holding Co (No 2) v CSD (NSW)* (1980) 1 NSWLR 510.
2. A declaration of trust occurs where the legal owner transfers property to a third-party trustee. In this situation, the settlor declares that the third party is trustee for the benefit of the named beneficiary. The declaration may be by transfer or by direction.
3. A direction to the trustee that a beneficial interest is to be held upon trust for named beneficiaries also constitutes a declaration. This is exactly what occurred in *Grey v IRC*.
4. An assignment of an equitable interest never amounts to a declaration because it is considered as a transaction to transfer property rather than create it.

Disposition

A disposition has been defined as any act by the settlor to get rid of an existing interest. In the context of **section 53(l)(c)**, a disposition refers to any act designed to get rid of a subsisting equitable interest. To establish a disposition for the purposes of that sub-section, it must be shown that there has been an act that will result in transferral of the interest *and* the interest must be classified as a subsisting equitable interest.

Disposition for the purposes of **s 53(l)(a)** is not limited to subsisting equitable interests and includes any act to get rid of a legal or an equitable interest. Arguably, a trust by transfer could amount to both a creation of an interest in the new beneficiary and a disposition of a legal interest to the third-party settlor. This form of disposition could be covered only by sub-s (a) because disposition in sub-s (c) must be read in the context of subsisting equitable interest.

Comptroller of Stamps v Howard Smith.

In that case, Dixon J then summarised the type of transactions which would amount to equitable dispositions:

- declaration of trust over the equitable interest, such as a sub-trust;
- an assignment of the equitable interest; and
- a direction that a third-party trustee holds a beneficial interest on trust for another party.

With respect to land, **Section 53.1.B.** must be manifested and proved by some writing and duly signed:

1. Declarations, not dispositions
2. land, not personal property
3. manifested and proved" by some writing
4. some person who can declare such trust
5. express trusts, not resulting, implied or constructive trusts

Summary of the differences

- 1 A declaration primarily deals with the creation of a new interest. If the settlor has full legal ownership, then the declaration of trust is regarded as a creation of a new interest only; this is because the settlor is not regarded as having two separate interests, one legal and one equitable. There has been no disposition of a subsisting equitable interest, hence only sub-s (b) applies and the transaction need only be evidenced in writing.
- 2 A declaration occurs where a settlor transfers property to a third party. In such a situation the transaction is regarded as both a declaration and a disposition because the settlor creates a new equitable interest *and* gets rid of the legal interest. As such, either sub-s (b), or sub-s (a) applies. In such an overlap the stronger formality requirement rules, and the transaction needs to be created in writing.
- 3 A direction to a third-party trustee to hold property on trust for a new beneficiary can also amount to a declaration of trust. In this situation there is both a declaration and a disposition, and any provision could apply (that is, sub-s (c) will apply only if the interest is classified as a subsisting equitable interest).
- 4 A declaration is any method, oral or by transfer or direction, by which a new interest is created. The only transaction, which is not a declaration is an outright assignment. This is considered as purely a disposition of an interest.
- 5 A disposition refers to any natural act to transfer the property and includes an assignment, a declaration or a direction, but not a mere authorisation. Disposition and declaration directly overlap except to the extent that declaration does not include an assignment. To this extent, sub-s (b) overlaps both sub-s (a) and sub-s (c).
- 6 A disposition of a subsisting equitable interest occurs only if the equitable interest is subsisting at the time of the transaction. To be subsisting, the interest must have been created prior to the transaction; it cannot be created by the actual transaction itself, as *Grey v IRC* illustrates. In this situation, sub-s (c) applies.
- 7 A disposition of a legal interest occurs whenever there has been a transfer, direction or assignment. In such a situation, sub-s (a) applies.

Cases dealing with the application of s 53(1)

The decision in *Adamson v Hayes (1973)* is one of the most important for the interpretation and application of **s 53(1) of the Property Law Act**. In that case, each member of the HC came to a different conclusion about the applicability of the provisions.

An agreement to assign an equitable interest constitutes, *prima facie*, a disposition of a subsisting equitable interest and must, therefore, be in writing. That was certainly the view of the High Court in *Adamson v Hayes (1973)*, which involved an oral agreement dealing with equitable interests in mineral claims in Western Australia

If *DSS v James* is applied in Victoria, it means that, despite any overlap, subs (b) applies to all declarations of trust over land and they need only to be evidenced in writing. It is not clear whether it applies to declarations over subsisting equitable interests.

Exceptions to the application of s 53

Not all transactions involving the creation of express trusts are covered by the writing requirements in **s 53 of the Property Law Act**.

The following represents a summary of situations in which the section does not apply:

- a. The doctrine of part performance: If a beneficiary of a trust has acted so as to change their position on the faith that a trust exists, the beneficiary can prove the trust.
- b. It may be possible to create an express trust through equitable proprietary estoppel despite the lack of writing.
- c. The effect of s 53(2) excludes from the section constructive, resulting or implied trusts. These trusts are effective even if there is no writing to prove the trust.
- d. A legal owner against whom an oral trust is alleged may be prevented from denying the trust under the equitable principle that the statute is not to be used to cloak a fraud. (Estoppel and part performance may be used to prove the trust.)

Secret trusts

These can sometimes exist as independent trusts separate of a will *Re Snowden*, the requirements for a secret trust is, *Ledgerwood v Perpetual Trustee Co Ltd*:

1. The testator had an intention that the done is subject to a trust obligation
2. The testator's communication of the intention to the donee
3. The donees' acceptance of the obligation upon the testator's death

Quick Summaries

What is the difference between a legal interest and a subsisting equitable interest?

A legal interest is an interest that is categorised as having a legal identity because it complies with the statutory formality requirements. Hence, if the interest is in land, a legal interest will occur where a deed has been properly executed or, in the context of digital conveyancing, where the online document satisfies the Electronic Conveyancing Law. A subsisting equitable interest is an interest that pre-dates the creation of a trust, but which is only recognized in the equity jurisdiction. In this sense, a subsisting equitable interest would be a beneficial interest under an express trust that is subsequently, for example, transferred to a sub-trust. The beneficial interest is equitable because it is recognized as proprietary in the equity jurisdiction. It is subsisting because it is created by the anterior express trust and not the subsequent sub-trust.

Why was it that the interest in *Grey v IRC* could be classified as 'subsisting'?

Hunter was the beneficiary under a bare trust of 18,000 shares. Grey was the trustee. On 18 February 1955 Hunter orally and irrevocably directed Grey to hold those shares on various trusts for Hunter's grandchildren. One week later Hunter executed various declarations of trust confirming the effect of the oral direction given to Grey. The issue was whether the oral directive was effective to pass the interest? If it was then stamp duty was only payable on a nominal basis on the confirming declarations. The House of Lords ruled against Grey and found that the oral directions were ineffective. This was the disposition of a subsisting equitable interest and needed to be in writing. The equitable interest on the facts was subsisting because Hunter was a beneficiary under a bare trust and he was disposing of that interest by way of a direction which was held to constitute a disposition and which effectively attracted the formality requirements for writing. Because the direction was only oral, the disposition was ineffective and *ad valorem* stamp duty had to be paid on the written declarations of trust.

Are the formality requirements for the creation of an express trust over 'subsisting equitable interests' different from those with respect to legal interests?

The cases indicate that where an express trust is created with the trust property constituting a subsisting equitable interest, the relevant formality requirements will be either s53(1)(c) and this requires writing. This is effectively the same formality requirement as is applicable under s53(1)(a) for the creation of express trusts over legal interests. In both cases, the creation of the trust over pre-existing trust property must be in writing nor oral.