

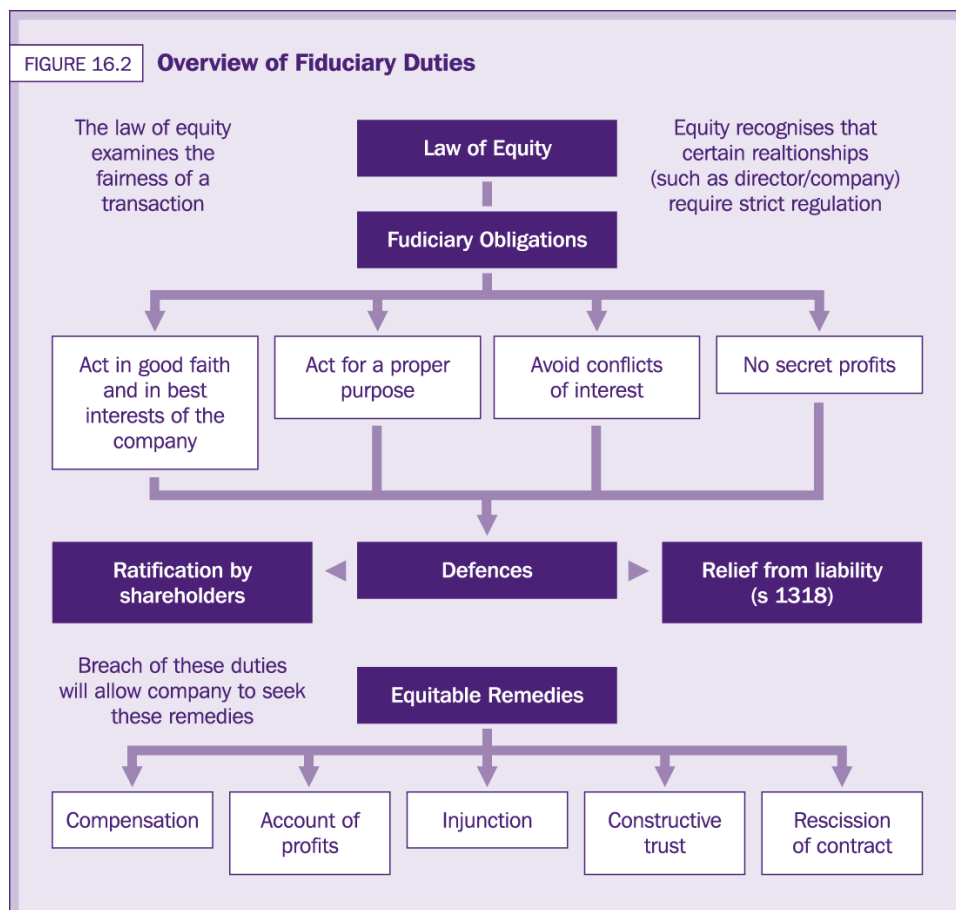
3.1 → Directors Duties 1

ALWAYS ANSWER WITH COMMON LAW AND STATUTE LAW – remedies are different!

- Can limit liability within partnership agreement (doesn't mean it's a limited partnership, just states responsibility of each partner)
 - Provision in partnership act to remove a partner from the partnership
- Trust – run to preserve assets, need a trustee (often corporate)

Company – run by directors

- Power can only be taken away if it is reserved within the constitution to be exercised by the shareholders
- Shareholders are the owners – what rights do they have to get rid of a director?
- 5% or 100 members can call a general meeting (paid for by company unless company refuses to hold meeting and then members pay)
 - Put forward resolution to remove a director
 - Director is entitled to put forward a defence (max 1000 words, not defamatory)
 - Members vote – need 50% majority to remove director
 - Poll or show of hands? → decided by chairman
 - Need to say why we want to get rid of them → breached duty to company
- Duty of care, skill, diligence
- Duty to prevent insolvent trading
- Overview of the duties:



- Law of trust (obligation imposed on every director) → fiduciary duties → common law!
- Start by identifying history of director's and their trustee obligations – 1885
- Equitable remedies: restoring to the position they were in before the event occurred (transaction may have moved on – affects third parties – very difficult)
 - Compensation – only returns to original state (to restore)
 - Injunction – equitable injunction to stop something
 - Constructive trust – you don't own it, acting as a trustee
- Statutory remedies work with equitable remedies (SECTION 185 – statute and equitable remedies co-exist, must bring action in both)
- Statutory remedies:
 - Pecuniary penalty – a power that is vested in the Commonwealth gov't to inflict on a person who has breached their statutory director's duties (can be fined \$110 for a breach, amounting to \$220,000 for any single action)
 - Disqualification order
 - Compensation- whatever the court decides, payable to whomever the court decides
 - totally different to compensation under fiduciary duty
- There are limitations to the statutory remedies
 - Can't have constructive trust
 - Can't have a recession of contract
 - Can't have an accounting of profits
- Therefore equitable and statutory orders co-exist
- Duties are owed to the company
- Duties are largely fiduciary in nature (cf negligence) and the strictness of early cases are indicative of these origins especially with regard to conflict
- Duties are only owed to others eg individual shareholders, in very limited circumstances
- 180 → common law → tort → carelessness, harm, causation (negligence)
- Cases re duties owed to shareholders, individual responsibility - Percival and Wright, Coleman and Myers, Brunninghausen v Glavanics
 - Fiduciary duties owed in "overgrown partnerships"
- Duties are found;
 - Statutory – s 180-184, 588
 - General law – found in cases
 - Both kinds apply to directors
 - Some overlap in content of duties
- The duties are:
 - Good faith and proper purpose
 - Duty to retain discretion
 - Conflicts of interest and duty of disclosure
 - Duties of care, skill and diligence
 - Avoiding insolvent trading (statutory)
- Duty to prevent insolvent trading:
 - S 588 (g) – the director of a company which incurs a debt when the company is insolvent or rendered insolvent by entering into the debt, they breach this section

S180 – says director or officer (could be financial controller or accountant)