

# *Equity Exam Notes*

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# *Topic 1: Introduction to Equity*

## 1.1. Equity as an Element of the Australian Legal System

**Definition:** The separate body of law, developed in the Court of Chancery, which supplements, corrects, and controls the rules of common law (CL was very rigid).

**Court of Chancery:** English court of equity, presided over by the Lord Chancellor, that existed until passing of Judicature Act 1973, which provided procedural unification of equity and common law jurisdictions (done in same court).

*The Earl of Oxford's Case (1615):*

Attorney General on behalf of King issued decree: "*In cases of conflict between the rules of common law and equity, **the rules of equity should prevail***".

Given effect in *Supreme Court Act 1986 (Vic) s29(1)*

**Supreme Court Act 1986 (Vic) s 29(1):**

- Law and equity to be concurrently administered

*(1) Subject to the provisions of this or any other Act, every court exercising jurisdiction in Victoria in any civil proceeding must continue to administer law and equity on the basis that, if there is a conflict or variance between the rules of equity and the rules of the common law concerning the same matter, **the rules of equity prevail**.*

...

# Topic 2: Breach of Confidence

## Introduction

### Model response

[P] may consider bringing an action of breach of confidence (BOC) against [D] for disclosing [INSERT INFO] to (INSERT WHO), and seek equitable relief as to the damage suffered. What is required to be established is specificity (*O'Brien*), that the information has the necessary 'quality of confidence', circumstances importing the duty and unauthorised use (*Megarry J in Coco v AN Clark*).

## Element 1: Specificity

**(Rule):** Per *O'Brien*, the information disclosed by [D] can/cannot be identified with sufficient precision and not in general terms: [insert information]. This specificity is demonstrated as [insert reason].

[D] can identify with sufficient precision the information disclosed which is protected: [insert information] (***the information***). This element is established.

- [P] should distinguish from generality as seen in *Ocular Sciences* where it was held that 'warehouse information' was not specific.
- [D] should argue [INFO] is analogous to the **vague** and **unidentifiable** tax scheme Komesaroff had alleged was disclosed without authorisation in *O'Brien*

### Sample analogy:

- Much like in *O'Brien @ 326*, where Komesaroff had not made clear which specific parts of the unit trustee contained confidential information...
- The facts here are **dissimilar** to *O'Brien* because of the information in the [insert info holder eg package] being sufficiently specific. The information here includes (list)

Mention if relevant: If all documents are confidential

However, in contrast *Ocular Sciences*, all of the [insert documents] OTF are confidential. Whereas only some/not all of the documents in *Ocular Sciences* were confidential. In the filing cabinets of *Ocular Sciences* there was statements of Snell's law (basic principles in Physics learnt in High School) as well as documents included in press releases about new inventions that were not confidential as they had been broadcast and published in the press.

On balance, the specific element for [insert information] is likely met because the information can be identified with sufficient specificity (what [D] is claiming as confidential can be identified with sufficient precision).

## Element 2 - Necessary Quality of Confidence (NQOC)

**Rule:** Per *Megarry J* in *Coco v Clark*, the information must have the **NQOC** such that it can be protected by equity. [P] must satisfy the additional requirements of **secrecy** (the information is not publicly available) and **value** (the information is not trivial and not benal), to prove that (INSERT INFO) has the NQOC.

### 2.1 Secrecy

**RULE:** Per *ABC v Lenah Game Meats*, the information must be **sufficiently secret** as opposed to 'public property and public knowledge' (*Cwth v Fairfax citing Saltman*).

It is not necessary for information to be secret, in the sense that it has not been communicated by the person or person to whom it relates, for it to satisfy the test of private or confidential (*Jane Doe*)

[D] is likely to allege that [INFO] was not secret as it was known in the local community/ broadcasted on television or to the public

When is information considered to be 'public':

- (i) If it was confidential and has been disclosed
- (ii) If it was so general to begin with that it could never have been confidential

...

# *Topic 3: Fiduciaries Duties*

## General Notes:

- The duties are normally negative or 'proscriptive' (forbidding or restricting something) as they prevent bad conduct in fiduciary relationships
- Third parties can be liable where a fiduciary breach has occurred
- Breaches of fiduciary duty attract the full range of equity's remedies (including proprietary remedies)
- **Fiduciary** – person who owes the duty of loyalty and insuring no conflict of interest
- **Principal/Beneficiary** – the person who reposes the trust and confidence

## **Key steps in a fiduciary question**

1. Establish the fiduciary relationship
2. Determine the scope of that relationship
3. Establish if any breach has occurred
4. Any defences available?
5. Assess any available remedies against the fiduciary?
6. Is any third party involved?

## **Step 1) Introduction**

### Model response:

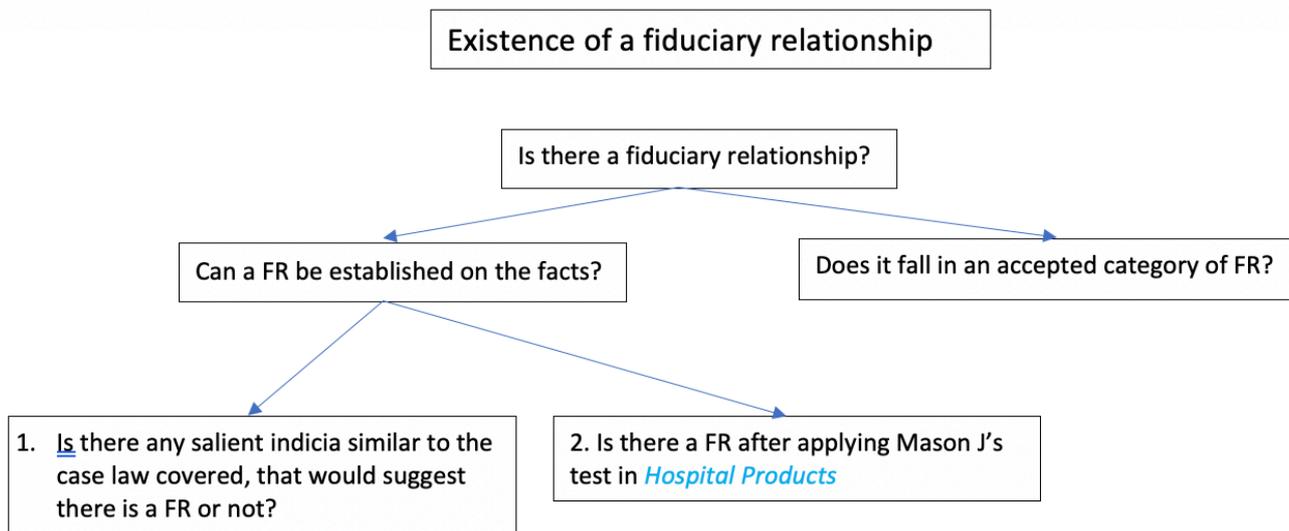
[P] may allege that [D] owed a fiduciary duty to her/him and in [insert conduct] breached a fiduciary obligation.

## **Step 2) Did [D] owe [P] fiduciary duties?**

### Model response:

In order to attract Equity's protection and remedies, the relationship between [P] and [D] must be fiduciary. Fiduciary relationships can be established in two ways (1) if they fall within an **accepted category** or (2) when **established on the facts** (*Gibbs CJ, Hospital Products*). To established on the facts a fiduciary duty **Mason J's test in Hospital Products** requires consideration or **analogy** must be drawn with case law.

NB: Establishing a fiduciary obligation **is only the first step** (*Grimaldi [179]*)



## 2.1 Is the relationship between [D] and [P] an accepted categories?

Sample shutdown: On the facts (OTF), the relationship between [D] and [P] **does not fall** within an accepted category.

Sample application:

As the relationship between [P] and [D] is one of [**insert accepted relationship**] the relationship will be held to be fiduciary, not by way of presumption, but because it is an accepted category of Fiduciary Relationships and exhibits the necessary characteristics that equity protects.

### Accepted categories

- (i) Trustee and beneficiaries (*Boardman v Phipps; Keech v Sandford*)
  - Gibbs CJ in *Hospital Products* ‘the archetype of fiduciary is of course the trustee’
- (ii) Directors and companies (*Regal Hastings; Queensland Mines*)
- (iii) Shadow Directors and companies (*Consul Developments*)
  - “a person who though irregularly appointed assumes the position of director and ...
  - (if property developer is relevant) performs the tasks of finding, investigating and reporting upon properties suitable for purchase by the company owes a fiduciary duty to the company with which his private interests cannot be allowed to conflict” [page 394-5]

- (iv) Agents and principals (*McKenzie v McDonald*)
- (v) As an employee, [employee] owed [employer] fiduciary duties (*Warman v Dwyer; Vic Uni v Wilson*).
- (vi) Partners (horizontal relationship) (*Chan v Zacharia*)
- 'It has been said that a stronger case of fiduciary relationship cannot be conceived than that which exists between partners' Dixon J in *Birtchnell*
  - The subject matter over which the fiduciary obligations exist must be determined by the character of the venture or undertaking for which 'the relationship between the prospective JV existed' (*Birtchnell*)
- (vii) Distributor and manufacturer/supplier (*Hospital Products* — Blackman as distributor and USSC as supplier).

### 2.2.1 Test per Mason J in *Hospital Products* (affirmed in *John Alexander's Clubs*) OR

Model response:

**TEST:** Per Mason J "the critical feature of [fiduciary relationships] is that the fiduciary undertakes or agrees to (FACTOR 1) act for and on behalf of or in the interests of another person in the exercise of a power or discretion which will (FACTOR 2) affect the interests of that other person in a legal or practical sense. The relationship parties is therefore one which gives the fiduciary a special opportunity to (FACTOR 3) exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of [her/his] position"

**Factor 1: Had [fiduciary] undertaken/agreed to act for or on behalf or in the interests of another person (insert beneficiary)? — Representative character**

Model response

[D] must undertaken/agreed to act for, on behalf or, or in the interests of [P], in a **representative character**. [P] will argue that [D] acted on behalf of their interests in a representative way

## Representation of goodwill

[Fiduciary] had undertaken to represent [principal]'s [TYPE OF INTEREST] interests which is analogous to the Blackman representing the USSC's product's good will in Australia *Hospital Products*. Just as USSC reposed its Australian market goodwill in Hospital Products who were the 'custodians' (page 101 *Hospital Products*) of USSC's goodwill, [D] acted as custodian of [P]'s goodwill

Per Mason J (dissent) in *Hospital Products*: "The expressions 'for', 'on behalf of', and 'in the interests of' signify that the fiduciary acts in a **representative character** in the exercise of his responsibility..."

## Partnership/JV scenario

The current factual scenario is analogous to how *UDC v Brian* pool your assets/efforts and repose parts of your affairs into the other partners/JVs

**Principle:** It is not enough that you undertake to act for somebody else – the undertaking must be one *to not act* in your own best interests

Similar to *Hospital Products*, where there was no undertaking by HP to act in USSC's best interests, even though USSC had relied on HP...

Was [P] relevantly vulnerable to [D]'s exercise of powers/ discretions, in respect of her/her legal/practical interests?

**Factor 2: Was [fiduciary] exercising power or discretion?**

...

## Step 6: 3rd Party Liability

### Introduction:

Equity may impose personal liability on third parties when fiduciary obligations are breached. Remedies will be limited to personal remedies alone. Per *Barnes v Addy*, Equity May impose liability for BOFD on a third party (TP) who either:

- 1) Knowingly receives or deals with fiduciary property (**Knowing Receipt**)
- 2) Knowingly assists with the fiduciary's dishonest and fraudulent design (**Knowing Assistance**)

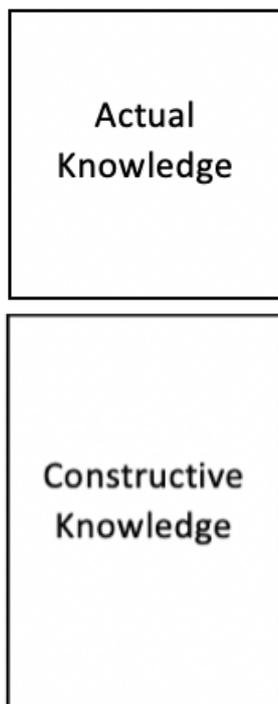
Both of the limbs do not need be shown, merely one.

**1st limb:** A stranger to a trust who **receives** trust property becomes chargeable with it as if they are a constructive trustee

**2nd limb:** A stranger to a trust who, with **knowledge**, assists a **trustee** in a **dishonest and fraudulent design**, is liable as a constructive trustee

Note situation where the assister/recipient is the corporate 'alter-ego' of the fiduciary – liability is straightforward (*Grimaldi*)

### *Baden Scale of Knowledge*



1. Actual knowledge
2. Wilfully shutting eyes to the obvious
  - *'she didn't ask because she was scared of losing her job'*
3. Wilfully/Recklessly failing to make enquiries an honest/reasonable person would make
  - Think it was wrong AND THEN don't enquire
4. Knowledge of circumstances that would indicate facts to honest/reasonable person
  - **Sufficient** for 3p Liability
    - Knowing Receipt – *Grimaldi*
    - Knowing assistance – *Consul; Farah*
  - Ensures that the *'morally obtuse'* cannot escape liability by a failure to recognise an impropriety that would have been apparent to an ordinary person (Gibbs J)
5. Knowledge of circumstances that would put an honest/reasonable person on enquiry
  - **NOT SUFFICIENT** to establish 3p Liability (*Grimaldi; Farah*)

## Knowing assistance (2<sup>nd</sup> limb)

Model response:

**Rule:** A stranger to a trust who knowingly assists a fiduciary in a dishonest and fraudulent design, is liable as a constructive trustee. The TP [TP] will be liable if they had knowledge at or above category 4 of the Baden scale (*Farah applying dicta in Consul*). Thus, it only need be shown that [TP] at least had knowledge at level 4.

**NB:** Do not need to spend a lot of time determining precisely which level their knowledge was at!

**Elements:**

1. There must be a **primary breach** of fiduciary duty;
2. The defendant must **'assist'** in the breach,
3. The third party must have **knowledge** of 'dishonest and fraudulent design' of the fiduciary (*Consul*) that falls within the first 4 levels of the Baden Scale (*Farrah; Westpac; Bell*).
4. Finally, the defendant's breach must be **fraudulent and dishonest**, with the HC in *Farah* insisting strict fidelity to this

### Q1: Is there a **primary breach**?

Model response: Yes. See discussion of BOFD by [fiduciary].

### Q2: Does what the [TP] did constitute **assistance**?

Assistance is broadly defined (*Lifeplan*) and can be at any time (before/during/after).

Sample analogy: Assisting in misappropriating opportunity

[TP]'s conduct could be likened to that in *Consul Developments* (i.e assisting the fiduciary in realising the gains of the misappropriated opportunity). [TP] clearly assisted in [fiduciary]'s BOFD by [insert action eg deploying the technique/participating in the transaction] and thereby realising the value of the opportunity that he misappropriated.

## Examples

1. Facilitating transactions, executing docs; receiving and transmitting payments
2. Diverting assets to third party and participating in diversion (*Consul; Farah*)
3. Solicitor carries out client's instructions on receipt of money and pays out person not entitled
4. A party issuing fraudulent invoices that allows company director's to defraud their company.

### Sample analogy: TP making BOFD possible

Much like in *Lifepan*, where Mr Wolf and Mr Corby would not have been able to implement a scheme without company like Foresters to run it, [fiduciary] could not have [insert activity] without [TP]. Just as Foresters knowing assistance was crucial to the scheme, [TP]'s was. A causal connection existed between [TP]'s knowing assistance and the profits they made can be drawn (*Lifepan*).

## Q3: Is the primary breach by [fiduciary] a 'fraudulent and dishonest design'?

**Rule:** The underlying breach which the TP knowingly assisted **must be fraudulent and dishonest** (*HCA in Farah Constructions*).

## What is dishonest and fraudulent?

Initially in *Consul (1975)*, Gibbs J stated dishonest and fraudulent ... 'is to be understood by reference to equitable principles'. Later in *Westpac v Bell Group* Drummond J states a BOFD must be too serious to be excusable, and this is judged by whether the fiduciary acted reasonably and honestly, and whether in trust law, they ought to be excused. However this low threshold in *Westpac* was rejected in *Hasler v Singtel* with Leeming J stating to be 'fraudulent and dishonest' the alleged breach must amount to a "transgression of ordinary honest behaviour" [page 621 para 46].

### Sample response: Keeping information secret but not lying

[P] clearly had the requisite dishonest and fraudulent design given the flagrancy of the dishonesty (*Farah, Hasler*) – she had kept the matter secret from [D].

[D] had kept secret [insert dishonest and fraudulent design] ....but did not actually lie. This surreptitious was not trivial or well-intentioned.

#### Case summaries:

In *Hasler v Singtel* Mr Curtis was a **SD of Sumo** and **senior employee of Optus** and he placed in personal interest in Sumo in conflict with the interests of Optus by approving Optus' decision to accept Sumo's offer to warehousing services (at the price he determined).

In *Westpac v Bell Group*, the BOFD was sufficiently serious by committing their companies to transactions which they knew were not in the co's interests even though they may have been in the interests of the wider parents companies, they were acting dishonestly and fraudulently in the meaning of Fid law.

In *Farah Constructions*, Mr Allias Farah was in BOFD by reason of his insufficient disclosure (the HC said they were not) the HC said these would be **mistakes rather than** frauds and not **constitute dishonest and fraudulent conduct**.

#### **Q4: Did [TP] have knowledge of 'dishonest and fraudulent design'?**

##### Model sentence:

[TP]'s knowledge must fall within the first 4 levels of the Baden scale (*Farah; Westpac; Bell*). Level 5 is insufficient (*Farah*).

##### **Yes:**

Much like in *Lifepan* where the court held that Foresters knowingly took advantage of Wolf and Corby's dishonest and fraudulent design by taking the business concept plan (BCP) containing misused confidential information which would have been apparent to honest and reasonable person in position of Foresters board members, [TP] knowingly took advantage of [P]'s dishonest and fraudulent design. The [insert information eg confidential information] would have been apparent to honest and reasonable person in position of [TP]. This requirement is met.

## No:

Much like in *Farah Constructions*, where the mother and children of Farah Allias had no knowledge of Mr Allias' fid obligation or that the property or the use of the info to purchase property would be a BOFD, [TP] had no knowledge of [fiduciary's] obligation or or the use of the info to purchase property would be a BOFD

P will argue that knowledge pf [TP] is at or above level 4. More specifically, [TP] has

- **actual knowledge** per Level 1 of the Baden scale...
- **Wilfully** shut their eyes to the obvious per Level 2 of the Baden scale...
- **Wilfully** and **recklessly failed** to make **enquiries** and honest and reasonable person make per Level 3 of the Baden scale...
- Knowledge of circumstances that would put an honest and reasonable person on notice per Level 4 of the Baden scale...

because [insert reason]... On the facts, as [TP] knows the essential facts that amounts to breach and participates in the breach, the lack of fully informed consent is irrelevant (*Hasler*).

[TP] will argue the knowledge they possessed is between Level 4 and 5 (*Consul*)

# *T 4/5 Personal & Proprietary Remedies*

All equitable remedies are discretionary and are available in Equity's exclusive and auxiliary jurisdictions. Equitable remedies may take two forms; those related to the person (personal remedies) and those which are attached to the property (proprietary remedies).

## *Topic 4: Personal Remedies*

### **1. Introduction**

BOFD can give rise to personal remedies.

All Personal Remedies

1. Specific Performance
2. Injunction
- 2.5 Interim Injunction
- 2.75 Specific Delivery
3. Lord Cairns Act (damages in lieu) — only mention if SP and injunction discussed
4. Declarations
5. Equitable Rescission (P wants a contract undone)
6. Account of Profits
7. Equitable Compensation

If there is an egregious breach mention common law principles

Sample shutdown (specific performance):

There was no salient subject matter for an order of specific performance against [fiduciary] (as there is no promise to be honoured in a contract).

Sample shutdown: Obtaining a remedy for a TP

The issue here is [D] is insolvent/bankrupt which means personal remedies aren't much use when obtaining a remedy for [insert breach eg use of a cheque]. Therefore [P] needs to try obtain a proprietary remedy or personal remedy from someone who is solvent (a third party)

## Remedy 2.1 Interim injunctions

### Model response

An interim injunction may be sought to prevent [D] from engaging in certain conduct (insert conduct) before the matter can be heard properly in Court.

[P] will bear the onus of showing that (1) there is a serious question to be tried, (2) that he or she will suffer irreparable damage if the injunction is not granted and (3) the Court will also have regard to the balance of convenience (*per Glesson CJ in Lenah Game Meats*)

### (1) Is there a serious question to be tried?

Yes. The question of [D]'s BOC/BOFD/assignment of property demonstrates there may be a prima facie case and [P] does have a significant likelihood of success to justify the preservation of the status quo (*Lenah Game Meats*).

### (2) Will the damage suffered by [P] be irreplaceable if the injunction is not granted?

Yes. No.

**Much like/Unlike** *Foster v Mountford* where the damage would have been irreplaceable as the loss would have been exposure of a secret and sacred religion, with which monetary compensation would not be able to fix, in this instance, the damage suffered by [P] **is irreplaceable/is replaceable** because [insert reason]

### (3) Which way does the Balance of convenience fall in relation to an injunction

### Model response

The Court aims to balance the potential harm suffered by [P] if no injunction were awarded and the potential inconvenience caused to [D] if the injunction were awarded.

## The court will have regard to the following:

1. Delay
2. Effects on third parties
3. Whether other compensation would be adequate

Much like in *Foster v Mountford*, where there was no amount of money that could compensate the disclosure of the culture that was secret and possessed spiritual and community value, in this instance damages would too be inadequate as the information disclosed possessed [insert value type].

4. Commercial factors -effect on business etc...

## Conclusion (NB: taken from introduction)

An interim injunction may be sought to prevent [D] from [insert conduct] before the matter can be heard in Court.

# Remedy 2.1 Prohibitive injunctions

## Introduction

[P] may look to the Court to grant a prohibitory injunction to prevent [D] from [insert action eg auction the sculpture]. An injunction would only be granted by the Court if [P] could show s/he had an equitable right in ownership of the chattel [insert item].

## Criteria for awarding an injunctions

### 1) Is there a legal, equitable or statutory right to support the claim?

Injunctions are not available at large (*Lenah Games Meats*) and [P] will need to prove that he/she has a legal or equitable right. [P] will argue that they have an equitable right in relation to [BOFD], unlike *Lenah Game Meats*, which failed to establish that there was a breach of confidence (equitable) right. This element is met.

### 2) Will the award of injunction be just and convenient?

The court is empowered to grant injunctions under *s 37(1) Supreme Court Act (Vic)* if it is **just** and **convenient** to do so.

[P] may argue that granting the injunction would be 'just and convenient' as [apply to facts and how it would ensure justice]. [P] may argue that this is analogous to *Atkins* since the convenient outcome was pragmatically decided as what would most likely maintain peace between the parties.

[D] may argue that granting the injunction would not be 'just and convenient' as [apply facts] would not administer justice in the broader legal context.

## Conclusion (NB: taken from introduction)

A prohibitory injunction to prevent [P] from [insert activity eg auctioning the sculpture] may be awarded.

## Remedy 6: Account of Profit (AOP)

AOP = gain-stripping remedy

### Introduction

[P] may seek an account of [D]'s profits. AOP is a personal money and disgorgement remedy which **aims** to strip a [D] of wrongful gain (*Warman*) in circumstances breaching the conflict and/or profit rule (*Chan*). OTF, [D]'s wrongful gain is [insert]. AoP is measured at the time of breach (the date the asset was wrongfully acquired), however AoP must also account for enduring breach where [P] will have the benefit of any appreciation. Per *Warman* in calculating AOP “*the cardinal principle ... that the remedy must be fashioned to fit ... the case and the particular facts*” requires consideration.

### Allowance? Accounting for any skill D employed (this is a settled principle)

Per *Warman at 561*, in some circumstances it might appropriate for a fiduciary to keep some profits “*when ... a significant proportion of an increase in profits has been generated by [a fiduciary's] skill, efforts, property and resources*”

#### Sample shutdown:

Given that [D] did not put any effort into earning this profit, the doctrine of allowances does not require consideration.

#### Sample application:

[D] will cite *Warman* and argue that an allowance should be made for the time, skill and effort spent in [cultivating the business/purchase] such that [D] is not P's slave (like the plaintiffs were to *Warman*)

#### *If not honest*

However, [P] will distinguish the current facts from *Boardman* where a more generous allowance was made because the party in that case was acting honestly; whereas here [D] was acting dishonestly in their BOFD.

## Causal connection (CC) (what kind of connection do we need behind BoFD and profits and how should the quantum of loss be measured?)

Per *Lifeplan* [85], “the benefit ... a fiduciary or knowing participant is liable to be ordered to account must, as a baseline requirement, have a causal connection (CC) to the fiduciary’s [BOFD].” More specifically, “a CC between [fiduciary’s/TP’s BOFD and their benefit] ... will exist if the benefit ... would not have been obtained “but for” the breach.”

The High Court in *Lifeplan* at [4] explain CC involves considering the overall effect of [P]’s conduct rather than a specific link between one breach and the harm suffered.

For a breach of the conflict rule, a CC would be established where “the benefit or gain has been obtained ‘**by reason of**’ the fiduciary position” (*Lifeplan* [85] explaining *Warman*). For a breach of the profits rule, a causal connection would be established where “the benefit or gain has been **obtained ‘by reason of’ [fiduciary’s] taking advantage of an opportunity or knowledge derived from [their position]**” (*Lifeplan* [85] explaining *Warman*).

*Lifeplan* [93] elaborates that CC between the BOFD and benefit obtained is “not only [a] factual [question of causation]; fundamentally, it is evaluative”, meaning that approach to causation that gives best effect to the policy underlying AOP should be adopted. Further, *Lifeplan* at [95] “...the outcome of [the]... evaluative judgment, and not merely the outcome of the initial inquiry into causation ... yields the ‘true measure’ of the benefit or gain to be reflected in the order.”

Nettle J in *Lifeplan* [179] elaborates upon causation explaining “the matter does not permit of mathematical exactness but only of reasonable approximation” and to calculate the true measure of profit “whether the BOFD has materially contributed to the profit [need be considered]...as opposed to legal tests of causation and remoteness.”

### Model response

Once the ‘baseline’ causal connection (but for test) is satisfied *Warman* at 561-2 (endorsed by *Lifeplan*) **states** “the onus shifts to the defendant to establish that it is inequitable to order that the defendant account for the [full amount].”

There were 2 approaches that were proposed in *Warman* to discharge this onus.

The **first** involves holding the defendant liable for **all** the profits and make necessary allowances for skill, effort and labour. [P] will favour this approach as it is likely they will be receiving more.

- Quantum: ALL profits less allowance (eg 500k - 50k)

The **second** involves holding [D] liable for profits specifically connected to the BOFD, which will exclude all other sources of profit from account. [D] will favour this approach as theoretically they would be accounting for less but [P] may be receiving less

- Quantum: ONLY profits specifically connected to the breach

*Lifepan* expresses that there “no precise test...for determining when it will be inequitable to account for a benefit on the basis that it has no reasonable connection with wrongdoing...all of the circumstances must be considered.” However “the nature of the conduct...[more specifically, the fact] that the profits were from deliberate and dishonest conduct” means the Court will be more likely to **adopt expansive approach to AOP for fiduciaries and third parties.**

NO END in sight for profits:

The current facts are analogous to *Lifepan* as there is no end point that can be ascertained as to when [fiduciary]’s profit will end (much like there being no endpoint as to what the Forester’s have made). Consequently, the facts are distinguishable from *Warman* “where the profits awarded were limited to the first two years’ exploitation of the business opportunity” (*Lifepan* [22]).

END in sight for profits

The current facts are analogous to *Warman*. Just as “the profits awarded were limited to the first two years’ exploitation of the business opportunity” (*Lifepan* [22]), in this instance the profits awarded may be limited to [insert time period]. Consequently, the facts are distinguishable from *Lifepan* there was no end point that can be ascertained as to when Forester’s profit would end.

# Topic 6: Equitable Assignments

## Terminology

NB: Subject matter = thing being assigned

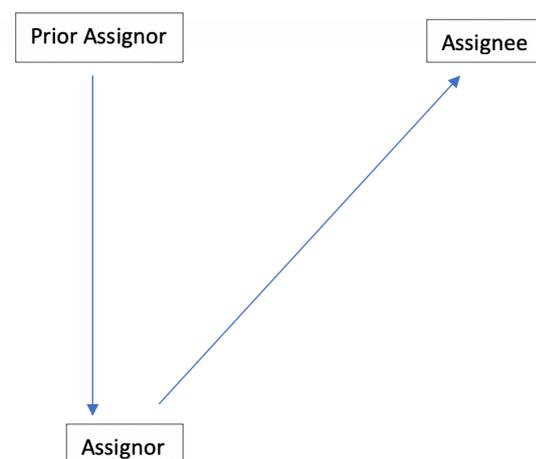
- Land (**real property**) and chattels or goods (**personal property**)
- **Chattel**: moveable personal possession
- **A chose in possession**: a *tangible* personal property that is capable of physical possession (books)
- **A 'chose in action'**: an *intangible* personal property that is incapable of physical possession (shares; debts)

Equity is involved in the following assignments:

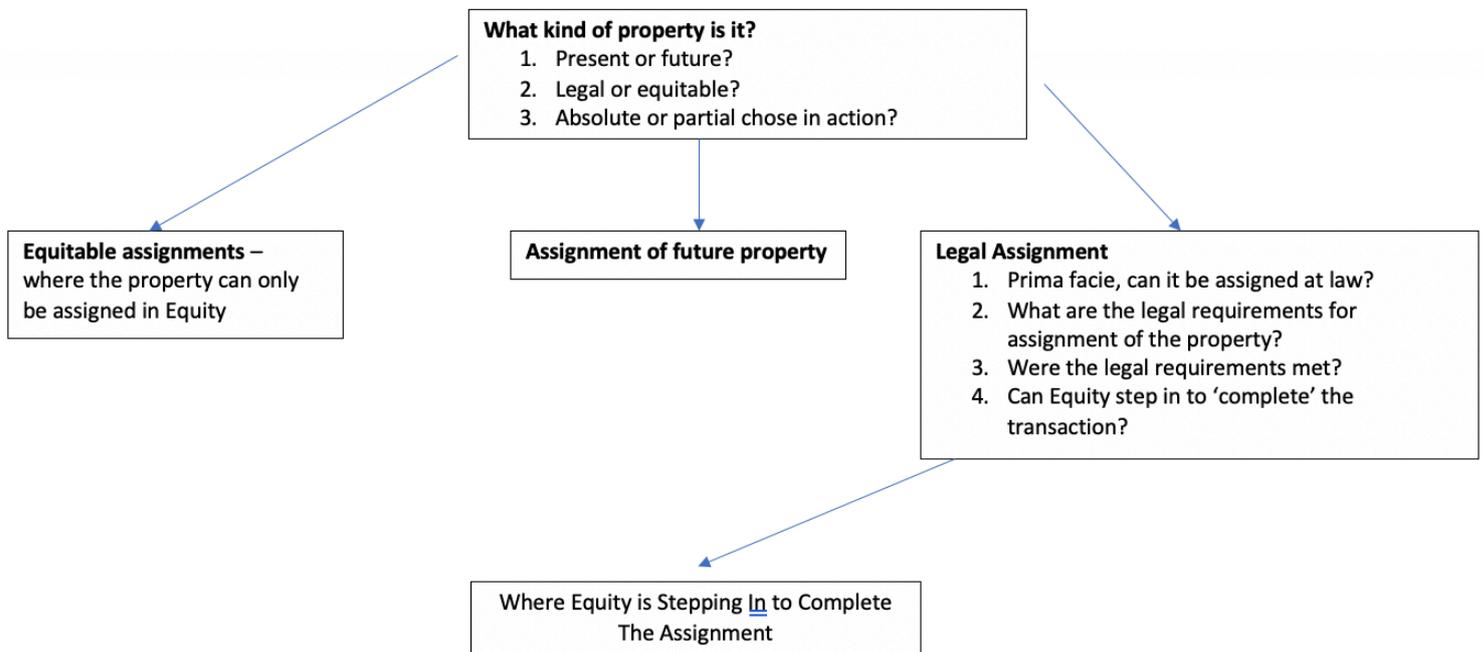
1. An assignment of Present Property, namely:
  - (viii) Failed Legal Assignment: Legal property which can be assigned at law;
  - (ix) Legal Property Incapable of Legal Transfer: cannot be assigned at law (also includes part chose in action); and
2. Equitable Property: which is only assignable in equity
3. An assignment of Future Property for consideration: *Tailby*

## Subsequent EA after another EA:

The effectiveness of transfer is dependent in the first place on whether [assignor] has any present property right which they can transfer. By the time the transfer of the [insert future property eg declared dividends/legal property completed at equity] is complete in equity, [prior assignor] will hold the property on constructive trust for [assignor]. From that point on (until the legal title is perfected), [assignor] has an equitable interest in [insert future property/legal property completed at equity] —> go to STEP 4



# Step 1: What is the subject matter of the assignment?



## A. Identify the subject matter on the facts

*[Assignor] is attempting to assign [subject matter] to [assignee]. If the assignment is ineffective, then [assignor] still has rights in relation to that form of property. However, [assignor] has lost their rights over effectively assigned property.*

## B. What type of property is this?

*Sample shutdown:*

- The [insert legal property] is presently existing legal property and [see legal requirements]
- The [insert equitable property] is presently existing property in equity and can only be transferred in equity.

## Q1. Is this present or future property?

1. If future, go to STEP 5
  - Either voluntary - no consideration (use *Williams/Norman/Shepherd*) or involuntary/a contract (use *Tailby*)
2. Present. Ask the following question
  - *The wording of the assignment states [insert wording eg "all rights to the proceeds"]. The assignment is of presently existing rights as the assignment is of rights currently in existence of [donor] established by [subject matter]. This is in contrast to Williams where the attempted assignment was not of present rights but of a certain amount of money not yet accrued and hence not yet owned. Thus, there is **no issue here of an attempt to assign future property.***
3. If neither, and the property is a mere personal right (eg right to sue or easement), this is not assignable.

## Q2. Was consideration/value given?

Yes. As **consideration** is provided for the assignment in the form of [insert consideration], then it will be enforced & [assignor] will hold the property on CT for assignee (STOP HERE).

No. As no consideration is provided, the following question need be asked.

## Q3. Is the property legal or equitable?

1. If legal, go to STEP 2
2. If equitable, go to STEP 4

Legal property:

1. Real property
2. Chattels
3. Shares
4. Intellectual property
5. Bills of exchange
6. Debts or other legal choses in action (eg term deposit)
7. Cheques

Equitable property:

1. Partnership interests (UDC; Chan)
2. A beneficial interest under **trust** (e.g a **share** in a trust fund)
3. Equitable interests in land (eg equitable mortgage/lease)
4. Parts of legal choses in action (e.g. parts of bank accounts, half of what someone owes)

## Step 4: Assignments possible only in equity

Can either be:

1. Assignments of equitable property
2. Assignments of parts of legal choses in action
  - Will come up if someone says 'XYZ owes me \$100, half is yours' or 'I'm giving you half of my bank account'
  - \$1000 in bank and assigning \$500 to sister – cannot do this in CL (must be whole chose in action), but can do this in equity, as per *Normans test*.
  - Not to be confused with giving someone 50 out of 100 shares: that's 50 from a bundle of indistinguishable things, not a single chose in action

### Has equitable title been passed to [assignee]?

Model response

Equity will enforce a gift when the assignor's conscience was bound by it. The assignor's conscience will be bound when following test is met.

To assign [subject matter] [donor] has to express or manifest an **immediate** irrevocable **intention** to assign [subject matter] (Windeyer J at 30 in *Norman*; Kitto J in *Shepherd*). Further, to assign a whole or part of 'equitable property' the requirements of s53(1)(c) PLA listed below need be satisfied.

- *Part chose in action*: However, these PLA requirements, do not apply to the assignment of a **part chose in action**.

NB: The PLA requirements still apply to the assigning of part of the partnership interest

TEST paraphrased: "Per *Norman* and *Shepherd*, an assignor must make a clear expression of an intention to make an immediate disposition of the equitable property in order to successfully assign it to another person."

*53(1)(c) PLA: 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.*

## Is the intention clear and immediate?

'The rule only operates when delivery is immediate. If the intention was to deliver today, property rights will have passed, but if it wasn't until tomorrow the property right will not pass.' Per *Norman*, the best way to manifest this intention is via deed, but other writing may suffice. Would [insert mode of communication eg voicemail] for [assignee] be sufficient to manifest an intention that equity will recognise? Perhaps not/Likely yes.

Arguably the writing of [insert document] indicate an intention was manifested.

*If manifestation is dependent on an event's occurrence*

However, the [document] states [insert phrase stating intent to deliver at later time]. As [insert event] is [state how far] the immediacy requirement may not be met.

*Issue: "This is yours"*

The phrase 'this is yours' is problematic. Is 'this' referring to the [document], the [subject matter] or something else entirely? However, the phrase 'this is yours' could be seen to dispell doubts about the immediacy of the intention.

*"You CAN have..."*

Although the word 'can' connotes a possibility, exercisable at [donee]'s discretion, the language is sufficiently clear and the property [insert property] is sufficiently identified.

*"I Hereby assign"*

The intention seems sufficiently immediate ("I hereby assign").

*"I want you to have"*

Was [assignor]'s use of the word 'want' made the intention sufficiently 'immediate'?

Partnership interest (if assigning 50+%):

If the partnership interest that [assignor] has was only 50% the assignment of [50+%] is invalid. However, no facts specified this.

## Was the disposition in writing? (s53(1)(c) PLA)

NB: It has to be the writing that is effectuating the transfer.

Example: If over the phone you orally agree to transfer shares and later confirm with a letter, the letter is evidencing the assigning but was not the language that actually effectuated it!

Yes. Thus, this requirement is met.

## Was the disposition signed by the donor/the donor's agent who was lawfully authorized in writing or by will? (s53(1)(c) PLA)

Yes. Thus, this requirement is met.

## Conclusion:

1. Equitable title of [equitable property] has passed to [assignee].
2. Given the ambiguous nature of the **immediate** irrevocable **intention** to assign, equitable title of [equitable property] has NOT passed to [assignee].

## Issue of future assignment?

Nevertheless, the intention to immediately assign may fail as it is unclear if the phrase [\$X] means to transfer [donor]'s present right to [\$X] (*Shepherd*) or the the dollar amount itself (*Williams*). If the latter, the assignment will fail.

If [donor] wishes to avoid paying [donee], they may argue that they attempted to assign future property. [Donee] will argue that what [donor] assigned was a present right to future property.

Therefore it need be determined where the assignment is of [donor]'s rights to [\$X] (*Shepherd*) or the [\$X] itself (*Williams*)? — GO TO STEP 5 “Option 1: Where consideration is NOT given”

Example: giving a birthday card a day early, do they intend to give half the bank account today, or tomorrow on the actual birthday?