

# Topic 2B: Equitable Fiduciary Obligations

## Fiduciary Relationships

### What is a fiduciary relationship?

- A fiduciary relationship is one in which **one person (the fiduciary, F)** undertakes to act **for or on behalf of another** (the beneficiary, principal, B) in circumstances that give F a power or discretion affecting B's legal or practical interests - a **relationship of trust and confidence**
- **Core rule:** The fiduciary must exercise that power **exclusively in the interests of the beneficiary (undivided loyalty)**.
- **NOTE: Vulnerability isn't the biggest criteria here. There doesn't need to really exist a power imbalance.**
- *"There is no generally agreed definition... other than the need for the relationship to be one that includes an **undertaking that gives rise to an expectation that one party (the F) will act in the best interests of the other.. In short relationship is an undertaking of loyalty**" - Naaman (2025)*

### The 2 central obligations (the 'twin pillars')

- **No profit rule:** a fiduciary must not make an **unauthorised profit** from the fiduciary position. If they do, they must **account** for it (disgorge)
  - **Causation test:** was the profit obtained by reason of the fiduciary position (or by use of opportunity or information from it)? If yes, fiduciary must disgorge
  - **Loss irrelevant:** Even if the beneficiary suffered no loss, the fiduciary must surrender the profit
  - **Authorisation:** Profit is permitted if **full disclosed and informed consent** is given (or if authorised by the governing instrument, the company's constitution or court)
  - **Example:** A company director secretly takes a business opportunity that arose because of their office - even if the company wouldn't or couldn't have taken it, the director may have to account
- **No conflict rule:** a fiduciary must not place themselves in a position where their **personal interest conflict (or may conflict) with their duty to the beneficiary**, including not owing conflicting duties to different beneficiaries where that conflict could influence their exercise of power
  - **Potential conflicts matter:** Fiduciary liability can be engaged even if an actual conflict hasn't yet produced harm - the possibility is sufficient
  - **Multiple principals:** Owing duties to different beneficiaries with competing interests can itself create a conflict
  - **Disclosure and consent:** If the fiduciary discloses material facts and the beneficiary give informed consent, the conflict may be authorised

### Identifying the relationship?

1. Is it a status-based relationship? Emerging?
2. If not, is it an ad hoc relationship/ on the facts?

#### Recognised (status based) fiduciary relationships

- Legal relationships that have been recognised as fiduciary (first owes a duty to second)
  - Trustee–Beneficiary
  - Solicitor–Client
  - Director–Company
  - Employee (Fiduciary)–Employer (Beneficiary) - depends on the facts
  - Agent–Principal
  - Partner–Co-partner
  - Financial Advisor - Client (Emerging)
- **NOTE: not every aspect** of these relationships will be fiduciary - the fiduciary obligations are confined to the scope where the fiduciary has undertaken to act in the beneficiary's interests

#### Emerging Status-based fiduciary relationships

- A financial adviser can be acting in a fiduciary capacity when giving financial advice to the client per **Daly** - *"place on the broker an obligation to make to the client a full and accurate disclosure of the broker's own interest in the transaction"*
- In **ABC AMRO Bank (2014)**, court emphasised that *"the question is not whether the [alleged financial advisor] 'fits' into the facts of a decided case, and in particular Daly... the question was and remains whether the facts disclose the existence of a fiduciary relationship"*.

#### Ad-Hoc Based fiduciary relationships

- *"The categories of established fiduciary relationships are not closed and a fiduciary relationship might also arise from an undertaking of loyalty found in the facts of a particular case"* (Naaman 2025)
- Consider:
  1. What is the 'essence' of the relationship? Consider the 'undertaking test' in **Hospital Products, Grimaldi** and vertical relationships
  2. The 'Multifactorial Approach' in **Breen v Williams**

## Vertical v Horizontal Relationships

- **Vertical relationships**
  - One party has superior access to resources, knowledge, power - e.g. agent/ principal, adviser/ client. The undertaking to act exclusively is easier to identify here. **News Ltd (1996)**
- **Horizontal relationships**
  - Both parties bring resources, skill and information - e.g. a partnership or joint venturers
  - Here, fiduciary duties may exist but are often *moulded* to mutual goals; the presence of mutual advantage makes the analysis different **United Dominions Corporations**

### a) The Undertaking (or '**Hospital Products**') test

- Ask whether the putative fiduciary **undertook** or agreed to act for or on behalf of the other in the exercise of a power/ discretion that will affect the other's legal or practical interests ?
- Where one party has greater access to resources, skill or information than the other
- If yes, the relationship may be fiduciary but the **scope** is defined by that undertaking and by any contractual terms

### b) Multifactorial Approach (or **Breen v Williams** test)

- No single decisive test, instead a bundle of circumstances point toward fiduciary character:
  - 1) Inequality of bargaining power
  - 2) Relation of confidence;
  - 3) Undertaking or act in the other's interests;
  - 4) Control of a power which may affect the other;
  - 5) Dependence or vulnerability;
- These factors help parse novel relationships

### c) The '**Entitlement to Expect Approach (Finn)**

- Ask whether on the actual circumstances, the principle is **entitled to expect** that the other will act in the principal's interests and to the exclusion of their own/ 3rd party interests for the purpose of the relationship
- Focuses on role and reasonable expectations flowing from it

## How courts determine the scope of fiduciary obligations

- **Scope = what specific activities or subject matter are covered.** Fiduciary duties do not automatically cover every aspect of the parties' dealings
- Courts find scope by reference to
  - The undertaking (what was promised/ agreed);
  - The character of the relationship
  - The conduct of the parties (how they dealt with each other in practice);
  - Any express contractual terms - fiduciary duties must cohere with the contract and cannot be superimposed to alter it
- *"What that function or responsibility is that the fiduciary has assumed to perform is a question of fact. Put shortly the actual function or responsibility assumed determines the subject matter over which the fiduciary obligations extend for conflict of duty and interest and the conflict of duty and duty purposes"* **Grimaldi**

## Remedies available for breach of fiduciary duty

1. **Account of profits** (disgorgement) — requires fiduciary to give up unauthorized profit.
2. **Equitable compensation** — money to compensate the beneficiary for loss caused by breach (sometimes used where disgorgement is inappropriate).
3. **Constructive trust** — the benefit obtained is treated as held on constructive trust for the beneficiary (gives proprietary remedy and tracing); used when the conscience of the holder is affected and benefit can be traced.
4. **Rescission** — setting aside an impugned transaction (where applicable).
5. **Injunctions / mandatory injunctions** — to prevent threatened breach or to compel restoration.
6. **Equitable lien / tracing / proprietary remedies** — allow claimant to follow a benefit into substituted forms.
7. **Other reliefs** — restitutionary relief or rectification in appropriate situations.

## Which remedy? Depends on whether:

- The profit can be traced;
- The court thinks a proprietary remedy is appropriate (constructive trust) or whether monetary compensation is adequate;
- Equity's discretionary maxims and defences apply

## Analytical Framework

1. **Identify the relationship:**
  - a. Who are the parties? Is there a recognized fiduciary relationship (trustee, agent, director, solicitor)? If yes, proceed to scope.
2. **If not recognized, test for fiduciary:**

- a. Apply the *undertaking test*, *multifactorial factors*, and *entitlement to expect*— give reasons which test fits best on the facts (vertical vs horizontal).
3. **Define scope:**
  - a. What exactly was the undertaking? Specify time, subject matter, and activities covered by fiduciary obligations. Did the fiduciary duties extend to the conduct in question?
4. **Identify the conduct:**
  - a. What did the putative fiduciary do? Was there a profit or conflict?
5. **Apply the duties:**
  - a. No-profit / no-conflict — ask whether the profit/conflict arose *by reason of* the fiduciary position or in the relevant scope. Were fiduciary obligations breached and if so, which ones, what is the content of those duties and how were they breached?
6. **Authorisation or consent?:**
  - a. Was the profit/disclosure authorised? Was consent informed and valid? Full disclosure and informed consent defences?
7. **Remedies:**
  - a. If breach, which remedy fits: account of profits, constructive trust, equitable compensation, injunction? Discuss defences. Which should the plaintiff seek?
8. **Primary v 3rd party/ accessory liability?**
  - a. Against who might those remedies be available
9. **Policy & fairness:**
  - a. Consider equitable defences (clean hands, delay), statutory overlay, and practical consequences (traceability, insolvency, third parties).
  - b. Are there any potential bars to relief?

### ***Hospital Products Ltd v United States Surgical Corporation (1984)* - the landmark 'undertaking' analysis**

#### **Facts:**

- USSC was a company which manufactured surgical stapling products. Its products were marketed outside of the US through distributors but were not patented in Australia.
- In 1978, Blackman proposed that he should be the sole distributor of the company's products in Australia in place of the current distributor. He was appointed sole distributor.
- He then established Hospital Products Ltd (HPI) and began repackaging USSC's products and selling them under the HPI brand
- USSC terminated its contracts with Mr Blackman and sued for breach of contract and breach of fiduciary duty

**Issue:** Was the distributor/ manufacturer relationship fiduciary?

#### **Decision:**

- **No fiduciary relationship** arose.
- The HC held that HPI had broken its contractual obligations to USSC and that HPI had not owed any fiduciary obligations to USSC.

#### **Held:**

- Gibbs CJ - *"there are two features of the case, which together constitute an insuperable obstacle to acceptance of USSC's contention that a fiduciary relationship existed... in the first place, the arrangement was a commercial one entered into by parties at arm's length and on equal footing. Secondly, the whole purpose of the transaction from Mr Blackman's POV, as USSC knew was that he, and later HPI should make a profit"*
  - The arrangement was negotiated at 'arm's length', both parties were sophisticated businesspeople, bargaining in their own interests. There was no special vulnerability of USSC to Blackman. Both entered contract to make money, not with one party assuming responsibility to act in best interests of another. There must be some undertaking.
  - USSC knew that Blackman's sole purpose was to make a profit for himself and later HPI.
- Mason J - *"the critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interest of another in the exercise of a power or discretion which will affect the interests of the person in a legal and practical sense."*

### ***Grimaldi v Chameleon Mining (no 2) (2012)* - definition and accessories**

#### **Held:**

- Grimaldi was a fiduciary of Chameleon (even though he was not a director, his role negotiating acquisitions gave rise to fiduciary obligations).
  - He breached his fiduciary duties by obtaining undisclosed benefits and misusing corporate opportunities
  - He was ordered to account for profits and a constructive trust was imposed over certain benefits
  - Associated companies were liable as knowing assistants/ knowing recipients where they had the requisite knowledge of the impropriety

- **A person is a fiduciary “when and in so far as” they have undertaken a function or responsibility which entitles the other to expect that they will act in that other’s interests to the exclusion of their own or a third party’s interests. The scope of the fiduciary obligation is defined by the particular functions undertaken (cf Hospital Products).**

- Accessories - knowing assistance and knowing receipt
  - Knowing assistance: a 3rd party who participates in a dishonest and fraudulent design by a fiduciary, with sufficient knowledge, is liable to account as a constructive trustee
  - Knowing receipt: a 3rd party who receives property in breach of fiduciary duty, with the relevant degree of knowledge that is misapplied, may also be liable as a constructive trustee

### **Breen v Williams (1996) - multifactorial caution**

#### **Facts:**

- Ms Breen had breast augmentation surgery in 1977 and subsequently suffered complications.
- Dr Williams performed a subsequent procedure to investigate her injuries.
- She suffered further complications and wanted to participate in a class action lawsuit against the manufacturers of the implants.
- To ‘opt in’ to the class action, she needed to file copies of her medical records. She requested these from Dr Williams on basis that he was her fiduciary, and that he owed her an obligation to disclose her medical records.

**Issue:** Is the doctor patient relationship fiduciary in a way that supports a proprietary claim to medical records?

#### **Decision:**

- **The HC did not find a fiduciary duty entitling Breen to a proprietary right to the records.**

#### **Held:**

- **Gaudron and McHugh JJ** - *“As the law stands, the doctor patient relationship is not an accepted fiduciary relationship. In Hospital Products, Mason J pointed out that in all those relationships ‘the fiduciary acts in a ‘representative’ character in the exercise of his responsibility’ But a doctor is not generally or even primarily a representative of his patient”.*
- *“However the courts have identified various circumstances that point towards but do not determine the existence of a fiduciary relationship. These circumstances have included: The existence of a relation of confidence; inequality of bargaining power; an undertaking by one party to perform a task or fulfil a duty in the interests of another; the scope for one party to unilaterally exercise a discretion or power which may affect the rights of interests of another; and a dependency or vulnerability on the part of one party that causes that party to rely on another.”*

### **Daly v Sydney Stock Exchange (1986) - giving advice**

#### **Facts:**

- Dr Daly took investment advice from Patrick Partners (PP) and placed money on deposit with the firm on PP’s advice as they said it was not a good time to buy shares. This constituted a loan whereby the firm would be required to pay interest to Dr Daly
- Unknown to Daly, the firm was struggling financially. After he placed the money on deposit, the firm went into liquidation.
- To obtain statutory compensation, Daly needed to establish that the firm had owed him fiduciary duties making them a constructive trustee of the money received.

**Issue:** Did PP owe fiduciary duties? If so, did PP hold the money on trust? Was the failure to disclose a breach?

#### **Decision:**

- **PP owed fiduciary duties as an investment adviser and breached them by failing to disclose its financial position. The money was not held on constructive trust for Daly, it was a loan.**
- *“Whenever a stockbroker or other person who holds himself out as having expertise in advising on investments... in giving that advice the adviser stands in a fiduciary relationship to the person whom he advises. The adviser cannot assume a position where his self interest might conflict with the honest and impartial giving of advice.”*
- *“His duty is to furnish the client with all the relevant knowledge which the adviser possesses, concealing nothing that might reasonably be regarded as relevant to the making of the investment decision and to obtain for the client the best terms which the client would obtain from a 3rd party”*

### **United Dominions v Brian (1985) - When do fiduciary duties begin?**

#### **Facts:**

- UDC entered into a ‘joint venture’ agreement with Brian and Security Projects (SPL) to build a shopping centre. SPL owned the land.
- The agreement provided that upon construction and subsequent sale of the shopping centre, the participants would each be repaid their contributions along with a share of the profits.

- Unknown to Brian, UDC had taken a mortgage over SPL's land as security for money that UDC had loaned to SPL. Some of this money had been loaned by UDC to SPL for the purpose of the joint venture.
- SPL subsequently defaulted on the mortgage and UDC claimed all the money owing under its mortgage. Brian sought to recover the money claimed by UDC on the basis that there was a fiduciary relationship between it and UDC.

**Decision:**

- **A fiduciary relationship existed amongst joint ventures; UDC breached duties by retaining surplus to pay unrelated debts**

**Held:**

- *"Whether joint venturers is fiduciary will depend upon form which joint ventures takes and upon context of obligations which parties to it have undertaken"*
- *"A fiduciary duty can exist between parties who have not reached, and who may never reach, agreement upon the consensual terms which are to govern the arrangement between them".*
- Joint ventures and preliminary collaborative arrangements can create fiduciary obligations moulded to the project - even if the arrangement is limited to one venture
- Fiduciary duties apply to protect mutual confidence and to ensure participants don't divert opportunities or profits from the joint purpose

**Howard v Commissioner of Taxation (2014) - scope**

**Facts:**

- Howard had been involved in a joint venture to buy and sell a golf course. He was the director of a company, Disctronics, which was the intended investment vehicle for the acquisition of the golf course.
- His fellow joint venturers were found to have breached their fiduciary duties when they diverted the sale of the golf course to themselves. Howard was awarded equitable compensation for their breach.
- He failed to include this equitable compensation in his tax return, arguing that as a direct of Disctronics, he held the compensation payment on trust for Disctronic.

**Held:**

- *"Asserting that Disctronics sought or desires to invest in the project doesn't demonstrate that the appellant's gain or profit was an unauthorised gain or photo. Instead it's necessary to ask whether the identified gain or profit was obtained or received by reason or by use of the appellants position as director of Disctronics or by reason or by use of any opportunity or knowledge resulting from that position it was not"*
- Remedies and entitlement arise from breach are shaped by the **precise nature and scope** of the fiduciary relationship - you cannot assume all benefits flowing from a breach automatically belong to some wider group absent the facts or agreement that create that entitlement

**Naaman v Jakes Properties Australia Pty Ltd (2025) - former and new trustees**

**Facts:**

- A former trustee had incurred liabilities properly in administering the trust, and therefore retained the usual right of indemnity out of the trust assets
- A new trustee was later appointed and now held the trust assets

**Issue:**

- The question arose whether the new trustee owed fiduciary duties (in particular duty of loyalty) to former trustee in respect of former trustee's continuing indemnity rights over the trust property?

**Held:**

- **Former trustee's right of indemnity** gives them a proprietary interest in trust assets that must be respected. **However, successor trustee does not owe a fiduciary duty of loyalty to former trustee.** Former trustee's position is protected through proprietary remedies (e.g. injunctions) not via fiduciary obligations
- The mere fact that someone holds property in which another has an equitable proprietary interest (for example, a former trustee's indemnity interest) does not itself create a fiduciary relationship.
- A successor trustee's primary loyalty is owed to the beneficiaries and to the due administration of the trust, not to the former trustee.

**Hopcraft v Close Brothers (2025) - car dealers**

**Issue:**

- Do car dealers who arrange finance for buyers owe the buyer fiduciary duties of loyalty, such that undisclosed commissions are treated as breach of fiduciary duty?

**Held:**

- A mere seller of goods does not, just by arranging finance, automatically become a fiduciary
- A fiduciary duty may arise where the dealer has assumed a role of adviser or broker and the customer reasonably relies on their judgment as protecting the customer's interests
- **Whether a fiduciary relationship exists is fact specific and turns on what role the dealer has actually undertaken**

### Concurrent Contractual and Fiduciary Relationships

- Many fiduciary relationships arise through contract
- Others **evolve**: initially contractual/ self interest based → over time become relationships of trust and confidence
- Contract and fiduciary obligations often co-exist as a fiduciary obligation is distinct from a contractual one
- *"The mere presence of a contract does not exclude the co-existence of concurrent fiduciary duties and the contract may, provide the occasion for their existence"* - **Breen v Williams**

### Contract can modify/ exclude fiduciary obligations

- **Hospital Products v USSC**
  - Fiduciary relationships must **accommodate contract terms**. Fiduciary duties cannot be imposed in a way that undermines the true operation and purpose of the contract.
- Commercial contracts can therefore exclude or limit fiduciary liability in several ways:
  1. By expressly acknowledging that the contract does not impose fiduciary obligations;
  2. By confining fiduciary duties to certain specified areas only;
  3. By excluding the application of equitable remedies for breach of fiduciary duty.
- **ASIC v Citigroup Global Markets (No 4) (See more info below)**
- **United Dominions Corporations 1985** - *"A fiduciary relationship can arise and fiduciary duties can exist between parties who have not reached, and who may never reach, agreement upon the consensual terms which are to govern the arrangement between them. In particular, a fiduciary relationship may and ordinarily will exist between prospective partners who have embarked upon conduct of the partnership business or venture before the precise terms of any partnership agreement have been settled.. If an informal arrangement to assume such a relationship and steps have been taken for its establishment or implementation"* - **a fiduciary obligation can start before a contractual one**

### Not every breach by a fiduciary amounts to a breach of fiduciary obligation

- A breach of duty by someone who is a fiduciary does not automatically mean there has been a breach of fiduciary obligation. Breaches of contract/ tort can occur without any fiduciary failure.
- Fiduciary breaches are confined to situations involving **unauthorised conflicts of interest or unauthorised profit making**
- **Farrington v Rowe McBride** - example of where breach of contract = breach of fiduciary duty
  - Solicitors (Rowe McBride) (F) who acted for a plaintiff (B) in a personal injury claim also advised him on how to invest the damages he recovered,
  - The firm had a major corporate client in financial trouble and solicitor persuaded plaintiff to invest his damages with the corporation which went into liquidation after
  - In Court of Appeal, held that the solicitors were in a **conflict of interest** as they had placed themselves in a position of conflict between their duty to the plaintiff and their duty to the corporation client, and also between their own interests and those of the plaintiff
  - This was a breach of fiduciary obligation and firm was ordered to compensate the plaintiff.
- **Hill v Van Erp**
  - Held solicitor's (Van Erp's) negligence in failing to ensure that a will complied with statutory formalities was not a breach of fiduciary duty
  - Due to solicitors' mistake, plaintiff (Hill) beneficiary did not receive legacy she expected.
  - **Court found solicitor was liable in tort for breaching duty of care to beneficiary and also in breach of contractual duty of care to client's estate however no breach of fiduciary duty as there was no conflict of interest or unauthorised profit in her negligence conduct.**

### ASIC v Citigroup (no 4) (2007) - Contracting out

#### Facts:

- Citigroup was engaged under a Mandate Letter to advise Toll on a proposed takeover of Patrick
- The day before the takeover was announced, a Citigroup employee bought Patrick shares on Citigroup's own account
- ASIC alleged Citigroup owed Toll fiduciary duties of loyalty and to avoid conflicts and that dealing in Patrick shares breached those duties
- Citigroup relied on the Mandate letter which
  - Defined its roll narrowly
  - Expressly contemplated conflicts of interest

- Allowed Citigroup to trade on its own account
- Provided for 'information walls' to manage conflicts

**Issue:**

1. Did Citigroup, as adviser, stand in a **fiduciary relationship** with Toll?
2. If so, could those fiduciary obligations be 'contracted out' by the terms of the Mandate letter?

**Decision:**

- No fiduciary breach established. Where a purported fiduciary relationship arises out of a contract, whether any fiduciary duties exist and their scope are questions of **construction of contract as a whole**
- Mandate Letter expressly permitted Citigroup to act on its own account and contemplated conflicts, so Toll could not reasonably expect undivided loyalty in that respect
- **ASIC argument failed because the engagement letter expressly excluded the existence of fiduciary obligations and allowed the bank to trade on its own account.**
- **The court considered it hollow to argue that a party was acting in the interests of another when the very contract that governed the relationship had excluded fiduciary obligations.**
- **Principle was that you could contract out a fiduciary relationship/ Even if it was fiduciary there would be no breach.**
- At 77, [281]: *'The effect of the Australian and English authorities referred to above is that where a fiduciary relationship is said to be founded upon a contract, the ordinary rules of construction of contracts apply. Thus, whether a party is subject to fiduciary obligations, and the scope of any fiduciary duties, is to be determined by construing the contract as a whole in the light of the surrounding circumstances known to the parties and the purpose and object of the transaction.'*
- Factors like **vulnerability, trust, confidence, dependence, reliance, inequality of bargaining power, or ascendancy** are not determinative by themselves but are **indicators** of a fiduciary relationship.
- The **"core" fiduciary duty** is loyalty: avoiding conflicts and unauthorised profits. These duties are **proscriptive (negative), not prescriptive (positive)**.
- Fiduciary duties can be **excluded or modified by contract**, except perhaps in cases involving dishonesty or fraud.

**Survival of fiduciary obligations after the termination of the contract**

- Fiduciary obligations can sometimes continue even after the contract that gave rise to them has ended. E.g. they may survive dissolution of partnership, end of joint venture or resignation of company director
- **Termination to obtain a personal benefit:** Where the fiduciary terminates a contract with their Principal, solely to obtain a benefit they would have otherwise been duly bound to obtain for their Principal then they will still commit a breach of Fiduciary Duty. An injunction can be granted to prevent them from deriving any advantage. If advantage already obtained, fiduciary may be required to account for it or hold it on constructive trust for other party
- **Will a solicitor commit a breach of fiduciary duty by acting against a former client?** **Prince Jefri Bolkiah**

**Prince Jefri Bolkiah v KPMG - solicitor conflicts between old and new clients**

**Facts:**

- Prince Jefri Bolkiah had previously retained KPMG to provide forensic accounting and litigation support in disputes involving the Brunei Investment Agency (BIA). That retainer ended in March 1998
- In July 1998, Govt of Brunei retained KPMG to investigate affairs and assets of BIA, in circumstances where Prince Jefri's interests were potentially adverse to BIA
- Prince sought injunction restraining KPMG from acting for BIA on basis that KPMG held confidential information from earlier retainer which could be used to his detriment

**Decision:**

- Injunction granted restraining KPMG from acting for BIA. **No continuing fiduciary duty of loyalty to a former client once retainer ends. However, continuing duty of confidentiality, which is strict, it is duty to keep information confidential, not merely to take reasonable care.**
- Once the former client shows that the firm holds confidential information relevant to the new matter, the burden shifts to the firm to show there is no real risk of misuse. KPMG failed to discharge that burden.
- *"Where on contract or equity, duty to preserve confidentiality is unqualified. It is a duty to keep the information confidential, not merely to take all reasonable steps to do so."*

**Fiduciary Obligations**

### Core Fiduciary Duties

- *"Equity imposes on the fiduciary **proscriptive obligations** - not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. The law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed"* - **Breen v Williams 1985**
  - In **Breen**, the HC held that although there may be circumstances in which a doctor would owe fiduciary obligations to a patient, **equity did not recognise the existence of an affirmative fiduciary obligation** on the part of the doctor to act in the best interests of the patient.
  - Usual to see this case as **authority** for the wider proposition that Australian law recognises proscriptive, but not prescriptive, fiduciary obligations
- **No Profits Rule:**
  - A fiduciary must not make any (unauthorised) profits (benefit of any economic/ pecuniary value) from the fiduciary position/ role or from any information or opportunity arising from it (**Keech v Sanford 1726; Regal (Hastings) 1942**)
  - A fiduciary may profit from her position, only so long as it has been authorised by the principal
- **No Conflicts Rule:**
  - Within the scope of his fiduciary role, the Fiduciary must not allow any conflict to arise between the principal's interests and his own interests or the interests of a 3rd party
  - Thus, the duty comprises two sub duties:
    - **Duty interest** - The Fiduciary must avoid conflict (or the real and sensible possibility of conflict) between their **own self interest and their fiduciary obligation** with respect to the interests of the principal
    - **Duty - duty** - The Fiduciary must avoid conflicts (or the real and sensible possibility of conflict) between their fiduciary obligation **to one principal, and their fiduciary obligation to another principal** (ie the duty not to try to 'serve two masters at one time')
- You can have a breach of no-conflict rule but no breach of the no-profit rule, but you can't have a breach of the no-profit rule without a breach of no-conflict rule. As a fiduciary, if you are benefiting from your beneficiary, you are naturally putting yourself at a conflict.

### Discretion

- Essential characteristic of fiduciary relationships is that fiduciary exercises powers and **discretions** which will affect interests of beneficiary
  - **Grimaldi** - *"where the beneficiary does not have the right to dictate or to veto how the power, discretion etc is exercised by the fiduciary. Here the law channels and directs how 'fiduciary discretions' are exercised"*
    - **Westpac v Bell Group (No 3)**
      - Drummond AJA: "[U]ntil the High Court declares the law to be otherwise, long established authority requires the duties of company directors to act **bona fide in the interests of the company and to exercise their powers for proper purposes to be accepted to be fiduciary ones even though they may require the directors to take positive action"**

### **Keech v Sanford - no conflict of interests**

#### Facts:

- The defendant held a lease on trust for an infant beneficiary
- The landlord did not want to renew the lease with the infant when it was about to expire. This was because granting a lease to a child is problematic because children cannot be held legally accountable for breaches of covenant.
- Therefore the defendant took the lease in his own name which the landlord agreed to.

Held: The trustee cannot retain the lease.

#### Decision:

- Trustee cannot retain the lease in own name. Despite the beneficiary being legally incapable of obtaining the renewal, and even though the defendant had acted openly and not in bad faith, equity wouldn't allow the trustee to put himself in a position **where his own interests conflicted with those of the trustee**
- *"This may seem hard, that the trustee is the only person of all mankind who might not have the lease; but it is very proper that the rule should be strictly pursued and not in the least relaxed; for it is very obvious what would be the consequences of letting the trustees have the lease"*
- The court imposed a **constructive trust**, holding that Sanford held the renewed lease on trust for the infant beneficiary.

### **Regal (Hastings) v Gulliver (1967) no (unauthorised) profits - position of conflict**

- Just by putting yourself in a position of conflict, you can be liable
- *"The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud... The Liability arises from the mere fact of a profit having, been made. The profiteer however honest and well intentioned cannot escape the risk of being called upon to account"*

### Boardman v Phipps - no profit/ conflict rule - position of conflict

- A fiduciary must not place themselves in a position where their personal interest may conflict with their duty, and must not profit from their position without fully informed consent.
- It is enough that there is a real sensible possibility of conflict, even if the fiduciary acted honestly and even if the principal in fact benefited.
- Information obtained in the course of acting as fiduciary can be "trust property" in the relevant sense.
- Where a fiduciary breaches the no-profit or no-conflict rules, equity can impose a constructive trust over gains and require an account of profits, but may allow an allowance for skill and effort in appropriate cases.

### Chan v Zacharia 1984 - No conflict rule - fiduciaries in partner relationships can't personally get opportunities

#### Facts:

- The parties were doctors who were partners in a medical practice
- They rented their premises jointly for a period of 3 years, with an option to renew for a further 2 yrs
- Eventually the parties decide to dissolve their partnership, and a receiver was appointed
- The parties could not agree as to whether the option should be renewed or not, so Chan renewed the lease on his own and the lease was granted to Chan

#### Outcome:

- HCA held Chan had breached fiduciary duty by taking new lease in own name. He was ordered to hold lease on **constructive trust** for benefit of both himself and Dr Zacharia.
- Applying **Keach v sandford** just as a trustee cannot personally renew a lease that is subject to a trust, fiduciaries in other relationships (such as partners) cannot personally appropriate opportunities tied to fiduciary relationship
- *"The principle of equity is that a person who is under a fiduciary obligation must account to the person to whom the obligation is owed for any benefit or gain i) which has been obtained or received in circumstances where a conflict or significant possibility of conflict existed or ii) which was obtained or received by use or by reason of his fiduciary position or of opportunity or knowledge resulting from it"*

### CBA v Smith (1991) - No conflict rule

#### Facts:

- The Smiths were longstanding customers of the Kadina branch of CBA. They often received advice from its manager (D).
- Smith approached D to discuss the possibility of buying a hotel.
- D encouraged them to buy a different hotel business than the one they were considering. The current owner of the Weeroona held a mortgage with the Kadina branch and was in overdraft.
- D disclosed that he acted for both parties but did not divulge any further information to the Smiths on the grounds of confidentiality
- The valuation of the hotel business provided prior to the purchase assumed that the lease of the hotel would be renewed.
- The Smiths purchased the hotel and lost money operating the hotel. The landlord refused to extend the lease.

#### Outcome:

- *"Not only must the fiduciary avoid, without informed consent, placing himself in a position of conflict between duty and personal interest, but he must eschew conflicting engagements. The reason is that by reason of multiple engagements, the fiduciary may be unable to discharge adequately the one without conflicting with his obligation in the other"*

### Defences

1. Contractual provisions excluding liability;
2. Ratification, Authorization or Consent
3. Informed Consent;
4. Equitable bars to relief; and
5. In the case of a trustee, the court may excuse such a breach.

#### Informed Consent .

- A fiduciary who obtains the beneficiary's consent to placing himself in a position of conflict between his interest and the duty he owes the beneficiary, or to making a profit from his fiduciary position, will not be liable for breach of fiduciary duty
- Consent may be given prior to the transaction (authorisation) or subsequently (ratification)

- It is convenient to refer to informed consent as a defence, but the correct analysis is that the beneficiary's informed consent prevents any liability for breach of fiduciary obligation from arising.
- *"What is required for a fully informed consent is a question of fact in all the circumstances of each case and there is no precise formula which will determine in all cases if fully informed consent has been given. The circumstances of the case may include the importance of obtaining independent and skilled advice from a 3rd party."* - **Maguire v Makaronis 1997**
- **Farah Constructions v Say-Dee (2007)**
  - **In order to obtain the beneficiary's consent**, the fiduciary must have made full disclosure of all the facts to the beneficiary.
  - The extent of the disclosure required will depend on *'the sophistication and intelligence of the persons to whom disclosure must be made'*
  - It was held that, since the P had considerable business experience, the disclosure had been sufficient.
  - *"The principles of SD had much business experience and intelligence. The remarks they made in conversations with Mr F, showed them to be shrewd and astute."*
  - **Relevant to informed consent defence, the sufficiency of disclosure will depend on the sophistication of the parties to whom they are making that disclosure. If this was a new business, the standard may not be sufficient**

#### Authorisation

- A fiduciary can avoid liability for what would otherwise be a breach if the principal gives fully informed consent.
  - Authorisation: permission given in advance
  - Ratification: consent given after the act, once all facts are known
- A principal can also ratify what would otherwise constitute a breach of fiduciary obligation
- Authorisation - pre-imposed contract formation, authorisation occurs pre and ratification is post
- **QLD Mines v Hudson: - fully informed consent**
  - **Facts**
    - QML (QLD Mines) was interested in developing iron mining tenements in Tasmania
    - Hudson, their managing director, negotiated and obtained valuable licences and mining options for QML
    - QML in serious financial difficulty decided it could not proceed with project so Hudson resigned and took up opportunity for himself through a private company
    - QML board knew he was doing this and didn't object.
    - The project later became very profitable. 11 years after the event, QML sued Hudson, alleging he exploited a corporate opportunity that properly belong to their company and must account for his profits
  - **Held:**
    - Hudson doesn't have to account for profits.
    - The opportunity had been presented to QML and it had, with full knowledge, decided not to pursue it because it lacked the funds to do so. Hudson only took up the venture after QML had effectively rejected it.
    - He acted with the full knowledge and implicit consent of the board. The directors knew the relevant facts and allowed him to proceed. Court also hinted that, even if authorisation hadn't been accepted, extremely long delay meant laches would likely have barred relief.

## Topic 3A/B: The Law of Assignment

### Assignments and Transfers of Property

#### Assignments of Property

- An *assignment* is the **immediate transfer** of an **existing property** from one person (assignor) to another (assignee)
  - Can occur for **consideration** (e.g. sale, exchange) or as a **gift**
  - **Formal requirements** must be met
- **Equity's approach to assignments:**
  - Equity has more flexible and conscience based approach, but still grounded in principle - it may treat a transfer as complete even if the law regarded it as incomplete

#### Consideration in Assignments

- **At Common Law:**
  - Assignment requires receipt of **consideration** (e.g. money or value) and completion of all **formal steps**.
- **In Equity:**
  - Once the assignor receives consideration, their conscience is bound.
  - Equity may treat the assignor as holding the property on trust for the assignee until legal transfer is perfected.
- **Future property:**
  - Equity recognises assignments of property not yet owned by the assignor.
  - When the property later comes into their hands, equity compels the assignor to transfer it to the assignee.

- CL does not recognise future property transfers, showing equity's broader and more flexible approach.

### Taxonomy of Property

- **Property recognised at common Law**
  - Real property (land):
    - Includes all estates and interests in land: fee simple (ownership), lease, mortgages, easements etc
  - Personal property:
    - Choses in Possession: (i.e. tangible property like car);
    - Choses in Action: (i.e. intangible property like contractual right to payment, shares, debts)
    - Chose means 'things'
- **Property recognised in equity**
  - Equity follows the law: All of the above categories of property (i.e. Equitable ownership, Equitable lease, Equitable mortgage etc; and)
  - Some kinds of property recognised only in Equity e.g. a beneficiary's interest under a trust, a partners interest in the partnership, a restrictive covenant wrt land etc

### Requirements for equitable assignment of property

1. **Clear, immediate intention to assign**
2. **In writing** - Statute of Frauds requires assignments of equitable interests to be evidence in writing
3. **Deed** - delivering a deed stating intention to transfer is one of the most effective ways to satisfy writing and intention requirements

### Gifts of equitable property

- Complete in equity when:
  - Assignor has manifested an **immediate, irrevocable intention** to assign
  - Once intention is clear and evidence in writing, beneficial title passes in equity
  - **Still subject to statutory formalities** (writing under Statute of Frauds). If these are missing, the assignment is invalid/ unenforceable

### Assigning real property at law

#### For Torrens Title Land

- Almost all land in NSW is now under the Torrens System
  - **S41 of the Real Property Act 1900 (NSW)**
    - **Requires: The transferor to produce the certificate of title, sign a transfer form. The transfer must then be registered at the Land Titles Office.**
    - Note: eConveyancing now operates in NSW. We will operate upon the pre-digital conveyancing practices.
  - Exceptions to the Statutory Writing Requirements:
    - **Statute as an Instrument of Fraud**: where the statute is being used as an instrument of fraud:

#### General Law Land

That is, land not yet brought under the Torrens System (very little remaining)

- By deed (i.e. 'signed, sealed and delivered') and
- **s23C(1)(a) Conveyancing Act 1919 (NSW): in writing and signed** (satisfied by a deed of conveyance)

### Mode of Legal Assignment (Common Law Assignment)

#### Choses in Possession:

- These are tangible items of personal property. Sometimes also referred to as chattels or goods.
- At Common Law you assign by:
  1. Deed
    - a. The assignor signs a deed transferring the goods to the assignee
    - b. No delivery needed because the deed is a formal instrument
  2. Delivery + donative intention
    - a. Physical delivery of the goods to the assignee
    - b. Plus an intention to make an immediate transfer
- If one of these satisfied, legal title to chattel passes.

#### Choses in Action:

- intangible items e.g. entire debts, entire bank account, shares, benefit of certain contractual rights e.g. right to receive royalties/ dividends

- At Common Law you assign by (**s12 Conveyancing Act 1919 (NSW)**)
  - 1) The assignment is absolute:
    - a) You cannot assign a partial chose in action at law (i.e. half your bank account, or part of a debt owed to you)
    - b) However this can be assigned in equity
  - 2) The assignment must be in writing:
  - 3) This written assignment must be 'under the hand of the Assignor' i.e. they must sign it;
  - 4) You must provide express notice to the debtor:
    - a) Why? The debtor needs to know the identity of the person they must pay
    - b) If the debtor, does not pay attention to that notice, and pays the Assignor instead of the Assignee (i.e. the person they initially owed the debt to) then the debt will not be discharged and the Assignee will still be able to enforce the debt against the debtor (**William Brandt's Sons**)
- If one or more s12 requirements are missing, you cannot have legal assignment, but you may have equitable assignment either through assignment for valuable consideration or by way of gift.

### William Brandt Son v Dunlop (1905)

#### Facts:

- Kramrisch owed money to Brandt's Bank. As security, Kramrisch agreed that debts owed to it (including Dunlop's payment for rubber) would go to Brandt's
- Dunlop received an invoice from Kramrisch directing payment to Brandt's and a confirming letter from Brandt's
- Dunlop mistakenly paid someone else under an old instruction Brandt's then sued Dunlop for the money.

#### Issue:

- Was the debt **assignable** under the law and equity?
- Could Brandt's Bank enforce the debt against Dunlop?

#### Decision:

- **At law (s12 Conveyancing Act)**
  - Assignment failed because it was not an 'absolute assignment' of a whole debt; it operated as a security - which was a partial assignment
- **In Equity**
  - There was valuable consideration (the bank's advance to Kramrisch) so assignor's conscience was bound and equity treated debt as assigned to Brandt's
  - Clear evidence of intention to assign (agreement plus directions to pay Brandt's)
  - Dunlop had received clear notice of assignment (invoice and letter)
  - **In equity, for an assignment to be valid:**
    1. **Consideration** must exist (something of value exchanged)
    2. There must be **sufficient external evidence** showing the assignor intended to assign
    3. **Notice to the debtor** is required for enforcement

### Assignments in Equity

Where there has been an attempt to assign a legal chose in action, BUT the formalities necessary for an assignment to be recognised at law have NOT been met:

Nevertheless an equitable assignment may have occurred if:

- **The assignment was for Valuable Consideration:** the assignment will take effect upon the consideration being paid and the Assignor will hold the property on constructive trust for the Assignee: **Holroyd v Marshall**
  - Consideration executed (already paid)
    - Assignment is complete in equity once consideration is paid
    - The assignee has an equitable interest and can require the assignor to sue in their name if necessary
  - Consideration executory (to be paid/ performed later)
    - Is the agreement specifically enforceable?
    - If yes, equity will enforce it specifically, so assignor effectively holds on constructive trust (**Lysaght v Edwards**)
  - In the case of the assignment of a debt, the assignment will be binding upon the debtor once they have received notice of the equitable assignment (**William Brandt's Sons**)
  - So if **s12** fails because there is no notice, you can still have an equitable assignment. S12 is only needed if you want the full legal effect.
- **This assignment was a gift:** if there is no consideration, donor must have done everything that only they can do to complete the transfer at law, given nature of the property.
  - Has donor done all that is necessary to effect the transfer?

- If yes, equity will treat gift as complete and recognise equitable assignment
- If no, equity will not perfect an imperfect gift **Milroy v Lord, Re Rose**

### Corin v Patton (1990) - Australian authority - doing all that is necessary

#### Facts:

- Mrs P, terminally ill, tried to transfer her interest in jointly owned land to her brother on trust
- She executed transfer documents which included a memorandum of transfer in favour of her brother who was to hold the share on trust for her until her death, and also executed a will leaving her estate to her children
- However she failed to arrange for the mortgagee, the bank, to produce the title deed required for registration - she took no action in this regard
- She died before the transfer could be registered

The issue: had she done 'all that she had to do' for the transfer to be complete in equity?

#### Decision:

- Majority said **No**. Equity only treats a gift as complete if the donee (assignee) is in a position to complete all remaining steps without further action from the donor or intervention of the court. Mrs P had not arranged or authorised production of the title deed from the mortgagee.
- *"The test is a twofold one. It is whether the donor has done all that is necessary to place the vesting of the legal title within the control of the donee and beyond the recall and intervention of the donor"*
- Thus, under the minority view, since Mrs P maintained effective control over the transaction, the transfer was not irrevocable or complete, and the equitable interest in the land had not passed to the donee at her death.
- **For Torrens land, donor must execute the transfer and do everything they personally must do, if only a third party step remains (e.g. registration, notice by someone else) equity can step in.**

### Milroy v Lord (1862) - taking all necessary steps

#### Facts:

- An uncle (Mr Medley) attempted to assign shares to a trustee (Mr Lord) for the benefit of his niece (Eleanor)
- He executed a deed purporting to assign the shares and gave Lord the share certificates
- Mr Lord paid the dividends to the niece but the transfer of the shares never occurred
- However, the legal method for transferring shares required the assignment to be **recorded in the company's books** upon receipt of a transfer form signed by both transferor and transferee
- **The uncle did not complete this process or authorise Lord to do it on his behalf**

Issue: Had the uncle done 'enough' to bind his conscience and complete the gift in equity?

#### Decision:

- **No, the uncle had not completed all the steps necessary.** For equity to recognise an incomplete assignment, **the donor must have done everything necessary according to the nature of the property to transfer it and render the settlement binding on them**
- Since he failed to sign the proper transfer or give the Lord authority to do so, the assignment failed
- **Equity will not perfect an imperfect gift. The donor's conscience is only bound if the donor has done everything required of them personally to effect the transfer.**

### Re Rose (1952) - donor doing everything necessary on their part to effect transfer

#### Facts:

- Mr Rose executed share transfer forms in favour of his wife and forwarded them to the company for registration
- Registration took time, and he died before it was completed

Issue: Does the Milroy test require:

- "All that the assignor alone had to do" (narrow view), or
- "All that could possibly be done to complete the transfer" (broad view, including company registration)?

#### Decision:

- Court of Appeal held narrower view: the husband **had done everything required of him personally. His conscience was therefore bound from the date he handed the forms to the company, even though registration came later**
- **If the donor has done all that is necessary on their part, equity treats the transfer as complete.** The assignee becomes the beneficial owner, even if legal title still awaits completion by a third party.

### Marchesi v Apostolou (2009, FCA) - solicitor duties

#### Facts:

- A solicitor acted for both transferor and transferee in a proposed gift of land
- Transfer documents were signed but not registered and no stamp duty was paid
- Argument: transfer was complete in equity because the solicitor (holding the documents) could complete registration for the transferee

#### Decision:

- Equity did not recognise the transfer as complete. The solicitor held the documents only as **agent for the transferor**, not for the transferee, until the transferor authorised otherwise.
- As stamp duty had not been paid, the solicitor could not treat the documents as the transferee's property.
- **The transferee must therefore be in a position to complete the transfer without assistance of the transferor. If a solicitor acts for both parties, their authority is scrutinised, they cannot automatically be treated as holding documents for the transferee.**

### Non-Assignable Rights

- Some rights cannot be assigned at law or in equity, any attempt will fail.
- Equity often allows assignment of rights unassignable at Common Law, but this has **important limits**: not all rights are property interests capable of assignment
- Categories of non-assignable rights:
  1. Contracts of personal service
    - a. Cannot be assigned
    - b. *Reason*: the person who must perform may care deeply about **who** the service is for eg. actor, lawyer, doctor
    - c. Allowing assignment would undermine the personal nature of the contract
  2. Bare rights of action (choses in action for litigation only)
    - a. Traditionally void at Common law **on public policy grounds** (to prevent champerty and maintenance = trafficking in litigation)
    - b. Still void unless the assignee has a **genuine commercial interest** in the litigation
    - c. Otherwise, assignment is viewed as a procedural abuse: outsiders stirring up litigation for profit
    - d. **(Equuscorp v Haxton (2012))**
  3. Contractual restrictions
    - a. Contracts may expressly or impliedly prohibit assignment of contractual rights. Courts enforce these restrictions
  4. Statutory restrictions
    - a. Some statutes expressly forbid assignment.
      - i. **Re Bruyniu**: Superannuation pensions could not be assigned - legislation explicitly barred it
    - b. Other statutes imply restrictions
      - i. **Tasmanian Seafood v MacQueen**: Abalone diving licenses could not be assigned - licences were personal to the diver and had to be surrendered if they stopped diving commercially

### Future Property

- If the property is not presently existing property, then it cannot be assigned at law.
- **In Equity**:
  - Future property can be assigned, but only if the assignment **is for valuable consideration. I.e. the assignor must receive something of real value (not just a token or gift) in exchange for assigning future property**
  - A voluntary (gratuitous) assignment of future property is ineffective — no binding trust arises.
  - **If assigned the property will be held on constructive trust until it comes into existence (Holroyd)**
- **Two forms of future property**
  1. Presently existing but not yet owned by assignor
    - E.g. A expects to receive shares from B in the future, then assigns them to C.
  2. Not yet in existence at all
    - E.g. unborn foal, future crops, future dividends.

### Exotic Retirement Living v Construct by Design Commercial - what is future property

#### Facts:

- D contracted with a 3rd party for a car stacker (for apartments)

- When P and D's contract ended, D assigned all rights in the stacker to P
- P claimed entitlement to possession

Decision:

- At assignment, D had **no title** to the stacker (not yet delivered, located overseas and therefore the assignment was ineffective)
- **Cannot assign rights to property that does not yet exist or that assignor does not own at the time e.g. future property, unless in equity with consideration**

### **Norman v Federal Commissioner of Taxation (1963, HCA) - future property dividends**

Facts:

- Mr Norman attempted to assign 2 types of future property voluntarily (which means without valuable consideration) to his wife:
  1. Interest on a loan of \$3k, which would become payable if the borrower did not repay early
  2. Dividends on shares he owned

Decision:

- Federal Commission argued that these assignments were ineffective as gifts of future property.
- HC unanimously held that:
  - Dividends not yet declared as future property and cannot be effectively assigned by way of gift (because they might never be declared, so the right does not yet exist)
  - *"As it is impossible for anyone to own something that does not exist, it is impossible for anyone to make a present gift of such a thing to another person, however sure he may be that it will come into existence and will then be his to give... A court of law would not compel him to perform it. Equity did not share the view. Equity does not come to the aid of volunteers. For equity a deed does not make good a want of consideration."*
  - The majority held that the interest (i.e. 1 above) was a mere expectancy or possibility, since it was uncertain and might never become payable if the loan was repaid early. Therefore, it was future property, not assignable by voluntary gift.
  - *"A contract to pay a sum of money on a future day, call it interest, calculable in amount according to conditions presently agreed, is in my view a presently existing chose in action.. What he assigns... [is] a presently contractual right to be paid"*

Ratio:

- **Future property means rights that do not exist yet, like dividends not declared yet or interest that might never be payable. Such rights cannot be given away (assigned voluntarily as gifts) because there is uncertainty over their existence.**

### **Shepherd v Federal Commissioner of Taxation (1965, HCA) - assigning an income stream from existing contractual right**

Facts:

- Shepherd held a patent for a product he created. In 1954, he granted a licence to Cowen for the production and sale of the castors.
- Cowen was to pay a monthly royalty of 5% of gross sale price.
- Shepherd executed a deed assigning 'absolutely and unconditionally' all of his right title and interest to an amount equal to 90% for 3 years
- The Commissioner of Taxation argued that this was a purported assignment of future property that had been made voluntarily and was ineffective, he made this argument because then it would be taxable

Issue: Was this assignment of future royalties (ineffective) or assignment of a present contractual right (effective?)

Decision:

- Effective
- Assignment was not of future royalties themselves, but of part of the **present contractual right** to receive royalties if and when they arose
- If the underlying **contractual right presently exists**, it may be assigned, even if it will generate future income
- Distinction: **assigning an income stream - assigning the right to receive payments that will arise in the future. E.g. landlord assigns rent that will become payable under an existing lease. Even though those rent payments do not exist yet, they flow from an already existing legal relationship. In equity, this assignment can be effective. BUT, assigning ownership of a property or asset itself (underlying asset) e.g. assigning the lease itself (the legal estate) or assigning goods that exist now, if the assignor doesn't own the asset at the time, they cannot assign it, (you can't give what you don't have).**
- *"But whatever he might do or desire to do, the existence of the appellant's contractual right would be unaffected, though the quantum of its product might be."*

### **Holroyd v Marshall (1862)**

- An agreement for value to assign or mortgage future property is specifically enforceable in equity.

- When the assignor later acquires property answering the description, the beneficial (equitable) interest passes automatically to the assignee, and the assignor holds it on trust for them.
- Equity will then compel the assignor to perfect legal title if needed.
- **Cite for: equitable assignment of future property for valuable consideration; the idea that the assignor's conscience is bound, and once the property comes into existence, equity treats the assignee as having the beneficial interest**

### Re Lind (1915) - prioritising when assigning future property

#### Facts:

- Lind expected to inherit from his mother property (she was still alive, so he had only an expectancy, not an actual right)
- He mortgaged this expectancy (future property) to 2 lenders (Arnold and Norwich Union) for value
- Lind later went bankrupt and was discharged
- After discharge, he assigned the same expectancy to a 3rd party (Industrials Finance Syndicate)
- When his mother died, all 3 assignees claimed a right to Lind's share of the state

#### Issue:

- Who had priority over Lind's inherited property - the first 2 assignees or the third

#### Decision:

- **First 2 assignees win**
- Court held:
  - Assigning future property creates an **equitable interest immediately**, as soon as the property comes into existence - i.e. as soon as Lind actually inherited it which is when his mother died
  - **If you assign future property for value (not as a gift), equity treats the assignment as binding: as soon as the property comes into existence, the assignee gets an equitable interest automatically, without any further action needed by the assignor.**

### Disposing of Equitable Interests

- In the absence of any provision to the contrary, no formality (eg writing) is required for the assignment of **equitable property** - all that is required is a '**clear expression of an intention to make an immediate disposition**' (synonymous to assignment in this context) (**Norman**)
- All **assignments** of equitable interests are **dispositions**, but not all **dispositions** are **assignments**.
- However, this is subject to **s23 of the Conveyancing Act 1919 (NSW)**
  - **s23C(1)(a)** requires the creation or transfer of equitable interests in land to **be in writing**
  - **s23C(1)(C)** requires 'dispositions' of subsisting equitable interests to **be in writing**
    - *(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 the person's will, or by the person's agent thereunto lawfully authorised in writing.*
  - **S7** of Conveyancing Act
    - *"Disposition" includes a conveyance...vesting instrument, declaration of trust, disclaimer, release and every other assurance of property by any instrument except a will...*
- Possible Dispositions of Equitable Interests within the scope of **s23C(1)(C)**
  1. Assignments;
    - **Arrangements which will amount to a 'disposition' and require writing under s23C(1)(c)**
    - Where a Beneficiary assigns their equitable interest to a new Beneficiary e.g. B1 assigns their interest to B2
    - This will apply to **equitable interests in land and personal property**
  2. Directions to Trustees;
    - **Arrangements which will amount to a 'disposition' and require writing under s23C(1)(c)**
    - Where a Beneficiary directs the Trustee to hold their interest on trust for a new beneficiary (**Grey**) e.g. B1 instructs T to hold the property on trust for B2
    - Distinguish between a direction and mere authority (**Comptroller**)
    - Where a Beneficiary instructs the trustee to transfer the legal estate (encompassing the equitable interest) in property to a 3rd party. That will **not be a disposition and will not require writing (Vanderwall)** e.g. B instructs T to transfer the title to the property to C
  3. Sub-Trusts; and
    - No active duties - B1 disappears from picture
    - **Chief Commission of Stamp Duties (NSW) v ISPT (1998)** - *"where there are active duties, equity will recognise a sub trust whose beneficiary is same as legal owner. This is because failure to do so would defeat parties' intent that the sub trust operate according to its terms, including the term that the nominated sub trustee act as such. Thus where A holds on trust for B who holds on trust for C, then B will not disappear from the picture"*
  4. Contracts for Value to Assign

- Do contracts for valuable consideration to assign a beneficial interest in property have to be in writing? E.g. B1 assigns interest under trust to B2 for value
- Writing requirements
  - **s23C(1)(c)** would require the 'disposition' of a 'subsisting interest' to be in writing
  - However **s23C(2)** exempts constructive trusts from this requirement of writing
- E.g. in **Oughtred** the relevant property were shares in a private company held on trust i.e. the equitable interest in the shares. The shares were unique because they could not be purchased on the open market.
  - Constructive trust arises: the provision of valuable consideration results in a constructive trust arising i.e. the principal in **Lysaght** and the assignor is a constructive trustee of their interest for the assignee/ purchaser
    - Per **s23C(2)**, constructive trusts are exempt from the writing requirements of **s23C(1)(C)**

### **Grey v Inland Revenue Commissioners (1960) - meaning of 'disposition' that must be in writing**

#### Facts:

- Hunter was the sole beneficiary under a bare trust of 18k shares, with Grey as trustee
- On 18 Feb, Hunter orally and irrevocably directed Grey to hold the shares on new trusts for Hunter's grandchildren
- On 25 Feb, Hunter executed written declarations of trust confirming that Grey now held the shares on those new trusts
- If 18 Feb oral direction was an effective disposition, only normal stamp duty was payable on 25 Feb documents. If not, 25 Feb documents were the operative disposition, attracting higher duty.

#### Issue:

- Was to oral directive on 18 Feb an effective disposition of Hunter's equitable interest?

#### Held

- House of Lords found oral directions were ineffective. The direction was a 'disposing of a subsisting equitable interest' and under **s53(1)(c)** (UK equivalent), had to be in writing and signed.

### **Comptroller of Stamps (Vic) v Howard Smith (1936) - what is not a disposition**

#### Facts:

- Howard Smith was the residuary beneficiary under his deceased wife's estate
- He wrote a letter to the executor and trustee of the will, requesting that certain payments be made to named individuals from his interest as residuary beneficiary

Issue: Was the letter an effective assignment/ disposition of part of Smith's equitable interest (triggering stamp duty)?

#### Held:

- HC held letter didn't operate as an equitable assignment
- It was only an authorisation, dependent on trustee acting on it
- **There was no intention to make an immediate disposition of the equitable interest to the named donees. A mere direction to the trustees to pay others in future, without an immediate intention to pass an interest 'then and there' is only an authority, not a disposition.**

### **Vandervell v Inland Revenue Commissioners (1967) - transferring both legal/ equitable interest so writing not needed**

#### Facts:

- Tony Vanderwall wanted to endow a Chair of Pharmacology at the Royal College of Surgeons and in doing so, minimise tax liability
- He made an oral direction to his trustees (Vandervell Trustees Ltd) to transfer 100,000 shares in Vandervell Products Ltd (of which Tony was the beneficiary) to the Royal College of Surgeon
- Intention was for Royal College to become full legal owner of the shares. Once transaction was complete, a dividend was declared upon shares. Royal College would receive the dividend and grant the Chair in Vanderwell's name

Issue: was the direction to his trustees a 'disposition' within meaning of s23C(1)(c)

#### Held:

- **s23C(1)(c) did not have any application because Vandervell was transferring both legal and equitable interest. In Grey transaction dealt only with equitable interest, here it was with both**
- *"When Mr Vandervell being competent to do so, instructed the bank to transfer the shares to the college and made it abundantly clear that he wanted to pass, by means of that transfer, his own beneficial or equitable interest, plus bank's legal interest, he achieved same result as if there had been no separation of the interests... In such case I see no room for operation of s23C(1)(c)"*

# Topic 4A/B: Introduction to Express Trusts

## The Concept of the Express Trust

- **Express trusts** are a formal legal arrangement used for **wealth management**. They involve a **separation of ownership and enjoyment**:
  - The **trustee manages the property** (holds legal title)
  - The **beneficiary enjoys the benefit** of the property (holds equitable interest)
- It requires an individual (settlor) to demonstrate an intention to establish a trust. Roles under trust:
  - **Settlor**: individual who creates trust. Usually once trust created, settlor drops out of picture.
  - **Trustee**: individual(s) who holds the title (legal or equitable) to trust property and who owes a personal obligation to beneficiaries to perform their duties
  - **Beneficiary**: individual(s) who have a right to performance of trustee's obligations. Whether they have an interest in trust property depends on whether trust is fixed or discretionary.
- *"An obligation enforceable in equity which rests on a person (the trustee) as owner of some specific property (the trust property) to deal with that property for the benefit of a certain person (the beneficiary) or persons, or for the advancement of certain purposes."* - **Ford and Lee**
- A trust has no legal personality. The trustee acts on behalf of the trust and legal actions are brought by or against the trustee, not the trust itself. Trustee may use trust funds to meet properly incurred liabilities.
- Existence of trust obligations
  - In many cases, the existence of an express trust is **clear and uncontested e.g.** trust created by a deed or will
  - When it's unclear, courts may need to characterise the arrangement as a trust e.g. **Re Scott** - church sought court directions to clarify their obligations as trustees
  - It is important to do so as beneficiaries may assert claims on trust property that have **priority over personal creditors** of the trustee (**Barclays**)
  - If all beneficiaries are of full age and capacity, they can terminate the trust and require transfer of trust property, overriding the trust instrument

## Trust property

- **Essential requirement**: trust must have identifiable property.
- Even a **possessory title** (e.g. held by a thief or adverse possessor) can form the subject matter of a trust

## Barclays Bank Ltd v Quistclose Investments Ltd 1970 - trust v debt

### Facts:

- Rolls Razor Ltd (RR) borrowed money from Quistclose to pay a specific dividend. The loan terms restricted the money to that purpose only.
- The funds were placed in a separate account with Barclays Bank; Barclays knew the purpose
- Before dividend was paid, RR went into liquidation. Quistclose funds were still sitting in Barclays account.
- Barclays claimed money to set off against RR's overdraft; Quistclose claimed money as beneficiary under a trust

### Issue:

- Was the relationship between Quistclose and RR a simple debtor-creditor relationship (no proprietary rights for Quistclose), or had the money been advanced on trust so that Quistclose retained a proprietary interest if the specific purpose failed?

### Decision:

- **A trust has been created. Creation of trust likely where money had been left for a specific purpose. Hallmark duty of trustee they don't mix trustee funds with their own.**
- **Where money is advanced for a specific, limited purpose and both parties mutually intend that it is not to become part of the recipient's general assets, equity may treat the arrangement as creating a trust, not a bare loan.**
- **On failure of the stated purpose, a resulting trust arises in favour of the provider, who retains or recovers a proprietary interest in the funds.**

## Australian Elizabethan Theatre Trust (1991) - need intention to create express trust, also evidence of mixing means no trust most likely

### Facts:

- AETT donors could indicate preference for how they wish for their donations to be spent
- Ultimately though, decision was left with AETT. When AETT went into liquidation, liquidator sought declaration from court that donations weren't held on trust for a nominated organisation but belonged to AETT absolutely

### Held:

- Money was not held on trust

- His honour noted that decision in that case didn't give rise to a creation of new species of trust, QC trust was merely an example of an express trust which must satisfy ordinary requirements for creation of trust
- Whether express trust has been created, will always have to be to reference to intention. No obligation upon AETT to adhere to that preference
- **Unlike in QC, AETT did not earmark the donations (did not segregate them in any kind of separate bank account). Donations were deposited into companies operating account**
- Funds were not held by AETT for any kind of express trust in specific.

### **Cohen v Cohen (1929) - holding specific proceeds 'for' another, with duty to account and keep distinct, can = trust**

#### Facts:

- Mrs Cohen sued her husband for various sums, some of which were statute-barred unless characterised as arising under a trust
- 3 main categories:
  1. Proceeds of sale of her furniture: Mr Cohen sold furniture that belonged to her; \$123 represented her share
  2. Part of the proceeds of an insurance claim: a joint policy over items some of which were hers: \$80 was received by Mr Cohen, who did not account to her despite repeated requests
  3. 'German jewellery' transaction: money owed to Mrs Cohen in Germany, he was to collect it, use it to buy jewellery for his business, bring it to Aus, and later pay her an equivalent amount

**Issue:** In each category, was Mr Cohen merely a debtor/agent, or did he hold the money on trust for Mrs Cohen?

#### **Decision (HC)**

- Mr Cohen was not only acting as her agent but received money which he was bound to keep separate and to hold for her benefit.
- Each transaction gave rise to a trust obligation, so those claims were characterised as trust claims and not defeated by the limitation period.
- For the German jewellery transaction:
  - The agreement was that the jewellery purchased would belong to him; his obligation was simply to pay her an equivalent sum out of his own funds.
  - That created only a debtor-creditor obligation, not a trust. That part of the claim failed as a trust claim.
- **The case shows the functional principles of an express trust: the person holding property (husband) is obliged to deal with it for the benefit of another (wife), which is central to an express trust.**

## **Trust v Other Things**

### **Trust v Agency**

- Trust = Trustee holds legal title to property for the benefit of beneficiaries/ objects
  - To hold and manage property for others, subject to terms of trust
  - Can just appoint a new trustee upon trustee death
  - Legal title to trust property vested in trustee. Beneficiaries hold an equitable interest.
- Agency = Agent is authorised to affect the legal relations of the principal, usually be entering contracting on principal's behalf
  - To make/ affect transactions between principal and third parties
  - Agency terminates on death of either principal or agent
  - Legal title to property received by an agent is usually vested in principal. Money/ property may in some circumstances be held on trust, but that is a further step.

### **Trust v Bailment**

- Bailment
  - Bailor remains owner, but transfers possession of a chattel to the bailee for a limited time and purpose. Legal title remains with the bailor.
  - Only applies to tangible personal property (chattels). No bailment of a pure chose in action.

### **Trust v Charge**

- Chargor grants a security interest over their property in favour of the chargee, to secure repayment of a debt or performance of an obligation. The chargee does not become owner.
- Chargee has only an equitable security interest, a right to have the property sold or applied in satisfaction of the debt. No beneficial ownership of the property.

### **Trust v Contract**

- Founded on mutual assent, offer and acceptance, and requires consideration (or a deed) to be enforceable.
- Consideration not required for a trust.
- Creates personal obligations between parties. No proprietary interests unless a separate proprietary mechanism is used.

### Associated Alloys v ACN (2000) - trust v charge

#### Facts:

- Company bought steel from Associated Alloys (AA) under a clause saying that, if the company on sold the goods, it must keep proceeds in a separate account for AA
- Company later became insolvent.

#### Issue:

- Whether AA had only an unregistered equitable charge (void against liquidator) or a beneficial interest under a trust over the proceeds?

#### Decision:

- HC concluded that the clause created a trust, not merely a charge.
- The obligation to keep proceeds separate and to account to AA was characteristic of a trustee holding property for a beneficiary, not of a mere chargee with a security interest.
- **To distinguish trust from charge look for:**
  - **Intention to create a beneficial interest for other party, and**
  - **Obligations to segregate and hold identifiable proceeds for that party.**

### Trident General Insurance v McNiece (1988) - trust v contract

#### Facts

- Insurance policy between Trident and Blue Circle (BC) covered BC and 'all contractors and suppliers'. McNiece, a contractor, was liable for an employee's injury and sought indemnity from Trident.
- Trident argued McNiece wasn't a party to the contract

#### Held:

- HC held that McNiece was entitled to an indemnity and doctrine of privity did not bar their claims.
- One route taken was to treat the arrangement as creating an express trust: Trident as settlor, Blue Circle holding the benefit of the policy on trust for contractors such as McNiece.
- **A contract made for the benefit of a third party may, on construction, manifest an intention to create an express trust in favour of that third party.**
- **Whether a trust arises depends on objective intention drawn from the language and circumstances; general words alone will not suffice.**
- **Shows how trust law can be used to circumvent privity in limited cases.**

### Raulfs v Fishy Bite Pty Ltd (2012) - partnership v trust

#### Facts

- Mrs Raulfs contributed \$400k to a partnership for a 35% share. Funds were paid into the partnership account and mixed with other partnership money.
- Her partner, controlling Fishy Bite Pty Ltd, misappropriated partnership funds to pay his personal mortgage.
- She argued that the \$400k was held on express trust for her and should be repaid in full.

#### Held:

- No express trust arisen
- Partnership agreement showed money was contributed as capital, not to be repaid ahead of dissolution. No intention to create a separate trust fund.
- Her rights were those of a partner with a share in the surplus and Fish Bite owed her fiduciary duties as a partner, which were breached by misappropriation
- **Where money is paid as partnership capital, the partner usually gets an equitable chose in action to a share of surplus, not a specific proprietary interest in that money under a trust.**

## Topic 4A: Private Express Trusts

### Private Express Trusts

#### Trust

- Legal relationship in which **legal owner** (trustee) is **obliged** to hold and apply property for the benefit of one or more **beneficiaries**.
- **Settlor** creates the trust and transferred property into it. **Trustee** is entity who holds legal title and must apply property in accordance with the trust. **Beneficiary** is the persons who hold the beneficial/ equitable interest.

#### Fixed v Discretionary Trust

- Fixed
  - The property must be distributed in accordance with proportions fixed by instrument or oral declaration of trust e.g. Trustee holds property on trust for children in equal proportions
- Discretionary
  - Confers some discretion on trustee to confirm how property should be distributed.
  - The potential persons who may benefit from exercise of these powers do not have a fixed entitlement. These people are **mere objects/ objects**
  - **Can only insist trustee perform duties, cannot insist trustee organise some powers in their favour**
  - Exhaustive Powers (trust Powers)
    - Powers which **MUST** be exercised in accordance with terms of trust. Trustees have a discretion but they are under a duty to exercise that discretion. There is a trust obligation but its coupled with a discretion
    - E.g. trustee holds property on trust and **shall** pay rent to any or all children in amounts they determine. (Shall = exhaustive power or trust power, trustee has been given a discretion but they must exercise it due to Shall)
  - Non exhaustive powers (mere powers)
    - Trustee given **ABSOLUTE** discretion to distribute property but is under no obligation to exercise those powers
    - Presence of gift over clause may help here - trustee has discretion to give money to relate but in default of this, they will have to give money to...

#### The 3 certainties

A valid express trust must be sufficiently certain in 3 respects. Failure of 1 tends to invalidate the trust.

#### Certainty of Intention

- Settlor must have intended to create an **enforceable obligation** in respect of the property. Mere use of word trust isn't required, rather courts look at words and conduct to see whether a trust is the appropriate legal machinery
- Courts apply an **objective construction: would a reasonable person, looking at words and action, conclude the settlor intended to create the trust?**
- Evidence considered:
  - Express words in documents
  - Conduct after execution of documents
  - Surrounding commercial or family context (**Byrnes v Kendle 2011** - what is the meaning of what the parties have said, not what the parties meant to say)
- Where word 'trust' has been used in commercial documents, use will be sufficient to demonstrate requisite intention to create a trust (**Korda 2015 [109]** - an express term that one party is to hold property on trust for another will be recognised and enforced in equity as a trust (clear demonstration of intention))
- For unilateral express trusts, intention needs to be established and created during settlor's lifetime i.e. he can declare that the settlor holds property for beneficiaries
- For bilateral trusts (agreement between 2 parties). Mutual intention is critical.
- **Sham trusts**
  - A trust will be a sham where the parties execute documents or perform acts that are intended to give to 3rd parties or the court the **appearance** of creating legal rights and obligations different from the actual rights and obligation the parties intend to create
  - The documentation is a facade designed to mislead 3rd parties about true ownership/ arrangements
  - **Courts look at circumstances of execution, subsequent behaviour of settlor and courts may set aside trust as a sham**
  - In **Midland Bank pic v Wyatt**: trust executed but intended as a device to defeat creditors; no real intention to transfer beneficial ownership - therefore sham
  - **Lewis v Condon**: contrast - even though motive was improper (hide assets from family court), settlor intended the trust instrument to have legal effect; not a sham
- **Precatory (words of prayer)**
  - Courts are now stricter, saying precatory words e.g. 'I hope/ in full confidence' do not automatically create a trust unless the instrument contains clear evidence of an obligation rather than a mere wish. E.g. in **Re Williams**, words like 'fullest confidence' do not automatically create a binding trust
- **Immediate v Future Trusts**
  - **Settlor must intend for trust to take effect immediately i.e. trust relationship arises when document comes into legal effect. Equity reluctant to effect trusts which express it is only to be in effect in future as settlor could change it before it comes into effect (Harpur v Levy)**
  - Exception: contract to create a trust in future supported by **valuable consideration** can be specifically enforceable
- **Contract and trust overlap**

- In **Korda** HC emphasised that intent to create a trust can be imputed from contracts, oral dealings and commercial circumstances where express words are absent

### Certainty of Subject matter

- Property to be subject to trust must be identified with **sufficient precision** so trustees know what property they are obliged to apply for beneficiaries.
- Where settlor has purported to create trust over multiple items, and only one or some items are uncertain, **trust will remain enforceable but only property which is sufficiently certain will be held on trust**, for other items settlor will remain full beneficial owner. If all properties are uncertain, trusts will be void.
- Includes choses in possession (tangible items) or choses in action (intangible). Any property to be held on trust must also be **presently existing property**. This EXCLUDES any FUTURE PROPERTY.
- In **Palmer v Simmonds** said 'bulk of my estate' which was uncertain.
- **Re Golays Will Trust** - 'reasonable income' - sufficiently certain.
- **Re Goldcorp Exchange Ltd**: Gold bullion sold but was. Unsegregated. Will be sufficient if tangible property has been segregated from bulk and can be identified as a relevant proportion to be held on trust.
- **Hunter v Moss**: 50 shares (from 950 identical shares) = valid trust; fungible property doesn't need segregation. Where it is shares, it is not possible to separate them, but a proportion is valid. Where settlor holds more than 1 class of shares in one company, classes of shares must be clearly certified.

### Certainty of Objects

- Beneficiaries must be **sufficiently identifiable so trustees can locate and benefit them and court can supervise and enforce the trust**. Rules differ depending on type of trust.
- Object can be natural person/ persons/ corporations. No requirement object be required to know trust exists, objects must just satisfy relevant trusts based on fixed v discretionary trusts.
  - **Fixed trusts**: Property must be distributed in accordance with trust instrument. where shares are specific, courts require a **list certainty** - it must be possible to draw up a full list of beneficiaries.
  - **Discretionary trusts**: more flexible, 'is or is not' in **McPhail** question is whether it is possible to say of any given person whether they are or are not within the class - applies to both exhaustive and non exhaustive powers
  - **Charitable trust**: treated differently, valid even though beneficiaries are not individually ascertainable.

### Administrative Unworkability - can void trust even if 3 certainties are met

- In **McPhail** explained that a trust is unworkable if 'definition of beneficiaries is so hopelessly wide as not to form anything like a class' giving the example of 'all residents of Greater London'.
- Similarly in **District Auditor** a trust for 'any or all or some of the inhabitants of the County of West Yorkshire' was void
- Australia: In **Horan v James**, a trust for "all the world except specific named persons" satisfied the criterion certainty test without considering administrative unworkability
- Administrative unworkability should mainly invalidate hybrid trusts (e.g., trusts for anyone *except* X), where trustees cannot sensibly exercise discretion. Otherwise, trusts satisfying certainty of objects should generally not be invalidated.

### Byrnes v Kendle (2011) - certainty of intention

#### Facts:

- Husband bought a house in his name using a defence services loan
- He later executed a deed stating he held a half interest on trust for his wife
- After marriage failed and he failed to collect rent from his son, he argued he never really intended to create a trust

#### Issue:

- Whether there was sufficient intention to create an express trust in favour of the wife? Whether intention tested objectively (what the deed and context convey) or subjectively (what he says he meant)?

#### Held:

- HC held deed construed **objectively** in its factual context, manifested an intention to create a trust in favour of the wife. Subjective evidence that he 'did not mean it' was irrelevant
- **Intention to create a trust is assessed objectively by wording and circumstances, not by the settlor's later denial.**
- **An explicit written declaration of trust will normally satisfy certainty of intention unless there is some vitiating factor.**

### Re Williams (1897) - precatory words

#### Facts:

- Testator left his estate to wife 'absolutely, in fullest confidence that she will carry out my wishes' including a 'wish' that certain policies go to his daughter
- Widow later left one policy to daughter and other elsewhere. Executor tried to treat the 'wishes' as binding trust obligations

Issue:

- Whether words like 'fullest confidence' and 'wishes' created an enforceable trust in favour of the daughter?

Held:

- No trust. Language was precatory, expressing hope or confidence not a binding obligation.
- **Precatory words, without clear mandatory language and contextual support, do not create a trust. Instrument must be read as a whole; there must be a manifested intention to impose a legal duty, not just a moral expectation.**

#### **Cobcroft v Bruce (2013) - precatory words**

Facts:

- Will gave shares to wife Denies to 'deal with as she in her absolute discretion sees fit, but otherwise on condition that she ultimately gives those shares, or remainder, to my nephews'
- Denies later left shares to charities. Nephews claimed an entitlement.

Issue:

- Whether gift was absolute, merely precatory or subject to an enforceable equitable obligation in favour of the nephews?

Held:

- Court held there was an equitable condition in favour of the nephews, not an unrestricted absolute gift
- **Language that seems permissive can still impose an enforceable obligation where the structure shows an "absolute discretion" for present use, paired with a clear "condition" as to where the remainder must go.**
- **Shows that context and phrasing can turn apparently precatory language into a binding equitable obligation.**

#### **Harpur v Levy (2007) - present trust v future trust**

Facts:

- Deceased executed a deed purporting to declare himself trustee of certain property, with a commencement date specified after execution
- Executors argued there was no immediately effective trust, only a future trust for volunteers that equity would not enforce

Issue:

- Whether deed created a presently effective trust (with enjoyment postponed) or merely promised to create a trust in the future?

Held:

- Court treated deed as an immediate declaration of trust, taking effect on execution, with commencement date relating to administration/enjoyment rather than creation of trust itself
- A trust is valid where the language, read as a whole, shows an intention to create present trust obligations, even if enjoyment or some aspects are postponed.
- Equity will not enforce a bare promise to create a trust in future for a volunteer, but where there is a present declaration, subjective statements cannot turn it into a "future trust" only.

#### **Hunter v Moss (1994) UK - certainty of subject matter**

Facts:

- Moss owned 950 of the 1000 issued shares. He orally declared 50 of his shares were held on trust for Hunter.
- He later refused to transfer and argued trust failed because 50 weren't identified.

Held:

- A valid trust existed - the subject matter was sufficiently certain. Shares of the same class in a single company are indistinguishable and fungible. **This was not a mixed trust, all shares in Moss were off same class. There is no reason why a trust cannot be declared over specific number of shares within certain class within certain company.**
- It was enough to identify the number and class of shares; there was no need to earmark particular certificates.
- Shares in a single class of the same company are **fungible and indistinguishable**. It is therefore unnecessary to identify which specific shares are held on trust; it is sufficient to identify the number and class (e.g. 50 ordinary shares in Company X).

#### **White v Shortall (2006) Aus - certainty of subject matter**

Facts:

- Shortall held 1.5 million shares in Unitract Ltd and wrote that 222k were held on trust for White
- Later he denied creating any trust, arguing uncertainty of subject matter

Held:

- Trust was valid. Construed arrangement as a trust of whole shareholding, with equitable interests split: 22k beneficially for White, balance for Shortall
- Australian confirmation that where a trustee holds a bulk of fungible property, it is sufficient to define equitable shares by number or fraction; no need to identify specific units.
- Subject matter can be certain even without physical segregation if the bulk is clearly identified and interests are proportionate.

### Re Gulbenkian's Settlement Trusts (1970s) - certainty of object in powers of appointment

Facts:

- Settlement gave trustees a (non-exhaustive) power to appoint to the settlor's son 'and any person with whom he may residing or associated'
- Initial view was that this description was too vague

Held:

- Power was valid. 'Residing with or associated with' was sufficiently conceptually certain
- For powers of appointment, test is whether it can be said of any given person that he 'is or is not' within the class.
- A power is only void if it is impossible, not merely difficult, to determine who falls in or out of the class

### McPhail v Doulton (1971) - certainty of object in discretionary trust

Facts:

- Trust deed empowered trustees to distribute to 'employees, their relatives and dependants'
- If invalid for uncertainty, fund would fall into settlor's estate

Issue:

- What test to apply for certainty of objects in a discretionary trust?

Held:

- A discretionary trust is valid if it can be said with certainty of any given individual whether they are or are not within the class
- Same conceptual certainty test applies to discretionary trusts and powers: "is or is not" within the class.

## Creating an Express Trust

### Ways to Create a Trust

- **By declaration (self-trust):**
  - Settlor declares themselves trustee of their own property.
  - No transfer of legal title is needed as settlor already holds legal title.
  - Key question is **intention**: has settlor objectively imposed trustee obligations on themselves, rather than simply promising a gift or making a moral commitment. If sufficient express intention satisfied, self declaration effective (**Richards v Delbridge**)
- **By transfer to trustee:**
  - Settlor transfers property to another to hold on trust as trustee.
  - Legal title must actually vest in intended trustee, according to formalities for that type of property
  - If transfer ineffective at law, but settlor done everything that only they can do, equity may recognise transfer (**Corin v Patton; Re Rose; Anning**)
  - No particular form of words is required, subject to **Statute of Frauds/ Conveyancing Act** writing rules

### Incompletely Constituted Trusts

- A valid trust requires both:
  - Certainty (intention, subject matter, objects) and;
  - Constitution (vesting of title in trustee or effective self-declaration)
- Where steps are incomplete, equity is slow to intervene where the beneficiary is a volunteer.
- If a declaration of trust fails for uncertainty or for lack of required writing, the settlor simply retains the beneficial interest and holds absolute (**Milroy v Lord**)

### Statutory Writing Requirements — **Conveyancing Act 1919 (NSW) s 23C**

- **S7 of Conveyancing Act** defines 'disposition' to include a conveyance, a declaration of trust and every other assurance of property by instrument (other than a will)

- **s23C(1)(a):**
  - Any disposition of an equitable interest in land must be in writing and signed by the person creating or conveying that interest
  - If not in writing, transaction is void
  - This paragraph doesn't apply to declaration of trust over land
- **s23C(1)(b):**
  - A declaration of trust respecting any land or interest in land must be 'manifested and proved' by some writing signed by the person who is able to declare the trust
  - Trust can be created orally but cannot be enforced without written evidence
  - Writing may be created later
- **s23C(1)(c):**
  - A disposition of a subsisting equitable interest must be in writing and signed.
  - Unlike (a) and (b) this is not confined to land, so extends to equitable interests in real and personal property
  - If a person who already holds a subsisting equitable interest (e.g. beneficiary) seeks to dispose of that interest (assignment or sub-trust) writing may be required
- Resulting, implied and constructive trusts are exempt from these writing requirements under **s23C(2)**

#### Declaration of Trust

- Determined by **objective construction** of settlor's words/acts → must show **certainty of intention** (**Byrnes v Kendle; Re Williams**).
- Trusts often created **contractually** in commercial contexts (**Trident General Insurance v McNiece Bros**).
- **Secretary, Dept of Social Security v James (1990)**
  - Mrs James purchased a unit to give her disabled daughter independence and repeatedly described it that way in letters and dealing with Dpt
  - Tribunal and court held sufficient intention to create a trust in favour of daughter, and oral declaration could be 'manifested and proved' by later writings under **s23C(1)(b)**
  - Writing can be informal and created after oral declaration but oral evidence cannot be used to add missing elements

#### Creating a Trust by Transfer

- For a trust by transfer, legal title must pass to the trustee. If the settlor attempts to transfer but the transfer is ineffective and the beneficiary is a volunteer, equity will not perfect the gift by treating it as a declaration of trust. (**Milroy v Lord**)
- **T Choithram International SA v Pagarani (2001) PC**
  - Settlor orally declared a gift of wealth to a charitable foundation of which he was one trustee, but died before transferring assets to the other trustees
  - Privy Council held that there was a valid trust.
  - Where settlor is himself one of the trustees, words of gift can be construed as a self declaration of trust, binding his conscience.

#### Public Policy Limits on Trusts

- Illegality and immorality
  - Trusts that positively promote criminal conduct or interfere with administration of justice are void
  - In **Thrupp v Collett No 1 (1858)** gift of 5000 pounds to pay fines of convicted poachers was held void as contrary to public policy as it encouraged criminal activity
- Restraint of marriage
  - At common law a general restraint on marriage (e.g. gift 'provided she never marries') is void for public policy
  - Partial restraints (e.g. not to marry a particular person or within a particular group) may be valid, depending on reasonableness (**Re Caws**)
- Statutory and bankruptcy related limits
  - Trusts may be voidable if used to defeat creditors or avoid bankruptcy
  - **Conveyancing Act 1919 (NSW) s37A(1)**
    - Every alienation of property made with intent to defraud creditors is voidable at the instance of any person thereby prejudiced. **s37A(3)** - protects purchasers in good faith without notice
    - In **Marcolongo (2011)** HC held s37A should receive a liberal construction to suppress fraud. Defraud includes hindering or delaying creditors, not just outright denial. Intent may be inferred from circumstances (e.g. transfer of only significant asset while facing judgement debt)
- Trusts and Discrimination
  - Private trusts can define beneficiaries by religion, gender etc subject to public policy limits
  - In **Hickin v Carroll**: Will conditioned gifts on beneficiaries converting to Catholicism. Held not contrary to public policy and thus valid.
- Statutory policy more broadly
  - A trust that directly contravenes a statute or its policy may be void (**Sykes v Stratton**)