TOPIC 1 – The History and Nature of Equity

TB Ch 1. The History of Equity

Nature and Function of Equity

***Dudley v Dudley* (1705) 24 ER 118 at 119, Lord Cowper**:

"Equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law ... it assists the law where it is defective ... defends the law from crafty evasions ... supports and protects the common law from shifts and contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it."

Core early judicial description: equity supplements and protects common law, not replace it.

- Importance of historical understanding:
    1. Equity is *a creature of history* → cannot be understood without historical context.
    2. History explains equity's role within the general body of law.

Classical Origins

- Word **"equity"** traces to Ancient Greek *epeikeia* (Aristotle, *Nicomachean Ethics* 1137b).
    - *Equity is a rectification of law insofar as law is defective due to its generality.*
    - The equitable person *"accepts less than his share although he has the law on his side"* → fairness beyond strict legal rights.
    - Equity: a form of justice, not a separate character trait.

Early English Development

- By early 14th century, equity associated with the **Court of Chancery**.
- **MacNair**: Aristotelian idea explains judicial interpretation of law's purpose, but *not* Chancery's actual emergence.
- Real foundation: **conscience** → underpinning equitable principles by mid-15th century.

Competing Theories of Origin

- Two views:
    1. Equity's jurisdiction arose from **trusts law**.
    2. More orthodox: equity developed due to **defects in medieval common law**.
        - **Canada (AG) v Collins Family Trust [2022] SCC 26 at [9]**: equity emerged to alleviate results of *"unyielding common law"*, providing relief as a matter of conscience and fairness.

Common Law Background

- **Henry I (1100–1135)** centralised administration of justice into the **Curia Regis (King's Council)** → combined legislative, executive, and judicial functions.
- By Edward I (1272–1307), three courts emerged from King's Council → **King's Bench (Crown cases), Common Pleas (civil disputes), Exchequer (taxation)**.
- "Common law" = law that was *unenacted, non-statutory, common to all England*, term borrowed from canon law (*jus commune*).
- Early common law courts → discretionary, innovative, relief based on *abstract justice*.
- By late 14th century → became rigid, precedent-bound, bogged in **procedural technicalities**.
    - Result: demand for **new system** responsive to fairness → Chancery fills the gap.

Emergence of Chancery

- Litigants dissatisfied with common law → petitioned the **King**, who swore to do *"equal and right justice ... in mercy and truth"*.
- Petitions informal, no fee, simpler than common law procedure.
- Mid-14th century → petitions delegated to **Lord Chancellor (keeper of the King's conscience)**.

- By late 14th century → Chancellor's judicial role entrenched; issuing decrees on conscience.
- By 1430s → Chancery became one of the **central courts of the realm**, offering a *"responsive, quick, inexpensive, and desirable avenue"* for cases unmet by common law.
- Known as **Court of Conscience** by mid-15th century.
- Staffed by clerics; ecclesiastical training emphasised *saving the soul of the defendant* by preventing conduct contrary to conscience (Campbell, NSWCA judge, citing St Germain).

Features of Early Chancery

- No binding precedent until mid-16th century (first Chancery reports in 1557).
- Each case decided on its facts, decrees bound only the parties.
- Baker: Chancellors *"were enforcing the law by making sure justice was done ... they came not to destroy the law, but to fulfil it ... a court of conscience in which defendants could be coerced to do whatever conscience required in the full circumstances of the case"*.
- Language: unlike common law courts (Latin/French), Chancery proceedings conducted in **English** → major reason for early popularity.

Uses and Trusts

- **Uses**: holding land "to the use" of another (cestui que use).
  - Developed to get around **primogeniture, dower rights, feudal incidents (taxes)**.
  - Enforced initially in ecclesiastical courts, then by Chancery.
  - Example: land conveyed to feoffee to use for benefit of monks who could not legally own property.
  - Chancellor enforced use by acting on conscience of the feoffee, preventing unconscientious exercise of common law rights.
- **Motivations**:
  1. Avoidance of primogeniture and dower.
  2. Avoidance of feudal dues (by joint tenancy arrangements).
- **Statute of Uses 1536 (Henry VIII)**: converted use into legal estate, attaching liability for feudal dues.
  - Response → development of *"use upon a use"* → basis of modern trust.
- **Maitland**: "Of all exploits of equity the largest and most important is the invention and development of the Trust."

Later Developments

- **Trusts**: arrangement where legal ownership vested in trustee, who administers for benefit of beneficiaries.
- Used to:
  - Protect family wealth (esp. landed aristocracy).
  - Circumvent restrictions on women's property rights (via marriage settlements).
  - Support Catholic land ownership in Ireland (by using Protestant trustees).
  - Commercial uses: partnerships, avoiding insolvency, business structures (18th century commerce).
- Trusts central to **commercial equity**, evolving rules on priorities, tracing, and intention.

The Common Injunction

- Mid-15th century → Chancellor's key remedy: **common injunction**.
  - Ordered plaintiff at common law to **discontinue proceedings** or, if judgment already obtained, to **prevent enforcement**.
  - Disobedience = **imprisonment**.
- Basis: plaintiff's enforcement of common law rights was **unconscientious**.
- Two key features:
  1. **In personam remedy** → attached to *person* of common law plaintiff, reflecting Chancellor's focus on conscience.
  2. **Discretionary** → only granted if unconscientious conduct shown (Byers v Saudi National Bank [2024] 2 WLR 237 at 248; Ramsay Health Care v Compton (2017) 345 ALR 534 at 555–6).

    - Doctors later cleared of misconduct.

General Equitable Defences

- **Clean hands**: claimant may be denied relief if acting unconscionably (*AG (UK) v Heinemann Publishers Australia* (1988) 10 NSWLR 86).
- **Laches**: delay in enforcing rights may bar equitable relief.
- These apply as they do to all equitable remedies.

Remedies

- **Equitable remedies** available:
    - **Injunctions** (including interim)
    - **Equitable compensation**
    - **Account of profits**
    - **Delivery up** (*AG Australia Holdings v Burton* (2002) 58 NSWLR 464 at 507).
- **Principle:** defendant should **gain no advantage** from breach. Remedy is corrective, not punitive (*I-Admin v Hong Ying Ting* [2020] SGCA 32 at [68]).
- Most important in practice: **injunctions**, esp. interim ones, because they contain the loss of confidentiality

Injunctions and the Springboard Doctrine

- Core idea: a confidant who misuses confidential information cannot obtain a **head start / unfair competitive advantage**
- Even if information later enters the **public domain**, equity may restrain the defendant temporarily to neutralise the benefit gained
- Doctrine introduced in ***Terrapin Ltd v Builders' Supply Co (Hayes) Ltd*** [1967] RPC 375 at 391 (Roxburgh J):
    - Person who received information in confidence cannot use it as a *springboard* for activities detrimental to confider
    - "Springboard remains even when all features are public or ascertainable by inspection."

Key Cases

Terrapin Ltd v Builders' Supply Co (Hayes) Ltd [1967] RPC 375

- Prefabricated structure designs put on market so susceptible to reverse engineering → D breached confidence using designs to get unfair head start on competition; injunction granted until information fully in public domain.
- Court imposed a *special disability* to cancel out unfair advantage.

Create Financial Management LLP v Lee [2011] 1 WLR 78 at 93 (Morris J) – **key points** granting springboard injunction:

1. Springboard relief applies to breach of confidence, fiduciary duties, and contracts.
2. Aim = restore competitive position parties would have been in but for wrongdoing.
3. Relief is **not punitive**.
4. Claimant bears burden of proving **precise nature and duration of advantage**.
5. Advantage must be more than ephemeral/short-term.
6. Court assesses how long it would have taken defendant to achieve lawfully what was unlawfully gained.
7. Relevant to consider actual period of unlawful activity.

Forse v Secarma Ltd [2019] EWCA Civ 215 at [60] (Sir Terence Atherton MR):

- Duration of injunction depends on **nature of advantage** and how easily it can be removed.

Limits

- Springboard injunctions must be sought **while advantage still exists** (*Sun Valley Foods v Vincent* [2000] FCR 825).
- Courts consider **freedom of employment** of ex-employees — cannot restrain them indefinitely absent valid restraint clause (*DXC Connect v Deibe* [2017] NSWSC 1159).

***Coco v AN Clark (Engineers) Ltd* [1969] RPC 41**

FACTS: Coco was developing a design for a moped. He entered into negotiations with Clark (engineers) about possible manufacture. During negotiations, Coco disclosed details of his moped design. Clark did not proceed with Coco's design but later produced its own moped. Coco alleged Clark had misused his design in breach of confidence.

ISSUE: Whether Clark's conduct in producing its own moped amounted to a **breach of an equitable obligation of confidence** owed to Coco in respect of the disclosed design.

HELD (Megarry J): Action failed – insufficient evidence that the design was Coco's, or that it was sufficiently original to attract confidentiality. Nonetheless, Megarry J formulated the **modern three-part test** for breach of confidence, which remains foundational.

REASONING & PRINCIPLES

Three elements for breach of confidence (at 47)

1. "The information itself… must 'have the necessary quality of confidence about it'".
2. "That information must have been imparted in circumstances importing an obligation of confidence."
3. "There must be an unauthorised use of that information to the detriment of the party communicating it."

- **Objective nature of obligation:** Whether circumstance import confidence depends on whether a **reasonable person in the recipient's position** would have realised info was given in confidence (at 48)
- **Balance of convenience:** Injunction was refused at interlocutory stage, but Megarry J required an undertaking that defendant would account for a notional royalty if plaintiff later succeeded – highlighting the court's flexibility in tailoring equitable relief (at 48)

***Optus Networks Pty Ltd v Telstra Corporation* (2010) 265 ALR 281**

FACTS: Optus and Telstra had an agreement regulating access to each other's networks. Under this arrangement, one party could access data about the other's customers' telecommunications traffic (quantity, source, destination, duration, billing value, etc). Optus alleged Telstra had misused this traffic data for marketing and promotional purposes. Optus brought claims in **contract** and in **equity (breach of confidence).** At trial: claim failed – judge held contractual provisions were exhaustive and excluded equity.

ISSUE: Did the existence of contractual provisions governing confidential information **exclude the operation of equitable obligations of confidence**?

HELD: Appeal allowed. Equitable claim was **not excluded:** the contract contemplated that equitable remedies (injunction, account of profits) remained available. An **account of profits** is a remedy "provided by law independent of an agreement" [31].

REASONING

Contract and equity

- Trial judge erred in finding contract excluded equity.
- *Del Casale v Artedomus (Aust) Pty* Ltd [2007] NSWCA 172 at [118] (Campbell JA): "If there was a contractual obligation that covered the topic, there would, of course, be no occasion for equity to intervene to impose its own obligation."
- But here, the contract expressly preserved equitable remedies:
  - **Cl 15.6**: acknowledges breach may cause "irreparable damage" for which damages are inadequate → injunctive relief available.
  - **Cl 20.22**: contractual remedies are "cumulative" and "not exclusive of … remedies provided by law independent of this agreement."
- Therefore, equity could still operate alongside contract.

Elements of Breach of Confidence (at [39]):

(a) Information must be identified with specificity.
(b) Information must have necessary quality of confidence.
(c) Information received in circumstances importing an obligation of confidence.
(d) Actual or threatened misuse of information without consent.

Application to Facts (at [40]):

(a) Satisfied — information fell within "Confidential Information" in cl 1.1.
(b) Satisfied — definition required info be "of a confidential nature."
(c) Satisfied — existence of access agreement established obligation of confidence.
(d) Satisfied — info was used for preparation of Telstra's market share reports.

Estoppel (TB Ch. 14)

Introduction

- **Broad definition** (Pembroke J, *Seven Network (Operations) Ltd v Warburton (No 2)* [2011] NSWSC 386 at [41]): Estoppel is a *"bar or impediment preventing a party from asserting a fact or a claim inconsistent with a position previously taken."*
- **Mason CJ, *Commonwealth v Verwayen* (1990) 170 CLR 394 at 409; 95 ALR 321 at 330**: estoppel is a "label which covers a complex array of rules spanning various categories, all intended to serve the same fundamental purpose — protection against the detriment which would flow from a party's change of position if the assumption (or expectation) that led to it were deserted."
- Exists in **common law** and **equity**. They overlap, but remain separate and distinct (*DHL PM Pty Ltd v Blackthorn Resources Ltd* (2011) 83 NSWLR 718 at 739).
- **Equitable estoppel focus**: prevents denial of a state of affairs where such denial would be **unconscientious**, protecting plaintiff from **detriment** suffered on reliance on defendant's induced assumption/expectation (*Verwayen*; *Sidhu v Van Dyke* (2014) 251 CLR 505 at 511).

Common Law Estoppel

Estoppel by Deed

- Evidentiary rule: clear and unambiguous statements in a **deed** (esp. recitals) bind parties/privies — no contradictory proof admissible. (*Greeves v Kettle* [1938] AC 156 at 171).
- **Equity**: acknowledgement of receipt of payment in a deed is only evidence, not conclusive (*Peterson v Maloney* (1951) 84 CLR 91 at 100).

Estoppel by Judgment

Three species, all based on **finality of litigation** and avoiding relitigation. (*Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 517).

- **(a) Issue Estoppel**: prevents re-litigation of an ultimate issue of fact/law necessarily resolved in earlier proceedings. Elements:
  1. Same issue decided;
  2. Judgment was final;
  3. Same parties/privies (*Kuligowski v Metrobus* (2004) 220 CLR 363 at 373).
- **(b) Res Judicata (cause of action estoppel)**: after a final judgment (even consent judgment), the cause of action merges into the judgment — no further action for the same cause. Based on public policy of ending litigation (*Blair v Curran* (1939) 62 CLR 464 at 532; *Matthews v Lotus Stones* [2017] SASC 27 at [15]-[19]).
- **(c) Anshun Estoppel** (*Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 602): precludes a party raising a claim/issue in later proceedings if it was so connected with the first action that it was unreasonable not to raise it there. Confirmed in *Tomlinson v Ramsey* (2015) 256 CLR 507 at 517–18.

Estoppel by Conduct (aka *estoppel in pais*)

- Basis: law prevents **unjust departure** from an assumption of fact which one party caused another to adopt for their legal relations (*Grundt v Great Boulder Proprietary Gold Mines Ltd* (1937) 59 CLR 641 at 674).
- Detriment = the disadvantage that flows if the assumption is deserted. Can include loss of legal remedy or fair chance at benefit (*Australia Financial Services & Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 at 622–3).
- Two forms:
  - **Estoppel by Representation**:
    - Representation of existing fact,
    - Clear/unambiguous, intended to induce reliance,
    - Reliance leading to act/omission,
    - Effect: prevents representor from asserting contrary fact (*Newbon v City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723 at 738; *Waltons Stores v Maher* (1988) 164 CLR 387 at 458).
  - **Estoppel by Convention**:
    - Parties act on common assumption/agreed facts,

    - Must show **causal link** between assumption & conduct (*Miller Heiman Pty Ltd v Sales Principles Pty Ltd* (2017) 94 NSWLR 500 at 509).
    - Reliance must be **reasonable**:
        - (i) Reasonable to adopt assumption.
        - (ii) Action taken in reliance must itself be reasonable (*CBA v Carotino* [2011] SASC 42).
    - Factors: commercial sophistication, legal advice, whether represented parties were misled (*Waltons v Maher* – still reasonable despite legal advice).
- **No presumption of reliance** – plaintiff must prove it: *Sidhu v Van Dyke* (2014) 251 CLR 505.
- Current position: reliance = "contributing cause" or "influence," not strict "but for" test (*ADM v FDGK* [2018] NSWSC 442 at [1035]–[1073]).

4. Knowledge or Intention

- Representor must **know or intend** that relying party will act/refrain in reliance (*Waltons v Maher* (1988) 164 CLR 387 at 423).
- Knowledge can be **express or inferred** where inducement obvious (*Waltons* silence/acquiescence = implied promise).
- BUT: Brennan J – not enough that representor "ought to have known"; actual knowledge required.
- Deane J in *Verwayen* (1990) 170 CLR 394 suggested contrary view → preferred in later cases: constructive knowledge can suffice.
- Proprietary estoppel by encouragement – knowledge requirement looser; focus is on unconscionability (*Kramer v Stone* (2023) 112 NSWLR 564 at 586–7).

5. Detriment

- Plaintiff must suffer or stand to suffer **real/substantial detriment** if assumption not fulfilled.
- Key: detriment = the factor making departure **unconscionable**.
    - *Waltons v Maher*: demolition/rebuilding costs = reliance detriment.
    - *Guest v Guest* [2022] 1 All ER 695 at 702 (UK SC) – without detriment, no equity arises.
- Timing: detriment assessed at the time defendant seeks to depart (*Commercial & General Corp v Manassen Holdings* [2021] SASCFC 40 at [137]–[138]).
- Must be **reliance loss**, not expectation loss (Waltons: expectation = rent lost; reliance = wasted demolition costs).
- Can include life-changing, irreversible decisions: *Ashton v Pratt* (2015) 88 NSWLR 281 at 307.
- Not always financial: detriment may be significant change in life course (*Riches v Hogben* [1985] 2 Qd R 292; *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483).

6. Failure to Avoid Detriment

- Defendant must fail to act to prevent detriment.
- Not always requires fulfilling promise → could avoid by correcting assumption early enough (*Vella v Wah Lai Investment* [2004] NSWSC 748).
- Unconscionability depends on timing: was reliance reasonably preventable?
- Small/reimbursable reliance costs may mean it is not unconscionable to resile if compensation is given (*Sidhu v Van Dyke* (2014) 251 CLR 505 at 529).
- In proprietary estoppel, representor may be entitled to change mind if **circumstances shift** (*Thorner v Major* [2009] 3 All ER 945; *Delaforce* (2010)).

Entire Agreement Clauses & Equitable Estoppel

Issue

Does an **entire agreement clause** (EAC), which denies legal effect to prior negotiations/representations, bar a relying party from bringing an equitable estoppel claim?

Authority – *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603

- Campbell JA:
    - An **EAC does not create an insuperable obstacle in principle** to equitable estoppel.

    - Such clauses may create **factual difficulties in proving inducement/reliance** (since they deny that negotiations had legal effect).
    - They **might be relevant to the form of remedy** granted, though no clear example was identified.
    - Equity will not allow a contract to be used as an "instrument of fraud"; an EAC cannot "stultify the operation" of equitable doctrines.

Key Points

- **Not a complete bar**: equitable estoppel can still apply notwithstanding an EAC.
- **Practical impact**:
    - Makes it harder to prove *inducement* (that the promise/representation led to reliance).
    - May also complicate showing *reasonable reliance*.
- **Policy**: equity ensures contracts cannot exclude or prevent relief where unconscionability is shown.

Relief based on Equitable Estoppel

General Principle

- Once the **elements of equitable estoppel** are established, an equity arises in favour of the relying party → entitling them to relief.
- Relief is based not strictly on enforcing the promise, but on the **expectation generated by it** (*Giumelli v Giumelli* (1999) 196 CLR 101).

Approaches to Relief

1. **Reliance-based relief** (traditional / "minimum equity" approach)
    - Relief aimed at preventing the relying party suffering detriment.
    - Court orders the **minimum necessary** to satisfy the equity (*Waltons Stores v Maher*; *Commonwealth v Verwayen*).
    - Often applied in **promissory estoppel** cases.
2. **Expectation-based relief** (endorsed in *Giumelli v Giumelli*)
    - Relief may enforce the expectation generated by the promise.
    - Court may require **performance of the promise** (or its value in monetary terms).
    - Favoured in **proprietary estoppel** cases.
    - *Sidhu v Van Dyke* (2014) – expectation-based relief is prima facie position, but court has discretion.

Promissory Estoppel Remedies

- Usually **reliance-based** only.
- Enforcement of the promise is not the goal (*Commonwealth v Verwayen* per McHugh J).
- Specific performance may be ordered if that's the only way to avoid unconscionability (*Waltons Stores*).

Proprietary Estoppel Remedies

- Usually **expectation-based**.
- Courts prefer to fulfil the promise of property (eg. transfer or equivalent).
- BUT relief must be **proportionate** to detriment:
    - If expectation is extravagant or disproportionate → remedy may be modified (eg. compensation, limited occupation rights).
    - *Jennings v Rice* (UK); *Giumelli v Giumelli* (monetary award instead of transfer).
- Court may consider subsequent circumstances (eg. representor's financial hardship, lapse of time, death of parties).

Guiding Principles

(*Wilson Parking NZ v Fanshawe 136 Ltd* (2014) NZCA; Australian cases)

- Relief turns on:
    1. Quality/clarity of assurance.
    2. Nature/extent of detrimental reliance.
    3. Whether it would be **unconscionable** for promisor to resile.

- The judge canvassed whether, post-**AJA 1956 s 15(4)**, a perfected master's order remains variable "**on motion**" or only via a fresh action, observing that Ord 58 r 7(2)(a) **assumes** rather than **confers** such a power; he therefore **assumed** jurisdiction without deciding and, in any event, **refused** to extend time for the cross-motion ([1972] 1 WLR **313–16**).

PRINCIPLES

- **Order to execute ≠ order to perform**: Courts may decree **execution** of a service agreement even if they would not decree **performance** of the services themselves ("*not a ground for refusing to decree that the contract be entered into*": [1972] 1 WLR **316–17**).
- **Whole-contract specific performance**: A single non-enforceable personal-service term **does not immunise** the entire deal from specific performance; equity assesses the **contract as a whole** ("*does not prevent the contract as a whole from being specifically enforced*": [1972] 1 WLR **317–18**).
- **Personal-services 'rule' is flexible**: It is a **reluctance, not an absolute bar**; supervision is rarely the real obstacle, but **evasion/quality** problems can make enforcement **futile**, so courts conduct a **pragmatic balance** ([1972] 1 WLR **318–19**).
- **Contempt**: Deliberate non-compliance with a subsisting specific performance order attracts contempt; **mistaken legal advice** is **no defence** ([1972] 1 WLR **319–20**).
- **Procedure (uncertain)**: Whether a perfected master's order can be **varied on motion** post-1956 remains **open**; safer course is prompt appeal/appropriate application ([1972] 1 WLR **313–16**).

***Dowsett v Reid* (1912) 15 CLR 696 – SP and Fairness**

FACTS: Illiterate pastoralist **Dowsett** agreed on 13 Aug 1911 to **lease** 5000 acres, stock, implements and a rented hotel to **Mrs Reid** (husband Robert Reid acting) for £500 p.a., with an option to purchase at £8000; crucially, Dowsett had to **pay all future Crown instalments** (£1327), make statutory improvements (£1100), clear 300 acres (£300), ringbark 2389 acres (£100), erect/repair buildings, insure and reinstate and pay all rates/outgoings, while the lessee took all crops, increase of stock of wool (699-700). Dowsett later repudiated. The SCWA decreed specific performance; the Full Court affirmed. Dowsett appealed.

ISSUES:

1. Could Dowsett rescind for **ignorance/inebriation** when signing?
2. Did **Reid stand in a fiduciary relationship** such that the bargain should be set aside?
3. Should **specific performance** be refused as an **unfair/unconscionable** bargain, and if so, what relief?

HELD: Appeal allowed in part. **No recission** (majority). **No fiduciary relationship** (Griffith CJ & Barton J; Higgins J dissenting). **Specific performance refused** as working **great hardship,** but **damages awarded** instead: decree varied by substituting "a declaration that the plaintiff is entitled to damages for breach of contract" for specific performance (706-707,713).

REASONING

Ignorance/drunkenness – rejected (all members)

- The primary judge found Dowsett **understood** the agreement after it was **carefully read to him by the postmaster**; he was "*a shrewd man of business*," and his contrary story was **not believed**; the High Court would not disturb credibility findings: "*The onus was on the defendant … [and] he has failed … The agreement cannot be rescinded on that ground*" (701-702). Griffith CJ also stressed pleading proof rules: "*The plaintiff must succeed secundum allegata et probata*" (703).

Fiduciary relationship – none (majority); yes (Higgins J)

- **Majority.** Although Reid had arranged a loan and done clerical tasks, there was **no trust/confidence reposed** in him for this transaction and the parties dealt **"at arm's length"**; thus **no fiduciary relation** arose: "*there was in fact not any confidence reposed …; they were dealing at arm's length*" (705). Barton J added that merely putting property with an agent to sell/let **does not per se** establish a fiduciary relation; "*some evidence is necessary*" (708).
- **Higgins J (dissent).** Reid still stood in a **conflicting, fiduciary position** at contract time—as loan arranger, de-facto adviser, and finder of purchaser/lessee—yet became the counterparty without ensuring independent advice: "*Reid's fiduciary relations … had not come to an end*" (710); "*Dowsett was illiterate; he had no independent advice—his adviser was Reid*" (709). On public-policy grounds where **duty and interest conflict**, the **bargain cannot stand** (invoking *Gibson v Jeyes*): "*His interest and his duty conflicted; … the bargain cannot stand*" (711). He would have **rescinded**.

Specific performance vs hardship – refused; damages substituted (majority)

- Griffith CJ reaffirmed the **discretionary** nature of specific performance: "*the old doctrine is still the doctrine of the Court. The Court is not bound to enforce a bargain which would work great hardship upon either party*" (706). Applying the numbers, during the first **18 months** Dowsett would need to **outlay ~£840** (interest, Crown rents, clearing, ringbarking, repairs) against receipts of **£750**, while the lessee captured **crops, increase, and wool** and hotel rent (707).
- On that footing, **equity would not compel performance**; but following *Lamare v Dixon*, **damages** should be considered when refusing specific performance: "*if we were to refuse specific performance, [we] be*

- **Method:** Determine **rent that ought to have been received** (incl. reasonable vacancy tolerance), **less allowed outgoings** (rates, insurance, mortgage, water) paid by trustee; beneficiary gets **half of the net** ([81]–[86], [143]–[146]).
- **Application:** Netting produced **$11,193.70** (half of net rent) to add to **½ sale proceeds**; total ordered to **Martin Byrnes = $73,534.70**; balance to Kendle; costs to appellants ([86], [89], [146]–[148]).

PRINCIPLES

- **Objective intention governs:** Courts look to the **words used in context**—not to "secret motives" or post-hoc denials: "**What is the meaning of what the parties have said?**" ([53]); "**subjective intentions are irrelevant**" where arrangements have the effect of creating a trust ([55]); "**the text is the intention**" ([95]); "**subjective intention is irrelevant both to … existence and … terms**" ([115]).
- **Jolliffe limited:** Not authority to contradict a **clear written declaration** with subjective evidence; treat as a **sham/exceptional** context, not a general rule ([13]–[16], [65]–[66], [116]–[117]).
- **Trustee duties (land):** Even without express words, trustee must **make land productive** (lease, collect/enforce rent, replace defaulting tenant) ([67]–[73], [119]–[125]).
- **Beneficiary conduct: Consent** must be **before breach** and **known** to the trustee; **acquiescence** needs **informed encouragement/reliance**—mere silence for "matrimonial harmony" is **not enough** ([25]–[30], [77]–[80], [133]–[140]).
- **Accounting: Net-rent-less-outgoings** approach; beneficiary takes **half** of the net; trustee gets allowance for actual outgoings but **bears** loss from own breach ([84]–[86], [143]–[146]).

Certainty of Subject Matter

Core rule and consequence

- An express trust cannot exist without **trust property**. Once a trust is **emptied of all assets**, it ceases: *Re Austee Wagga Wagga Pty Ltd (in liq)* [2018] NSWSC 1476 at [19].
- Property must be **reasonably identifiable at creation** and **attributed to be held on trust** (certainty of subject matter): classic statement in *Knight v Knight* (1840) 49 ER 58 at 68; see also application to legal practice funds in *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 (HCA).

Vague dispositions fail

- Directions that do not identify the property or quantify interests are void for uncertainty (e.g., "consider my near relations"; "make ample provision"): *Sale v Moore* (1827) 57 ER 678; *Brutton* (1844) 60 ER 404.
- Where the **quantum of interest** among multiple beneficiaries is not specified, the trust fails: *Boyce v Boyce* (1849) 60 ER 959.
- Land must be clearly described: trusts failed where the land the subject of the trust was not identified: *Perpetual Trustee WA Ltd v Rowerwest Pty Ltd* [2004] WASC 81; *Bakranich v Robertson* [2005] WASC 12.

Statutory/entitlement overlay (practical identification problem)

- A claimant must be **entitled to specific trust money/property** before enforcing a trust right under statutory schemes. Barrister not "entitled" where client had not directed payment from solicitor's trust account: *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 (HCA).

"That which is not certain can be rendered certain"

- If the instrument supplies **workable criteria** so the court can fix the amount/thing objectively, certainty is satisfied: "reasonable income" upheld as an objective standard, *Re Golay's Will Trusts* [1965] 2 All ER 660.
- Everyday terminology can suffice where the **context makes identity clear** (e.g., testator's "bank account" encompassed a wealth-management account consistently called that during life): *Estate of Chau (dec'd)* [2008] QSC 156.

Fungible assets and unsegregated shares

Unallocated portions of a fund

- Uncertainty can arise with **part of a larger indistinguishable mass** (e.g., shares from a larger parcel).
- English acceptance of trusts over **unsegregated shares**: *Hunter v Moss* [1994] 3 All ER 215.

- **Use Cross J's three-way framework** in every unincorporated-association problem: (1) members as joint tenants; (2) members subject to contract (valid **only if** members can **at any time** divide the property); (3) purposes (must be **charitable** or fails) ([1962] Ch 832, 849–850).
- **Indicators of category (3)**: scale/dispersion of membership; deed/rules showing **enduring endowment**; inability (legally or practically) for members **to divide**; all point to a **purpose trust** ([1962] Ch 832, 851).
- **Religious congregations** can be **charitable**; **social uses** are acceptable if **ancillary**; **public benefit** is satisfied for congregations of adherents **living in society**, unlike cloistered orders (*Gilmour v Coats*) ([1962] Ch 832, 852–854).
- **s 62 (1853 Act)**: owning and using premises generally prevents "wholly maintained by voluntary contributions"; **timing** and **source** of funds matter for **exemptions**; do not assume building-fund receipts are fully exempt ([1962] Ch 832, 856–861).

***Succession Act 2006* (NSW), s 43**

s 43 Dispositions to unincorporated associations of persons

s 43(1) — What counts as the disposition, and how it operates

Each of the following **has effect as a disposition in augmentation of the association's general funds** (i.e., the law **treats it as a gift to the association's general fund**), **provided the association is not a charity**:

- **(a)** a disposition **to** an unincorporated association of persons (not a charity).
- **(b)** a disposition **to or on trust for the aims, objects or purposes** of an unincorporated association (not a charity).
- **(c)** a disposition **to or on trust for the present and future members** of an unincorporated association (not a charity).

Effect: (a)–(c) are **all re-characterised** as **"augmentation of general funds"** of the association (so you don't have to prove a valid private trust for members or a charitable purpose).

s 43(2) — What must be done with the property

Property that **is**, or **is taken under (1) to be**, a disposition **in augmentation of general funds** must be:

- **(a) paid into** the association's general fund; or
- **(b) transferred to** the association; or
- **(c) sold/otherwise disposed of** on the association's behalf, with the **proceeds paid into** the general fund.

s 43(3) — Personal representative: discharge for payments

If a **personal representative** pays an amount to an unincorporated association under such a disposition, the **receipt of the treasurer (or like officer)** is an **absolute discharge** for the payment.

s 43(4) — Personal representative: discharge for transfers

If a **personal representative** transfers property to the association, a transfer **to a person nominated in writing by any two** of the president/chairperson/treasurer/secretary (or like officers) is an **absolute discharge** for the transfer.

s 43(5) — Contrary intention in the will

Subsections **(3)–(4) do not apply** if a **contrary intention** appears in the will.

s 43(6) — What is not an objection to validity

It is **not** an objection that:

- **(a)** a **list of members at the testator's death cannot be compiled**; or
- **(b)** the **members may not divide the association's assets beneficially** among themselves.

s 43(7) — Definition

"Charity" means a body **constituted primarily for a purpose that is a charitable purpose under the general law.**

TOPIC 5 – Operation of Express Trusts

Duties, Powers, Rights and Liabilities of Trustees (TB Ch. 26)

- **Big picture: what this chapter is doing**
- The chapter explains the **rights, powers and duties** of trustees. Historically, trustees were often passive "name-lenders" for landed family settlements; modern trusts involve investment property (cash, bonds, shares) which requires active management, tax awareness and professional skill.
- Today these rights, powers and duties come from:
    - the **general law** (equity and fiduciary principles)
    - **statute** (especially Trustee Acts)
    - **most importantly, the trust instrument**, which is always your first reference, as the settlor can modify general law and statutory defaults subject to any mandatory rules.

Exam spine: in any trustee problem, you should think in three clusters

1. **Appointment / removal / vesting**
2. **Rights of trustees** (indemnity, contribution, remuneration, etc)
3. **Powers and duties** (investment, information, impartiality, non-delegation, etc)

2. Appointment, retirement, removal and vesting of trustees

2.1 Appointment

- **Primary source** is always the **original trust instrument**, which normally:
    - appoints the original trustees
    - may grant a **power to appoint new trustees**, exercisable by existing trustees or a third party (often called an "appointor").
- The **power to appoint** is **fiduciary** in nature and cannot be delegated unless the instrument allows it. A person does not actually become a trustee until they **accept the office**.

Capacity to be trustee (s 26.4)

- Only a **legal person** (natural person or corporation) capable of holding and dealing with property may be a trustee.
- Corporations can be trustees if their constitution permits.
- **Minors** generally cannot act as trustees because they lack capacity to manage property.
    - In ACT and NSW, an appointment of a minor as trustee is **void**.
    - In other jurisdictions it is not automatically void, but the court can appoint a new trustee to replace the minor under statute.
- This rule does not stop minors from being imposed with **resulting or constructive trusts**.

If a prospective trustee does not take the office (s 26.5)

- The trust does **not fail**.
    - For a **testamentary trust**, the trustee's role falls on the **legal personal representative** until a new trustee is appointed.
    - For an **inter vivos trust**, property usually re-vests in the settlor, who holds on trust until a new trustee is appointed.

Statutory appointment powers (s 26.6-26.7)

- If there is **no express power of appointment**, most Trustee Acts give **statutory powers** to certain persons:
    - anyone named in the trust instrument
    - failing that, the continuing or surviving trustees, or the legal personal representative of the last surviving trustee.
- Statutory power can be used where a trustee:
    - dies
    - is absent from the jurisdiction for a specified time
    - refuses to act
    - is incapable or unfit to act

Duty to obey the terms

***Chapman v Chapman* [1954] AC 429**

Facts

- Three trusts created by Sir Robert Chapman and his wife for grandchildren.
- Because of particular provisions, a claim for estate duty would arise on their deaths.
- Trustees prepared a scheme that effectively **varied the terms of the trusts** so estate duty would not be payable, and sought court approval.

Issue

- Whether the court has an **inherent jurisdiction** to sanction rearrangements of trusts for infants and unborn persons purely because they are advantageous (for example tax savings).

Reasoning

- Viscount Simonds LC summarised the argument: the court was asked to recognise "an inherent jurisdiction in the execution of the trusts of a settlement to sanction on behalf of infant beneficiaries and unborn persons a rearrangement of the trusts of that settlement for no other purpose than to secure an adventitious benefit which may be and, in the present case, is, that estate duty... will... not be payable" (passage quoted on slide).
- He approved Farwell J's statement in In re Walker that "I decline... to accept any suggestion that the court has an inherent jurisdiction to alter a man's will because it thinks it beneficial. It seems to me that is quite impossible" (quoted on slide).
- Viscount Simonds then identifies **four categories** where the court historically did depart from terms:
  1. Power to "change the nature of an infant's property from real to personal estate and vice versa", generally preserving succession rights.
  2. Power to authorise **investments in business transactions** not authorised by the instrument, sometimes "ignoring the direction of a settlor... by way of salvage" (for example salvage-type transactions).
  3. Power "from an early date" to provide **maintenance for an infant, and, rarely, for an adult, beneficiary" even if this departs from directions to accumulate.
  4. Power to "sanction a compromise by an infant in a suit" by next friend or guardian ad litem (fourth "compromise category").
- The question was whether this fourth "compromise category" should be extended "to cover cases in which there is no real dispute as to rights and, therefore, no compromise, but it is sought by way of bargain between the beneficiaries to rearrange the beneficial interests... and to bind infants and unborn persons" (slide).

Held

- The House of Lords refused to extend this jurisdiction.
- Viscount Simonds stated the core function: "It is the function of the court to execute a trust, to see that the trustees do their duty and to protect them if they do it, to direct them if they are in doubt and, if they do wrong, to penalize them. It is not the function of the court to alter a trust because alteration is thought to be advantageous to an infant beneficiary."

Principles / exam use

- Adult beneficiaries acting unanimously can still collapse or re-arrange under **Saunders v Vautier**, but:
- The court's **inherent jurisdiction** to depart from trust terms for infants and unborn persons is confined to the four Chapman categories.
- Use Chapman to say: the starting point is that trustees must obey the deed; the court does **not** have a general power to rewrite the trust simply because a variation is beneficial.

Statutory variation and "expediency"

***Perpetual Trustee v Godsall* [1979] 2 NSWLR 785**

Facts

- Widow with a life estate in real property under a trust.

- *Farrington v Rowe McBride*: solicitor advised client A to invest in client B's company; held liable for breach.
    - Courts may accept dual retainer if:
        - conflict is fully explained, and
        - client gets independent financial/legal advice or is fully informed.
- *GLG v Zhang*:
    - Duty is not just to "refer for independent advice".
    - Core duty is **not to act** without fully informed consent.
    - Simply saying "go get advice" without explaining why the conflict matters is not enough.

Informed consent as a defence

The **main defence** is **fully informed consent** of the person to whom the fiduciary obligation is owed.

Burden and standard

- Onus is on the **fiduciary** to prove informed consent.
- Consent requires **full and frank disclosure of all material facts**:
    - includes facts that might affect the principal's decision, not only those that would certainly change it.
    - includes facts the fiduciary knows and those they deliberately avoid knowing.
    - no duty to discover everything a prudent person might, but cannot deliberately stay ignorant.
- Sophistication of beneficiary matters (*Farah; Say-Dee*):
    - extent of disclosure needed depends on the intelligence and experience of the principal.
- Independent advice often needed where conflict is serious.
    - Advice must be "meaningful" and enable a **genuine independent choice**.
- It is no defence to show that:
    - beneficiary benefited,
    - fiduciary would have acted the same anyway, or
    - beneficiary would have consented if asked (*Recovery Partners v Rukhadze*).

Specific relationships

- **Trustee–beneficiary**: trustee must show beneficiary's release was deliberate and advised, with full knowledge of rights and claims (old equity statements, eg *Farrant v Blanchford*).
- **Solicitor–client**: very strict.
    - Must make conscientious disclosure of all material circumstances and interests.
    - Often not proper to continue to act at all.
- **Employee–company**: where employee is fiduciary, consent must come from the **board**, not just some directors.
- **Director–company**:
    - Proper consent usually requires ordinary resolution of shareholders, either:
        - authorising beforehand, or
        - ratifying afterwards (subject to limits below).

Shareholder consent limits

- Shareholders can approve or ratify conduct that would otherwise be breach, provided:
    - fully informed, and
    - no fraud on minority, or expropriation of company property, and no statutory breach (eg cannot ratify breach of statutory director duties).
- *Sharma v Sharma*: useful practical points:
    - Director who exploits opportunities for personal gain breaches duty, **unless** shareholders with full knowledge consent.
    - Consent can sometimes be inferred from informed acquiescence, but not from silence where shareholders do not know their consent is required, unless silence would be unconscionable.
    - "Full knowledge" means knowledge of facts, not necessarily legal characterisation.
- Where company is insolvent or near insolvent, **shareholders cannot consent** to conduct that breaches directors' duties as regards creditors' interests.

Zacharia sought a declaration that Chan held the renewed lease on constructive trust for both as an asset of the partnership.

Held

- The High Court held that both Chan and Zacharia were under **fiduciary obligations** to each other in relation to the lease.
- Chan was required to hold the renewed lease on constructive trust as a partnership asset.

Deane J's "fundamental rule"

Deane J explained that what is often treated as one "fundamental rule" of fiduciary liability in fact contains **two themes**:

- At [24] he identifies:
  1. **Conflict theme**
     - The rule "appropriates for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict".
     - The objective is "to preclude the fiduciary from being swayed by considerations of personal interest".
  2. **Position / opportunity theme**
     - It also requires the fiduciary to account for any benefit "obtained or received by reason of or by use of his fiduciary position or of opportunity or knowledge resulting from it".
     - The objective is "to preclude the fiduciary from actually misusing his position for his personal advantage".

He then states the principle comprehensively (paraphrasing but tracking the slide):

- A person under a fiduciary obligation must account for any benefit or gain
  - (i) obtained where there was a **conflict or significant possibility of conflict** between duty and personal interest in pursuing that benefit, or
  - (ii) obtained **by use or by reason of** the fiduciary position or opportunities or knowledge arising from it.
- "Any such benefit or gain is held by the fiduciary as constructive trustee."

Constructive trust and breach

- Deane J emphasises that:
  - The constructive trust arises from the fact that the personal benefit was obtained in that way.
  - It is **immaterial** that there was "no absence of good faith" or no damage to the person to whom the duty is owed.
  - In many cases the constructive trust follows an **actual breach** of fiduciary duty, such as "an active pursuit of personal interest in disregard of fiduciary duty".
  - In other cases there may be no breach until there is a **failure to account**, such as receipt of an unsolicited payment from a third party "as a consequence of what was an honest and conscientious performance of a fiduciary duty".
- The principle applies to "fiduciaries generally including partners and former partners in relation to their dealings with partnership property and the benefits and opportunities associated therewith or arising therefrom".

Exam use

- Core statement of **no conflict / no profit** and the **constructive trust remedy**.
- Use Deane J at [24] as your main articulation of fiduciary liability to account.
- Good faith and absence of loss are irrelevant to the obligation to account.

***Boardman v Phipps* [1967] 2 AC 46**

- Deferred business from USSC products by saying there was a shortage, then later filled orders with HPI products.
- Blackman then terminated the distributorship and filled backorders using HPI's copies and repackaged products.
- Hospital Products Ltd (HPL) later acquired HPI's business.
- USSC sued Blackman and HPI for breach of fiduciary duty and sued HPL as constructive trustee, seeking an account of profits and a constructive trust over the assets, business and goodwill.

Majority: no fiduciary relationship
- Gibbs J (with Wilson and Deane JJ agreeing on this point) held that there was **no fiduciary relationship** between USSC and HPI.
- Although there was an implied contractual term that HPI would use its "best efforts" to promote USSC's products, this did **not** extend to a further term that HPI would not do anything to damage or destroy USSC's market.
- The relationship was:
  - Arms length.
  - Commercial, entered on an **equal footing**.
  - One where both parties expected to profit, so HPI was not under an obligation "not to profit" in a general fiduciary sense.

Mason J's dissent 96–97

Mason J gave the classic modern statement of when a fiduciary relationship arises:
- "The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense."
- The relationship must give the fiduciary "a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position."
- The expressions "for", "on behalf of", and "in the interests of" signify that the fiduciary acts in a "representative" character.

On this approach, HPI's exclusive control over marketing USSC products and its discretion in how to do so meant USSC was vulnerable and HPI owed fiduciary duties not to act in conflict or make unauthorised profits.

Exam use
- Use the **majority** when arguing that a commercial contract does not give rise to fiduciary duties beyond its terms.
- Use **Mason J** when arguing that a party with discretionary power over another's interests has fiduciary obligations, especially in distributorship and agency settings.

United Dominions Corporation Ltd v Brian Pty Ltd **(1985) 157 CLR 1**

Facts
- UDC, Security Projects Ltd (SPL) and Brian Pty Ltd (Brian) entered a **joint venture** to develop land owned by SPL.
- The development was funded by SPL borrowing from UDC, secured by a mortgage that predated the formal joint venture agreement.
- The mortgage contained a **"collateralisation clause"**, allowing UDC to use project profits to secure SPL's other obligations.
- Brian was not told about this clause and ended up receiving none of the profits.

Held
- The High Court held that SPL and UDC owed **fiduciary duties** to Brian and that obtaining and relying on the collateralisation clause was in breach of those duties.
- UDC's role as lender did not absolve it from "the ordinary fiduciary obligations of a partner" in respect of the joint venture property.

- For **conveyances of land** by deed in NSW, the **mere absence of consideration** does **not** automatically give rise to a resulting trust.
- The section **eliminates** the traditional presumption that a voluntary conveyance of land is held on resulting trust for the transferor.

Scope
- Applies only to:
  - **Conveyances of real property by deed** in NSW, and
  - Not to situations where property is **purchased using someone else's money** (purchase money resulting trust still operates).
- Other states have similar provisions, eg s 19A *Property Law Act 1958* (Vic).
- For **personal property**, a presumed resulting trust generally does **not** arise unless the property is **income producing**.

Exam use
- When you have a **voluntary conveyance of land in NSW** with no trust declared, you cannot rely on a presumed resulting trust **just because there was no consideration**. You must look for **actual intention**, or another basis.

***Calverley v Green* (1984) 155 CLR 242**

Facts
- De facto couple lived together 10 years.
- They later jointly purchased a house for $27,250.
  - Calverley contributed $9,000 cash.
  - $18,000 came from a **mortgage** for which **both** were liable. Calverley made the repayments.
- Property was taken in **joint names**.
- After separation, Green sought to rely on legal joint tenancy and applied under s 66G *Conveyancing Act 1919* (NSW) for sale and division.

Issues
- Should beneficial interests follow:
  - **Legal title** (50:50 joint tenancy), or
  - A **resulting trust** reflecting contributions to the **purchase price**?
- Does the **presumption of advancement** apply to de facto relationships?

Held
1. Purchase money resulting trust
   - The High Court held that where property is conveyed to several purchasers, they generally hold on **resulting trust as tenants in common** in shares proportionate to their contributions to the **purchase price**.
   - Green's **mortgage liability** was treated as a **contribution** to purchase price.
2. No presumption of advancement for de facto couples
   - Majority (Gibbs CJ, Mason, Brennan and Deane JJ) held that the **presumption of advancement does not apply** to de facto relationships.
   - Mason and Brennan JJ emphasised at [11]:
     - When contributors are not husband and wife, taking title in joint names is **less likely** to support an inference they intended survivorship to govern their beneficial interests.
     - For an unmarried cohabiting couple, there is "no presumption, either of equity or human experience" that they intend their relationship to mimic marriage in its effect on property rights ([11]).
     - An assumption that such parties intend to **maintain independent control** of money and property and retain testamentary freedom is more realistic than an assumption of full **joint ownership**.
3. Interaction with family law

- there is a **loan / debtor–creditor** relationship, and
- at the same time, a **trust** over the money until it is used for the designated purpose.

Rationale

- It would be **unconscionable** for someone to obtain money **for a specific purpose** and then:
  - ignore that purpose, or
  - allow their unsecured creditors to take the money if the purpose cannot be carried out.
- The trust protects the provider by **ring-fencing** the money from the borrower's general creditors.

When does a Quistclose trust arise?

Key requirements

To get a Quistclose trust, you usually need:

1. **Specific purpose**
   - Funds are advanced for a **clearly identified, specific purpose**, not just "general use".
   - Example: to pay a dividend, to pay specified creditors, to pay legal fees in a particular case, to pay a share subscription.
2. **Intention that funds are not part of general assets**
   - There is a **common (or mutual) intention** that the funds:
     - are **not** to become part of the transferee's general assets, and
     - are to be used **only** for that purpose, or **repaid if the purpose fails**.
   - A mere "hope", "preference" or general understanding that the money will be used in a certain way is **not enough**.
3. **Segregation strongly supports a trust**
   - Often the funds are kept in a **separate account** or otherwise set apart.
   - Segregation is:
     - **Strong evidence** of a Quistclose trust, but
     - Not strictly essential if there are **careful records** showing exactly how the funds were used.
4. **Timing of intention**
   - Intention to hold on trust should generally exist **before or at the time of receipt** of the funds.
   - Some English authority suggests it can be formed **shortly after** receipt, but this is more controversial.

Evidence of intention

- Intention is inferred objectively from:
  - the **language** used in the contract / correspondence,
  - the **nature of the transaction**,
  - the **relationship** between the parties, and
  - how the funds are **held and recorded**.

Typical Quistclose pattern: loan for specific purpose

Classic pattern

- The usual case is a **loan** where lender and borrower both intend that:
  - money is advanced **only** for a specific purpose, and
  - if the purpose cannot be carried out, it will **not** be available for general use.

Structure

- On receipt:
  - Borrower holds the funds **on trust for the specified purpose**.
- When funds are properly applied:
  - The **trust ends**, and
  - The relationship is then just **debtor–creditor** for any remaining obligations under the loan.
- If the purpose **cannot be carried out**:
  - Money is held on trust **for the lender**, who can demand it back.

TOPIC 8 – Constructive Trusts

(TB Ch. 35, 36)

What is a constructive trust?

Definition and basic idea

- A constructive trust is a trust imposed by operation of law. It does not depend on any actual, implied or presumed intention to create a trust in the usual way.
- It is wrong to say intention is always irrelevant. Some constructive trusts are based on common intention and agreement (for example common intention constructive trusts over homes, Pallant v Morgan-type arrangements). Better to say that intention is not a *necessary* element, unlike express and resulting trusts.
- The case law is messy. Muschinski v Dodds described the law as "ill-defined" and Finkelstein J in Imobilari said the area is "a mess" with inconsistent authorities.

Differences from express and resulting trusts

1. **Source of obligation**
   - Express/resulting trusts depend on the settlor's intention and are subject to the usual requirement of certainty of intention.
   - Constructive trusts are imposed by the court regardless of actual or presumed intention, so they are not subject to certainty of intention in the same way.
2. **Duties of constructive trustee**
   - A constructive trustee is not necessarily subject to the full gamut of fiduciary duties.
   - Their main duty is often simply to disgorge or transfer the trust property, at which point the trust ends.
3. **Certainty of subject matter**
   - Traditionally, there had to be identifiable trust property. Westdeutsche suggested this is required, with the apparent exception of constructive trusts over dishonest assistants who may owe fiduciary duties even if they have not received identifiable property.
   - Giumelli v Giumelli acknowledges that some constructive trusts do not create proprietary interests at all, but instead impose a personal liability to account.

Institutional vs remedial constructive trusts

The debate

- Key question: is a constructive trust
  - a *property institution* (like express/resulting trusts) that arises automatically when certain conduct occurs, or
  - an *equitable remedy* imposed at the discretion of the court to respond to wrongdoing?

Consequences of each view

- If treated as a *remedy*:
  - It only exists from the time of the court order.
  - It is discretionary. The judge may refuse a constructive trust even if there is wrongdoing.
- If treated as a *property institution*:
  - It arises when the relevant conduct occurs and exists from that time onwards.
  - It is not discretionary in the same way – the court recognises an existing interest rather than creating it.

Deane J's "remedial institution" compromise (Muschinski v Dodds)

- Deane J described the constructive trust as a "remedial institution" that usually has both institutional and remedial aspects.
- Equity imposes a trust "to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle" – the court can choose the time from which the trust is treated as arising (for example retrospectively).

Effect on limitation periods and third parties

Elements (Australian view)

1. There is a breach of trust or fiduciary duty.
2. The breach involves a fraudulent or dishonest design (although Australian courts read "fraudulent" broadly).
3. The third party has the requisite knowledge of the dishonest design.
4. The third party assists in the breach.

Dishonesty and knowledge

- UK law: Baden categories have been displaced in knowing assistance by a general objective dishonesty test (Royal Brunei Airlines v Tan). The question is whether the defendant acted as an honest person would in the circumstances, given what they actually knew, taking into account their experience and intelligence.
- Lord Nicholls emphasised that the relevant dishonesty is that of the *accessory*, not necessarily the trustee.
- Australian cases (for example Ancients Order of Foresters v Lifeplan, Hasler v Singtel Optus, and Grimaldi) apply a flexible approach where dishonesty or conscious impropriety of the assistant is key, but precise alignment with Royal Brunei is still debated.

Joint and several liability

- It is unresolved whether the fiduciary and knowing assistant are jointly and severally liable or only severally.
- Michael Wilson & Partners v Nicholls suggests that relief against the fiduciary (e.g. compensation) and against the assistant (e.g. account of profits) need not coincide in nature or quantum, pointing towards several liability.
- Grimaldi suggests that, at least where both fiduciary and assistant share the one profit, there may be joint and several liability.

Exam flag: bank, adviser, lawyer or associate who helps a fiduciary strip assets or implement a suspect transaction, with clear red flags.

Common intention constructive trusts

Core idea

Equity may enforce a **common intention** that property is to be held in a particular way by imposing a constructive trust, even where there is no enforceable contract, provided the claimant has relied on that intention to their **detriment**.

In Australia, courts generally identify three elements:

1. **Common intention** of the parties that the beneficial interest in specific property is to be held in a particular way (can arise after acquisition).
2. The claimant has **acted to their detriment** in reliance on that intention.
3. It would be **fraud or unconscionable** for the legal owner to deny the claimant's beneficial interest.

The trust takes effect from the conduct that gives rise to its implication, not from the court order.

English development (comparative – useful for policy / critique)

- **Pettitt v Pettitt** – husband claimed interest in wife's house based on modest improvements. House of Lords held a constructive trust can arise if it is the **common intention** to give a beneficial interest, either expressly or inferred from circumstances, but the claim failed for lack of evidence of such intention.
- **Gissing v Gissing** – wife failed to establish beneficial interest in house in husband's name. House of Lords stressed CTs should only be used where there is an express or clearly inferable common intention. Direct financial contributions to acquisition were traditionally key.

Problems in English law:

- Historically, only **direct financial contributions to purchase price** counted for inferring intention, with homemaking ignored unless expressly agreed.
- Commentators argued this is **sexist**, as it devalues domestic contributions typically made by women. Wong argued the focus on direct contributions is discriminatory.

Softening:

- Agreements, oral or written, about how they will live or operate together (eg business, farming, lottery syndicate).

Non-examples:
- **Mere cohabitation** or sharing living expenses is not enough; there must be a **mutual expectation** that contributions are going towards acquiring or improving a shared asset.
- **Barnes v Western Australia** – sharing living arrangements alone did not create a joint endeavour.

Commercial context:
- Joint endeavour CTs are not limited to domestic relationships; they can apply to **business partners** where there is pooling of assets for a common purpose and unconscionable retention of title, although a valid commercial contract dealing with ownership will usually govern.

Examples:
- **Soto v Soto** – joint endeavour found where a brother agreed to take over mortgage repayments on his sister's property in return for a half share, then the relationship between them broke down.
- **Stavrianakos v State of Western Australia** – weekly purchase of a lottery ticket was a joint endeavour, so winnings were held on constructive trust.

Contributions

Contributions considered include:
- Direct financial contributions to purchase price, stamp duty, registration fees, solicitors' fees, bank fees.
- Pooling of financial resources, even in the absence of a formal joint account.
- Other financial contributions such as paying rates, insurance, outgoings, or loans that allow another to pay the mortgage.
- **Non-financial contributions**:
  - Labour in renovations and repairs.
  - Homemaking and parenting contributions.

Snippet from **Siriotis v Siriotis**: the court can take into account pooling, labour, non-financial contributions and later expenditure on repairs and renovations, where accepted by the legal owner knowing they would improve the home and its value.

But:
- There must be a connection between contributions and the **acquisition, maintenance or improvement** of the property; it is not enough that one person's contributions simply improve the other's general wellbeing. **Hill v Love** emphasises contributions must be linked, at least indirectly, to the property.

Mortgage payments:
- Payments of principal and interest can be contributions towards a CT. **West v Mead** confirms this.
- However, **Draper v Official Trustee in Bankruptcy** shows that payment of all mortgage instalments by a wife did not, without more, create a CT in her favour; the court preferred **equitable accounting** between co-owners.

Remuneration:
- If the claimant has already been compensated or paid at commercial rates, retention of the benefit will not be unconscionable:
  - **Engwirda v Engwirda** – de facto wife's claim to business assets failed because she had been paid commercial wages and there was no joint endeavour over the business assets.
  - **Hill v Hill** – son's improvements to mother's property did not justify a CT where she allowed him to live there for 12 years and guaranteed his business debts.

Termination without attributable blame
- Deane J's formulation speaks of the substratum of the joint relationship being removed **"without attributable blame"**.

***Baumgartner v Baumgartner* (1987) 164 CLR 137 – pooled resources CT**

Facts

- De facto couple lived together ~4 years.
- Lived first in a unit owned by male partner; after child born, moved into house purchased and mortgaged in his name alone.
- House funded by sale of unit plus building society loan.
- Parties **pooled income** and paid living expenses and mortgage from pooled funds: approx 55 per cent (male) and 45 per cent (female).
- After separation, she sought declaration of beneficial interest.

Held

- High Court adopted Deane J's **Muschinski joint endeavour principle** (148–149).
- Mason, Wilson & Deane JJ:
  - Parties had **pooled earnings** for the purposes of their joint relationship, one such purpose being to **secure accommodation for themselves and their child** (149).
  - Contributions, financial and otherwise, to land, house, furniture and home were **"on the basis of, and for the purposes of, that joint relationship"** (149).
  - His assertion after breakdown that the property was solely his, financed in part through pooled funds, and that she had *no interest* was **"unconscionable"**, attracting **constructive trust** (149).
- Court awarded the de facto wife a **45 per cent share** to reflect her contribution (150).

Principle

- If parties:
  - pool resources in a joint relationship / endeavour,
  - make contributions directed to acquiring/improving property,
  - and the relationship ends without serious blame,
  - it may be **unconscionable** for the legal owner to assert exclusive ownership.
- Court will impose CT adjusting beneficial shares to reflect contributions and the joint project.

***Green v Green* (1989) 17 NSWLR 343 – common intention + unconscionability**

Facts

- De facto couple from 1966; husband brought wife from Thailand, maintained her and persuaded her to stay with promises of care, children and a house.
- 1969: he bought Kirrawee property in a nominee's name, saying **"this is your house, I bought this for you"**.
- They and their two children lived there until 1975, when he persuaded her to move to Blakehurst, promising that house would be hers, repeating that promise to her and to his solicitors, and instructing transfer into her name.
- He died in 1981 without having transferred title. She sought declaration that she was beneficial owner of either Kirrawee or Blakehurst.

Held

- NSWCA held a **constructive trust** arose over Blakehurst in her favour.
- Basis: it would be **unconscionable** for the estate to deny her entitlement, arising from their **common intention** that she have a proprietary interest and her **detrimental reliance**.

Gleeson CJ:

- It is **"well-settled"** that courts may declare proprietary interests in the family home for spouse or de facto partner where it would be **"unconscionable ... to refuse to recognise the existence of the equitable interest"** (353).
- On the facts, **"the evidence establishes"** that the deceased repeatedly represented that she would have a proprietary interest, and by the time of Blakehurst, **"it was their common intention that the respondent should have a proprietary interest in the Blakehurst property"** (356).
- Her acquiescence in moving from congenial Kirrawee to Blakehurst was part of her **detriment** (356).

TOPIC 9 – Tracing

(TB Ch. 37)

What tracing is and why it matters

Core idea

- Beneficiaries have a right to *pursue trust property* that has been wrongfully taken or misapplied by a trustee, or passed into the hands of third parties who are not bona fide purchasers for value without notice (BFPFVWN).
- Tracing is the *process of identification*: it shows what happened to the property, where it went, what it was turned into, and who now holds it (Foskett v McKeown; Heperu Pty Ltd v Belle).

Key definitions

- Tracing is **not** a claim or a remedy.
    - It is the evidential process by which a claimant:
        - demonstrates what happened to their property
        - identifies its proceeds and the persons who handled or received them
        - sets up a *preliminary step* to bring either:
            - a **personal claim** (eg against the trustee), or
            - a **proprietary claim** (eg charge, constructive trust) to the extent available (Heperu v Belle).

Why tracing is powerful in exam scenarios

- Personal remedies are often useless if the trustee is insolvent, because the judgment competes pari passu with unsecured creditors.
- A successful *proprietary* tracing claim lets the beneficiary:
    - reclaim specific property
    - or assert a proprietary security (lien/charge) over it
    - and thus stand ahead of unsecured creditors in the insolvency (Akita Holdings; Foskett v McKeown).

So whenever you see **misapplied trust funds, mixed accounts, new assets and insolvency**, think "tracing to get a proprietary remedy".

Common law and equitable tracing

Basic distinction

- Both common law and equity recognise tracing.
- **Common law tracing** is very restrictive:
    - Once the property is **mixed** with other property or **converted** into a different kind of property, the plaintiff's *proprietary* right is treated as lost. Only a personal damages claim remains.
- **Equitable tracing** is more flexible:
    - Equity recognises that a beneficiary's equitable property right continues where trust property is:
        - mixed with other property, or
        - converted into a new form (Brady v Stapleton; Russell Gould Pty Ltd v Ramangkura).

Modern approach

- In Foskett v McKeown, Lord Millett and Lord Steyn suggested that there is "no real difference" in the tracing rules at common law and in equity, because both are really *rules of evidence* that help identify assets. They do not themselves decide the nature of the rights in those assets.
- Australian and NZ courts have largely adopted this evidential view (eg Re Magarey Farlam Lawyers Trust Accounts (No 3); Heperu v Belle; Worldwide Holidays Ltd v Wang).

Evidence and inferences

Problem of mixed funds

- If the trustee mixes trust money with their own and buys property with that mixed pot:
    - Beneficiaries usually **cannot take the whole property** in specie (it was not bought solely with trust money).
    - In that case, beneficiaries are entitled to a **charge over the purchased property** for the amount of the trust money used towards the purchase (709).

Presumption about withdrawals

- Where trust money is mixed in an account and the trustee withdraws money:
    - The trustee is **presumed to act honestly** and to withdraw **their own money first**.
    - So the trust money is treated as **remaining in the account** for as long as possible.
- As a result, the **rule in Clayton's Case (first in, first out)** will **not apply** between trustee and beneficiary in this context (727–728).

Use *Re Hallett* for: presumption trustee spends their own money first and the beneficiary's right to a lien or election where property is bought with mixed funds.

Brady v Stapleton **(1952) 88 CLR 322**

Facts

- Bankrupt Coward transferred **32,000 shares** in a company to Brady, who already held **1,300 shares** of the same type.
- Brady knew the transfer was intended to **defraud creditors**.
- Brady later transferred **17,000 shares** to Coward's wife.
- Question: which shares are held on trust for Coward's estate and how do we deal with indistinguishable shares?

Key principles

- The High Court held Brady held the transferred shares **on trust**.
- The question was how to identify the trust property in an indistinguishable pool of shares.

Mixing identical assets and charges

- Dixon CJ and Fullagar J at 337:
    - It does not matter what **form** the property takes, as long as its changed form can be **ascertained as derived from the trust property**.
    - Where trust property is mixed with other property of the same type (eg shares, bonds) and the items are **indistinguishable**, equity can:
        - impose a **charge over the entire mass**
        - or allow the beneficiary to **take specific items** out of the mass to satisfy their claim.

The horse and bonds analogy

- At 338–339:
    - If a trustee mixes trust money with their own and buys a **grey horse** and a **black horse**, or just one horse, equity imposes a **charge over the horse or horses**. You cannot split the horse into trust and non-trust parts.
    - If the trustee mixes **trust bonds** with their own bonds, the bonds form an indistinguishable mass in a different sense. You can simply **take out enough bonds** to satisfy the trust fund.
- The real distinction:
    - Equity looks at whether it is **practicable** to appropriate a **specific severable part** of the property to the beneficiary.
    - If practicable (eg bonds, shares), beneficiary may **elect**:
        - to take specific items in specie
        - or a **charge** over the mass.

Application of Re Hallett presumption

   - Trusts for the poor among relatives, employees, or Freemasons can be charitable because relief of poverty is intrinsically altruistic.
2. **Geographical limitations**
   - Trusts for people in a particular **geographical locality** do not breach Compton.
   - Being a resident of a place is not an inherent personal characteristic.
3. **Preference clauses**
   - A charitable trust may stipulate that **preference** be given to relatives or associates without losing its public character, provided the **paramount purpose is public**.
   - Eg scholarship trust with preference for descendants of the testator still charitable so long as open generally to a wider public class.

Presumptions of public benefit

- There is said to be a **rebuttable presumption** that trusts for:
  - **relief of poverty**
  - **advancement of religion**
  - **advancement of education**

  are for the public benefit.
- Purposes in the **fourth Pemsel category** must be shown to be beneficial. Public benefit may be direct or indirect and can be proved by evidence or reasonable inference.
- In practice the public benefit test can be a **high hurdle** for fourth-head political or advocacy purposes.

Charitable purposes outside the jurisdiction

- A charitable trust **need not be carried out within the local jurisdiction**; gifts to benefit people overseas can be charitable.
  - Eg trust for relief of distress of Armenians or Khartoum Armenians, or for a sanitarium on a Greek island, upheld as charitable.

Conceptual issues

- The Attorney-General of the relevant jurisdiction supervises charitable trusts, which is more difficult where property is applied overseas.
- Some earlier cases suggested there must be some benefit to the **community where the trust is established**, not only to a foreign community.

Current position

- Strong line of authority (including *Lander v Whitbread* and later NSW cases) treats purely overseas purposes as capable of being charitable, especially where the purpose falls under the first three Pemsel heads, where public benefit is presumed.
- For **fourth-head purposes**, it remains arguable that some local public benefit may need to be shown, but the modern trend is quite liberal, aided by statute such as the **Charitable Trusts Act 1993 (NSW)**.

Statutory reform – Charities Act 2013 (Cth)

Scope

- Applies to the law of charity **for Commonwealth legislative purposes** only (eg tax).
- States and territories still rely on the **general law** plus any local legislation.
- So you must be aware of **coexistence** of:
  - general law (Pemsel, Preamble, case law), and
  - federal statutory definition.

Statutory heads of "charitable purpose" (s 12)

A "charitable purpose" includes (summary only):

- advancing health
- advancing education
- advancing social or public welfare
- advancing religion
- advancing culture

    - High Court examined whether farm was an **end** or merely a **means** to a broader charitable purpose.
    - Held: general charitable intention to benefit the community through training, farm only a means.
    - Ordered cy pres scheme to sell farm and use proceeds for similar purposes.

Supervening impossibility and change of circumstances

- When impossibility arises **after** the trust has taken effect, there is no lapse. Property is already charitable.
- Cy pres may be ordered regardless of general charitable intention.

Examples:

- **Charitable association deregistered after donor's death**
    - *Re Graham (No 2)* - heart disease association deregistered before funds paid.
    - Cy pres ordered, dividing funds between similar organisations.
- **Hospital, care units or schools close or their model becomes unsuitable**
    - *RSL Veterans Retirement Villages* - retirement village for veterans no longer viable because not enough veterans.
        - Scheme allowed broader occupancy while retaining preference for defence personnel.
    - *Equity Trustees Ltd v Jewish Care (Vic)* - the hospital under its original name no longer existed. Cy pres scheme re-directed funding to updated services.
- **Original method no longer suitable or effective due to policy or social change**
    - *Cram Foundation v Corbett-Jones* - home intended for "crippled children" no longer suitable model due to de-institutionalisation policy.
    - Court held original terms no longer effective method and ordered cy pres scheme to use funds for accommodation and services for disabled people more generally.
- **Original purpose satisfied, surplus remains**
    - *Re Anzac Cottage Trust* - homes for dependants of First World War dead, purpose fulfilled, one cottage remained.
    - Cy pres scheme applied surplus funds to organisations providing housing to needy families of deceased service personnel.

Statutory cy pres provisions

Almost all States (not ACT or NT) have statutes making cy pres easier:

- Eg **Trusts Act 1973 (Qld) s 105**, **Charitable Trusts Act 1993 (NSW) s 9**, others in SA, Tas, Vic, WA.

Typical statutory grounds (see Qld s 105):

- Original purposes:
    - Have been fulfilled or as far as may be fulfilled
    - Cannot be carried out
    - Cannot be carried out according to directions or spirit of the trust
- Only part of the property can be used as originally directed.
- Property can be more effectively used in conjunction with other property for similar purposes.
- Original purposes refer to an area or class that is no longer suitable.
- Purposes:
    - Already adequately provided for by other means
    - Have ceased to be charitable
    - Have ceased to be a suitable and effective use of the property having regard to the spirit of the trust.

Key effect: removes strict requirement of literal impossibility – it is enough that the purposes no longer provide a **suitable and effective method**.

NSW - s 9 Charitable Trusts Act 1993

- s 9(1): cy pres may be used where:
    - Original purposes, wholly or in part, have ceased to provide a **suitable and effective method** of using the trust property, having regard to the **spirit of the trust**.

Classic four heads and “spirit and intendment”

***Commrs for Special Purposes of Income Tax v Pemsel* [1891] AC 531**

Facts

- Land settled on trust. Rents to be applied for the missionary work of the Moravian Church.
- The settlor argued that the income used for missionary work should be treated as for charitable purposes so as to obtain a tax advantage.

Held

- Missionary work of the church was a valid charitable purpose.
- Lord Macnaghten articulated the classic four divisions of charity, at 583:
  - Relief of poverty.
  - Advancement of education.
  - Advancement of religion.
  - Other purposes beneficial to the community not falling under the preceding heads.
- These categories reflect the “spirit and intendment” of the preamble to the Statute of Charitable Uses 1601.

Use in exam

- Opening definition: “Charity in its legal sense comprises four principal divisions …” (Lord Macnaghten, 583).
- Then move into “public benefit” and “spirit and intendment” via Scottish Burial.

***Scottish Burial Reform & Cremation Society Ltd v Glasgow Corp* [1968] AC 138**

Facts

- Company’s purpose: to encourage and provide facilities for **cremation**.
- Sought exemption from local rates on basis it was a charitable body.

Key principles

- Lord Wilberforce describes the modern approach to what counts as “within the intendment” of the Statute.
- At 154:
  - Purposes must be shown to be:
    1. For the benefit of the public or community, and
    2. Within the intendment of the preamble to the Statute of Charitable Uses.
  - However, “what must be regarded is not the wording of the preamble itself, but the effect of decisions which have endeavoured to keep the law as to charities moving according as new social needs arise or old ones become obsolete or satisfied.”

Application

- On benefit:
  - At 156, his Lordship notes that the scale on which the company’s services were used “clearly showed that they met a need of the public”.
  - Meeting the need for inexpensive and sanitary disposal of the dead is plainly beneficial.
- On “spirit and intendment”:
  - The law had already moved from “repair of churches” to maintenance of burial grounds in churchyards and cemeteries.
  - Cremation is the natural extension of that evolutionary line.
  - Group in the preamble “repair of bridges, ports, havens, causeways, churches, sea banks and highways” shows a common element of public utility.
  - Parliament had treated cremation like burial in the Cremation Act 1902.

Held

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Breach of Confidence

Cases

- ***Coco v AN Clark*** [1969] RPC 41, 47–48: three elements; objective duty test; "necessary quality of confidence"; "imparted in circumstances"; "unauthorised use".
- ***Optus v Telstra*** (2010) 265 ALR 281, 289–291, 290: contract **does not exclude equity**; four-part restatement; equitable **account** available.
- ***O'Brien v Komesaroff*** (1982) 150 CLR 310, 326–330: common/professional knowledge lacks secrecy; must **identify** specific confidential parts; routine dissemination undercuts confidentiality.
- ***Johns v ASIC*** (1993) 178 CLR 408, 432–433 (Brennan J): lawful public tender = **public domain**; no confidence thereafter.
- ***Bolkiah v KPMG*** [1999] 2 AC 222: duty survives retainer; **real and sensible risk**; burden shifts; ad hoc Chinese walls **insufficient**.
- ***ABC v Lenah*** (2001) 208 CLR 199, 226–228 (Gleeson CJ): proprietorial control ≠ confidentiality; assess nature of activity; privacy if disclosure "highly offensive".
- ***Commonwealth v John Fairfax*** (1980) 147 CLR 39, 50–53 (Mason J): Govt must show **public interest detriment** (national security etc.); mere embarrassment insufficient.
- ***Giller v Procopets*** (2008) 24 VR 1: equitable **compensation for mental distress** + **aggravated damages** for humiliating private-info breach; injunction may be futile once disclosure occurred.

1. Identify the Claim and Parties

Claim: Equitable action for breach of confidence (not contract/IP).

Parties:

- **Confider/claimant** = [X]
- **Confidant/defendant** = [Y] (include any **third parties with notice**).

Framing quote: "If a defendant is proved to have used confidential information... without the consent... he will be guilty of an infringement of the plaintiff's rights." (*Saltman Engineering* (1948) 65 RPC 203, 213 (Lord Greene MR)).

Equitable foundation: Obligation arises from "an obligation of conscience" (*Moorgate Tobacco v Philip Morris (No 2)* (1984) 156 CLR 414, 437–8 (Deane J)); aim is to prevent unconscientious misuse.

INTRO / ISSUE STATEMENT:

Equity's action for breach of confidence polices unconscientious misuse of confidential information. The obligation is not parasitic on contract or property; it arises from an "obligation of conscience" attaching to the circumstances in which the information was obtained or communicated: *Moorgate Tobacco (No 2)* (1984) 156 CLR 414, 437–8 (Deane J); classic statement: if D uses information "obtained from P, without P's consent," there is an infringement: *Saltman Engineering* (1948) 65 RPC 203, 213 (Lord Greene MR). The High Court ties the rationale to preventing unconscientious conduct: *ABC v Lenah Game Meats* (2001) 208 CLR 199, 227. **[State briefly what the information is, who communicated/obtained it, and what D did with it.]**

- **Watch for**: the claim is equitable (remedial flexibility; equitable defences may apply).
- If a **contract** also covers confidentiality, equity usually co-exists unless the contract clearly excludes it (see below).

APPLY: **Here**, the gravamen is that **[D]** used/disclosed **[describe information]** obtained **[how/when]**, in circumstances engaging an equitable obligation of conscience. This frames the analysis under *Coco*/*Optus*.

2. Elements — Core Test

- ***Coco v AN Clark*** [1969] RPC 41, 47 (Megarry J):
  (1) info has "necessary quality of confidence";
  (2) imparted in circumstances importing an obligation of confidence;
  (3) unauthorised use to the detriment of the confider.

- *Optus Networks v Telstra* (2010) 265 ALR 281, 290:
  (a) info **identified with specificity**;
  (b) info has **confidential quality**;
  (c) received in **circumstances importing** an obligation;
  (d) **actual/threatened misuse** without authority.

TEST STATEMENT:

Courts express the elements in two aligned ways. Coco requires: **(1)** the information has the necessary quality of confidence; **(2)** it was imparted in circumstances importing an obligation of confidence; and **(3)** unauthorised use to the confider's detriment: *Coco v AN Clark* [1969] RPC 41, 47–48 (Megarry J). The Full Federal Court restates as: **(a)** information identified with specificity; **(b)** confidential quality; **(c)** received in circumstances importing the obligation; and **(d)** actual or threatened misuse without authority: *Optus v Telstra* (2010) 265 ALR 281, 290 [39]. **[Flag which path you'll use; note they are substantively the same.]**

- Watch for: **specificity**—you must pinpoint what is confidential; **public domain** defeats limb (1); **objective notice** governs limb (2); "detriment" is usually inherent in misuse (see below).

APPLY: I analyse **[identify the material]** under *Coco*/*Optus*: **[brief roadmap sentence—Element 1/2/3].**

3. Element (a)/(1): Identify the Information & "Necessary Quality of Confidence"

a. Identify with specificity (what, where, when)

- Point to the **documents, datasets, images, emails, attachments**: "[Exhibit/attachment X]".
- Avoid generalities: failure to specify sinks claims: *O'Brien v Komesaroff* (1982) 150 CLR 310, 326–327 (Mason J) — "very little, if anything... confidential"; must **identify the particular contents**.

b. Is it secret/non-public?

- Not "public property and public knowledge" (*Saltman* 215).
- If repeatedly published/used in professional advice → secrecy undermined (*O'Brien*, 326–327, 329–330).
- **Public domain kills secrecy:** information tendered/read in public proceedings loses confidence (*Johns v ASIC* (1993) 178 CLR 408, esp 432–433 (Brennan J): "once in the public domain... can be freely used").

Practical checks

- Has it been **open-court/RC** exhibited? → apply *Johns*.
- Has it been **widely disseminated** by P? → *O'Brien*: routine dissemination inconsistent with secrecy.
- If publication is the **defendant's own breach**, don't let D rely on their wrong to claim "public domain": injunctive relief may be limited but **account/damages** may remain (cf *Spycatcher* logic).

c. Nature/type matters

- **Commercial/trade secrets** (recipes, formulae, datasets, customer analytics): protectable if not trivial/obvious.
- **Personal/private information:** strong weight (*Giller v Procopets* (2008) 24 VR 1 — intimate videos).
- **Business operations filmed:** not inherently "private" just because on private property (*ABC v Lenah* (2001) 208 CLR 199, 226–228 (Gleeson CJ): proprietorial control ≠ confidentiality).

ELEMENT (a) / 1 STATEMENT:

[D] must identify with precision the impugned information and show it is not public property or common knowledge. A failure to pinpoint the specific confidential content is fatal: *O'Brien v Komesaroff* (1982) 150 CLR 310, 326–7 (Mason J) ("very little, if anything ... confidential"; failure "to identify the particular contents"). Information routinely disseminated as part of a professional practice is unlikely to retain secrecy: *O'Brien*, 329–30. Information that has lawfully entered the public domain (e.g. read/tendered in open proceedings) ceases to be confidential: *Johns v ASIC* (1993) 178 CLR 408, 432–3 (Brennan J). Proprietorial control alone does not make conduct confidential; the nature of the activity matters: *Lenah* (2001) 208 CLR 199, 226–8 (Gleeson CJ). By contrast, inherently intimate material (e.g. sexual images/videos) has strong confidential character: *Giller v Procopets* (2008) 24 VR 1.

Modern refinements:

- ***Sidhu*** 251 CLR 505: reliance must be **proved** (no presumption) and only needs to be a **contributing cause** ([58], [76], [97]); relief often reflects the **value of the promise** where detriment is life-shaping ([82], [92], [95]).
- ***Kramer*** [2024] HCA 48: in proprietary **encouragement** cases, **no further post-promise encouragement** is required; it suffices that a **reasonable promisor would expect reliance** (or actually expected it), and reliance/detriment ensued ([34]–[40], [42]–[44], [58]–[60]).

ELEMENTS STATEMENT:

Australian courts organise the elements using *Waltons'* six-factor guide (Brennan J) and modern refinements: (1) **assumption/expectation** as to an existing/future legal relation and that **D is not free to withdraw**; (2) **inducement** by D; (3) **reliance** by P; (4) **knowledge/intent** that P would rely; (5) **detriment** if the assumption is not upheld; and (6) D's **failure to act** to avoid that detriment: *Waltons* 164 CLR 387, 428–429. The High Court adds that **reliance must be proved (no presumption)** and need only be a **contributing cause**; proportionate relief will often **reflect the value of the promise** where detriment is life-shaping: *Sidhu v Van Dyke* (2014) 251 CLR 505, 58, 76, 82, 92, 95, 97. In proprietary **encouragement** cases, **no further post-promise encouragement is required**; it suffices that a **reasonable promisor would expect reliance** (or actually expected it): *Kramer v Stone* [2024] HCA 48, [34]–[40], [42]–[44], [58]–[60].

- **Watch for:** clarity of assurance; commercial "subject to contract"; evidence of reliance; gravity/irreversibility of detriment; timing of resilement.

APPLY: I analyse **[the assurance]** against *Waltons'* structure with *Sidhu*/*Kramer* clarifications: **[roadmap: assumption → inducement → reliance → knowledge → detriment → unconscionability]**.

3. Element 1 — Assumption / Expectation (clarity & content)

What to identify

- The **content** of the assurance (right/benefit and timing).
- Whether it concerns **non-enforcement of rights** (promissory: cf ***High Trees***, ***Waltons***) or **grant of property** (proprietary: ***Crabb***, ***Pascoe***, ***Giumelli***, ***Kramer***).

Clarity threshold

- Australian law does **not** demand contractual certainty, but:
  - **Commercial / subject-to-contract** context → caution; unsettled essentials weigh against estoppel (***Austotel*** 16 NSWLR 582).
  - **Domestic/family** context → informality tolerated if assurance is sufficiently clear (e.g., "the house is yours": ***Pascoe***).

ELEMENT 1 STATEMENT:

An estoppel requires a **sufficiently clear assurance** giving rise to a **reasonable assumption** about **[rights/conduct/property]**. Commercially, courts are cautious where terms are **"subject to contract"** or **essential terms are unsettled**: *Austotel v Franklins* (1989) 16 NSWLR 582. In domestic/family settings, informality can suffice (e.g., "the house is yours"): *Pascoe v Turner* [1979] 1 WLR 431; promises of access/rights: *Crabb v Arun* [1976] Ch 179. In proprietary **encouragement** cases, the **assurance itself** can found the assumption; **no extra post-promise conduct** is required if a reasonable promisor would expect reliance: *Kramer* [2024] HCA 48, [34]–[39], [42].

- **Watch for:** statements too vague/puff; "agreement to agree"; explicit "subject to contract" labels; domestic vs commercial context.

APPLY: The assumption here is **[state content and timing]**; it is **[clear/too vague]** given **[exact words/conduct, context, any "subject to contract" qualifiers]**.

4. Element 2 — Inducement (express, implied, silence)

Routes to inducement

- **Express** promises/assurances (e.g., repeated statements: ***Sidhu***).
- **Implied** by conduct/course of dealing.
- **Silence/acquiescence** when conscience required speaking (knowing reliance underway: ***Waltons*** 164 CLR 387, 404, 420–421).

- Griffith CJ: The court is **not bound** to enforce a bargain which would work **great hardship**; consider **damages** instead (706–707).
- Be ready to show the **numbers** / burdens to frame hardship.
- Illiterate pastoralist had agreed to a lease/option imposing heavy obligations (Crown instalments, improvements, clearing, ringbarking, repairs, insurance) while the lessee reaped the profits of crops, stock and rent.→ "great hardship".

STATEMENT:
Even with jurisdiction, SP may be refused if enforcement would work "great hardship" on D (*Dowsett v Reid* (1912) 15 CLR 695, 706). There, an illiterate pastoralist had agreed to a lease/option imposing heavy obligations (Crown instalments, improvements, clearing, ringbarking, repairs, insurance) while the lessee reaped the profits of crops, stock and rent. The High Court held equity would not compel such a burdensome bargain and substituted damages (706–707). **APPLY:** Here, [set out burdens specific to your facts]; as in *Dowsett*, the court would likely refuse SP and award damages instead.

d. Regulatory approvals (craft the decree)

- **Dougan v Ley**: make the decree **conditional** on third-party/administrative approval; if refused, the decree **falls away** (Rich J 148; Dixon J 152).
    - This avoids supervision concerns; the court **is not running** the regulator.

Ask: Is an approval required? Frame a **conditional decree** with **liberty to apply**.

Where third-party or regulatory **approval** is needed, craft a **conditional** decree. **Dougan v Ley**: the court is **not** supervising a series of acts; the order **requires vendor to do everything necessary** to enable the application; if approval is **refused**, the decree **falls away**: 71 CLR 148 (Rich J), 152 (Dixon J).
APPLY: The order should be **conditional** on [approval]; require [D] to execute/lodge all documents and cooperate; **completion on grant**, **liberty to apply** if refused.

e. Further bars

- **Readiness, willingness, ability** (by the time of decree).
- **Mutuality** assessed **at date of decree**; later cure can suffice (cf **Dougan**: 155 (Williams J)).
- **Clean hands / delay** / **vitiating factors** (if raised).
- **Certainty of obligation** (ties to *Argyll* precision point).
- **Futility/impossibility** (don't order the pointless or impossible).

MUTUALITY; READINESS/WILLINGNESS; CLEAN HANDS
SP is discretionary and may be refused for lack of **mutuality** or if P is not **ready, willing and able** at the time of the decree. Mutuality is assessed at the **date of decree**; a later cure can suffice (cf **Dougan v Ley** 71 CLR 155 (Williams J)). P must show practical ability to perform essential obligations; and equity may withhold SP for **delay**, **unclean hands**, **uncertainty**, **futility**, or **impossibility**.
HERE: [P has financing/approvals; has tendered performance] → **ready and able**; no mutuality/fairness bar; no delay/unclean hands.

3. If SP is refused or granted...

IF GRANTED – can LCA damages be awarded in addition to SP:

- Even where SP is decreed, the court may award damages in addition under LCA. The statute expressly empowers equity to grant damages "in addition to" specific relief where needed to do complete justice (*Grant v Dawkins* [1973] 1 WLR 1406, 1410). This would be particularly useful to cover the consequential loss [mention based on facts e.g. rental income lost through delay in completion] not addressed by the order itself (*Sandpiper Kooragang Pty Ltd v Fortis Products Pty Ltd* [2020] NSWSC 1256, [116]–[117]). This would ensure full restoration.

IF REFUSED – move to LCA damages in lieu of:

- In *Dowsett* the court **refused SP** for hardship and **substituted damages** (706–707, 713).

EQUITY LAWS2015
FINAL EXAM SCAFFOLDS
2025

Nature and Constitution of Trusts | Establishing an express trust

0. ONE LINE TO START A TRUSTS / EXPRESS TRUST ISSUE

Use this whenever you are working out whether a disposition or arrangement creates an express trust or something else.
A trust is a legal relationship where a trustee holds legal title to property for the benefit of one or more beneficiaries, and owes fiduciary obligations to them (*Commissioner of Taxation v Bamford* (2010) 240 CLR 481, [17]–[20]). The key questions are what type of trust is involved (express, resulting, constructive) and whether the three certainties of intention, subject matter and objects are satisfied.

Template
Here, [SETTLOR] has dealt with [PROPERTY] in favour of [ALLEGED BENEFICIARIES]. A trust is a legal relationship where a trustee holds legal title for the benefit of beneficiaries, owing fiduciary obligations to them (*Bamford* (2010) 240 CLR 481, [17]–[20]). The issue is whether this disposition creates an **express trust**, or instead some other relationship such as a gift, condition, personal equitable obligation, equitable charge or something else. This turns on:

- classifying the trust as express, resulting or constructive
- whether the three certainties (intention, subject matter, objects) are present, and
- whether any beneficiary principle issues arise, including imperfect obligations and unincorporated associations.

[Soft prompt: if the question is really about charity or Quistclose, signpost: "If this is properly characterised as a charitable trust, see Topic 10. If it is a 'money for a specific purpose' loan, consider a Quistclose trust (Topic 7)."]

PART A – WHAT TYPE OF TRUST DO WE HAVE?

A1. Express, resulting or constructive trust?

Core rule sentence
Trusts are commonly classified as **express**, **resulting** or **constructive**. Express trusts arise from an intention (express or implied) to create a trust. Resulting trusts arise by operation of law to fill gaps in equitable ownership where an express trust fails or equity presumes an intention. Constructive trusts are imposed by law independently of, and sometimes contrary to, the parties' intentions.

Template
The first step is to classify the trust relationship. An **express trust** arises where [SETTLOR] intended that specified property be held on trust for the benefit of one or more persons. A **resulting trust** arises by operation of law to fill incomplete gaps in equitable ownership where an express trust fails or where equity presumes an intention that the transferee is not to take beneficially. A **constructive trust** is imposed by law, independently of, and sometimes contrary to, the parties' actual intentions, to reflect equitable obligations or prevent unconscionable retention of property.
Here, [SHORT DESCRIPTION OF FACTS], which suggests the primary characterisation is [EXPRESS / RESULTING / CONSTRUCTIVE] because [REASON].

[Soft prompt: If the core issue is whether the trust was properly created, focus on an express trust and the three certainties. Resulting and constructive trusts are often the fallbacks if the express trust fails.]

A2. Express trusts: fixed, discretionary and powers of appointment

Core rule sentence
An express trust is created by an express intention of the settlor that specified property be held on trust for beneficiaries. Within express trusts, the beneficial interests may be fixed, discretionary or subject to a power of appointment.

Template

An express trust is created where [SETTLOR] intended [TRUSTEE] to hold [PROPERTY] on trust for the benefit of [BENEFICIARIES].

- A **fixed trust** arises where the identity of the beneficiaries and their proportionate shares are fixed and ascertainable from the terms of the trust.
- A **discretionary trust** arises where the trustee has discretion to select beneficiaries from a class and decide the size of their shares, but must appoint to at least one object.
- A **power of appointment** (mere power) exists where the donee has discretion whether to distribute at all, as well as to whom and in what shares, subject to any gift over.

Here, the terms [QUOTE KEY WORDS] indicate that [TRUSTEE] [is obliged to distribute / has an option whether to distribute], so the arrangement is best characterised as a [FIXED TRUST / DISCRETIONARY TRUST / POWER OF APPOINTMENT].

A3. Resulting trusts (implied trusts)

Core rule sentence
Resulting trusts arise by operation of law where an express trust does not exhaust the whole beneficial interest, or where equity presumes an intention that the transferee is not to take beneficially, so that the beneficial interest results back to the transferor or their estate.

Template
A **resulting trust** is an implied trust that arises where the beneficial interest in [PROPERTY] is not fully dealt with, or where equity presumes that [TRANSFEREE] was not intended to take beneficially.

- **Automatic resulting trusts** arise when an express trust fails in whole or in part, so that the undisposed beneficial interest automatically results back to [SETTLOR / ESTATE].
- **Presumed resulting trusts** arise, for example, where A transfers property to B in circumstances where B is not A's spouse or child, and there is no explanation for the transfer; equity presumes that B holds on trust for A unless the presumption is rebutted.

If the alleged express trust fails for uncertainty or beneficiary principle problems, [TRUSTEE] will generally hold [PROPERTY] on automatic resulting trust for [SETTLOR / TESTATOR'S ESTATE].

[Soft prompt: Use this when your conclusion is "express trust fails, so resulting trust".]

A4. Constructive trusts (outline)

Core rule sentence
Constructive trusts are imposed by operation of law, independently of, and sometimes contrary to, the parties' intentions, to respond to factors such as wrongdoing, unconscionable retention of benefits or certain vendor–purchaser situations.

Template
A **constructive trust** does not depend on any express intention of the parties. It is imposed by equity where it would be unconscionable for [HOLDER] to retain property, or where particular relationships (such as vendor–purchaser) have crystallised. For present purposes, the main point is that if no valid express trust is created over [PROPERTY], a constructive trust might still arise later by operation of law, for example in [VENDOR–PURCHASER / CONTRIBUTION / WRONGDOING] scenarios.

[Soft prompt: For vendor–purchaser constructive trust, note that upon a specifically enforceable contract, the purchaser may have an equitable interest. This is developed more in other topics.]

PART B – THE THREE CERTAINTIES

Overview template – three certainties
Core rule sentence

POWERS AND DUTIES OF TRUSTEES

0. ONE LINE TO START A TRUSTEE POWERS / DUTIES ISSUE

Use this any time the facts raise how trustees are managing trust property, exercising discretions, investing, giving information, or varying the trust.

As trustee(s) of [TRUST], [TRUSTEE] must exercise their powers and discretions in accordance with the trust instrument, the Trustee Act 1925 (NSW) and the general law, and discharge all core trustee and fiduciary duties (including to learn and obey the trust, keep accounts and give information, exercise due care and skill, invest in the best interests of all beneficiaries, act impartially and personally, and not impermissibly delegate). The question is whether [TRUSTEE] has breached any of those duties and the consequences.

[Soft prompt: then run the checklist below in any order that fits the problem.]

PART A – DISTINGUISH POWERS AND DUTIES

1. CORE DISTINCTION AND SOURCES

Core rule sentence
Duties are things a trustee must do or refrain from doing; breach gives rise to breach of trust liability. Powers are things a trustee may do as they think fit, but must still be exercised in good faith, for proper purposes, and in line with fiduciary obligations.

Template

- Trustees' powers and duties come from three sources:
    1. The terms of the trust instrument (always primary)
    2. Statute, especially the Trustee Act 1925 (NSW)
    3. The general law of equity and fiduciary principles

Here, [TRUSTEE]'s powers and duties are primarily defined by [TRUST INSTRUMENT], overlaid by the Trustee Act 1925 (NSW) and general law. Any express provisions in the deed modifying default powers or duties will prevail, subject to mandatory rules.

[Soft prompt: always start by identifying any relevant clauses in the deed about appointment, investment, maintenance, advancement, powers of sale, variation, remuneration, indemnity.]

2. POWERS OF TRUSTEES – WHAT THEY MAY DO

Use this whenever trustees are choosing between options or exercising discretions (investment, maintenance, advancement, sale, postponement, appointment of beneficiaries etc).

Examples of powers (non-exhaustive)
Typical powers include:

- Power of appointment under a discretionary trust
- Statutory and deed-based powers of investment: Trustee Act ss 14, 14D–14DB
- Power to purchase a dwelling for occupation by a beneficiary: ss 14D–14DB
- Power to postpone sale of trust property: s 27B(1)
- Powers of maintenance and advancement of income and capital for beneficiaries (trust deed; Trustee Act ss 42A, 43, 44)

Template – how to frame a power
[TRUSTEE] is exercising a discretionary power to [DESCRIBE POWER, for example apply income for maintenance / advance capital / invest / postpone sale], conferred by [TRUST INSTRUMENT] and supplemented by [RELEVANT

Use whenever the fact pattern raises "variation" or "restructuring" of the trust.

Exam checklist for common law
When [PARTY] seeks a variation, consider:

1. Can all adult beneficiaries acting unanimously vary or terminate under *Saunders v Vautier*?
2. If not, is there an express power of variation in the deed?
3. If infants / unborn are involved, is the case within one of the four narrow *Chapman* categories? If not, common law variation is not available.

Common law variation – adult beneficiaries
Adult beneficiaries who are all sui juris and absolutely entitled may unanimously terminate or rearrange the trust under *Saunders v Vautier* (1841) 4 Beav 115. If [BENEFICIARIES] are all absolutely entitled and agree, they may collapse or vary [TRUST] without court involvement.

Court's inherent jurisdiction – Chapman v Chapman
Chapman v Chapman [1954] AC 429 confines the court's inherent jurisdiction to depart from the trust terms, especially for infants and unborn beneficiaries, to four narrow categories. The court does **not** have a general power to rewrite the trust simply because variation is beneficial.

Four categories:

1. changing an infant's property from real to personal estate (and vice versa)
2. authorising unauthorised business-type investments as a salvage operation
3. allowing maintenance out of income despite directions to accumulate
4. sanctioning compromises of proceedings on behalf of infants / unborn beneficiaries.

Outside these categories the court will not rewrite a trust simply because a variation is advantageous. Its function is to execute the trust, not alter it for perceived benefit (*Chapman* at 444).

[Soft prompt: then move to statutory routes – s 81, ss 86A–C.]

STATUTORY VARIATION – s 81 AND ss 86A–C TRUSTEE ACT

Use whenever trustees or beneficiaries seek court approval to vary administrative powers or arrangements.

Scaffold:

1. Is it expedient to vary the terms?
    a. What does expedience mean?
2. Is the person a minor, incapable, or unborn?

(i) s 81 – enlargement of administrative powers based on "expediency"

Core rule sentence
Under s 81 Trustee Act 1925 (NSW), the court may confer further powers on trustees where it is "expedient in the management or administration" of the trust property, for example to authorise sale, postponement of sale, carrying on a business, or employing capital in a business.

Perpetual Trustee Co Ltd v Godsall [1979] 2 NSWLR 785 at 789–790:

- "Expediency" is assessed by reference to the situation of management or administration at the time of the application and the interests of the beneficiaries. Once expediency is established, the court should ordinarily make the order, absent countervailing factors.

Template
Here, [TRUSTEE] seeks to [sell / postpone sale / carry on business / use capital] in a way not authorised by the deed. Under s 81, the court may enlarge their powers if it is expedient for the management or administration of the trust having regard to the beneficiaries' interests at the time (*Perpetual Trustee v Godsall* [1979] 2 NSWLR 785 at 789–790).

9. DUTY TO INVEST AND ACT IN BEST (FINANCIAL) INTERESTS

Use whenever the facts involve investment choices, ethical investment, or conflicting beneficiary classes (income vs capital).

Steps:

1. **Always start** with one blended line:
   - [TRUSTEE] has a broad power to invest trust funds in any form of investment (s 14), but must exercise that power with the care, diligence and skill required by s 14A, in the best financial interests of all present and future beneficiaries and in accordance with the s 14C factors and equitable duties preserved in s 14B (*Cowan*; *Harries*; Trustee Act ss 14A, 14B, 14C).
2. **If the facts raise ethics / "no coal / ESG" vibes**
   - Bring in *Cowan* (private trusts) or *Harries* (charities) explicitly.
3. **If the exam is really about whether the decision was careless / speculative / undiversified**
   - Lean on:
     - pro vs non-pro template under s 14A
     - pick the most obvious s 14C factors
     - and then conclude breach / no breach.
4. **Only go into s 90 / s 90A**
   - if they are asking about quantification, set-off of gains and losses, or the court's approach to assessing liability for an investment breach. Otherwise you can leave those for a separate "relief / quantum" heading.

Has the trustee exercised the power of investment prudently and in the beneficiaries' best [financial] interests?

Core rule sentences

- Trustees must exercise investment powers in the best interests of all present and future beneficiaries: s 14B(2)(a) Trustee Act; *Cowan v Scargill* [1985] Ch 270 at 287–289.
- For non-charitable financial trusts, "best interests" usually means "best financial interests", judged by risk and return (*Cowan* at 287–288).

Core duty and "best interests"

Core rule sentence

Trustees must exercise their investment powers in the best interests of all present and future beneficiaries, which in an ordinary non-charitable trust generally means their best financial interests, holding the scales impartially between different classes (*Cowan v Scargill* [1985] Ch 270 at 287–288; Trustee Act 1925 (NSW) s 14B(2)(a)–(c)).

Template

Here, [TRUSTEE] must exercise the power of investment in the best interests of all present and future beneficiaries, which in this non-charitable trust ordinarily means their best financial interests, while acting impartially between income and capital beneficiaries (*Cowan v Scargill* [1985] Ch 270 at 287–288; Trustee Act s 14B(2)(a)–(c)).

If facts raise trustees taking into account political/ethical motives for choosing investment

- For ordinary private trusts, trustees cannot sacrifice financial returns in order to pursue their own political or moral agenda (*Cowan v Scargill* at 288–289).
- For charities, trustees may take ethical factors into account, but only where this does not involve a risk of significant financial detriment to the fulfilment of the charitable purposes (*Harries v Church Commissioners for England* [1992] 1 WLR 1241 at 1246–1248).

Template

[If non-charitable] To the extent [TRUSTEE] allowed [political / ethical / industrial] considerations to override investment performance, this is inconsistent with the duty to prioritise beneficiaries' best financial interests (*Cowan v Scargill* at 287–289). In *Cowan*, union-appointed trustees could not veto overseas or non-coal investments merely to support coal industry policy.

Use this whenever a trustee or creditor wants payment out of trust assets for expenses or liabilities.

TRUSTEE'S PERSONAL RIGHT TO REIMBURSEMENT AND PROPRIETARY INTEREST

Core rule sentence
A trustee, as legal owner, has a personal right of indemnity from trust assets for costs and expenses legitimately incurred in administering the trust, and a corresponding equitable interest over the trust property that ranks ahead of the beneficiaries' interests (*Re Raybould* [1900] 1 Ch 199; *CPT Custodian* (2005) 224 CLR 98; Trustee Act 1925 (NSW) s 59(4)).

Template
[TRUSTEE] has a personal right to be reimbursed from the trust fund for liabilities and expenses legitimately incurred in the proper execution of the trust, and a corresponding equitable interest over all trust property that secures that indemnity. This interest is similar to an equitable lien and takes priority over the beneficiaries' interests (*Re Raybould*; *CPT Custodian* at [49], [51]).

CREDITORS' RIGHT TO SUBROGATION

Core rule sentence
Third party creditors of the trustee can be subrogated to the trustee's right of indemnity and claim directly against trust assets to the extent of that indemnity (*Re Raybould*; *Re Knott* [1988] Ch 554).

Template
Creditors such as [CREDITOR] cannot ordinarily sue the trust itself, but may be subrogated to [TRUSTEE]'s indemnity, allowing them to claim directly against trust assets to the extent that [TRUSTEE] would have been entitled to reimbursement (*Re Raybould*; *Re Knott*). If [TRUSTEE] has also committed a separate breach of trust giving rise to a surcharge against the indemnity, that reduces the value of the available indemnity and so weakens [CREDITOR]'s subrogated claim, as illustrated in *Re Knott*.

WHEN ARE EXPENSES "LEGITIMATELY INCURRED"?

Always go through this is bringing up an reimbursement issue

Core propositions

- The test is not whether expenses were "properly" or "reasonably" incurred in some abstract sense. The real question is whether the expenditure was within the scope of the trust and not in breach of trust (*Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd (in liq)* [2002] NSWCA 29 at [8]).
- Liability for ordinary business risks, including statutory misleading or deceptive conduct, may still fall within the indemnity if not dishonest, criminal or outside the trust's scope.

Template
The right of reimbursement is not confined to expenses labelled "properly incurred". The focus is whether the payments were made in executing the trust and not in breach of trust (*Gatsios* at [8]). Here, [TRUSTEE] incurred liability by [DESCRIBE, eg carrying on the business in the usual way, even though it involved misleading conduct]. As this conduct was within the authorised business and not fraudulent or criminal, the resulting liability is a legitimate trust expense and falls within the indemnity.

Examples to recall

- Legitimate: carrying on the testator's business and being sued in that capacity where the trustee acted reasonably (*Re Raybould*).
- Legitimate: liability for misleading and deceptive conduct that was a normal business risk and not fraudulent (*Gatsios*).
- Not legitimate: expenses incurred by (1) breach of trust, (2) fraudulent conduct, or (3) criminal acts (*Gatsios*).

CAN THE TRUSTEE RECOUP FROM BENEFICIARIES PERSONALLY?

1. Fund for funeral/care expenses for cadets in a bus disaster; surplus remained.
2. Harman J held it was not charitable, so no cy-près.
3. He applied the "ordinary rule" of resulting trust, including for anonymous donors, saying he saw "no reason" to think small anonymous donors had a different intention to named donors – "They all give for the one object" (*Re Gillingham* [1958] Ch 300, 314). Surplus was money "held upon a trust for which no beneficiary can be found" and was paid into court.

Template

On the facts, [FUND] closely resembles the disaster appeal in *Re Gillingham*, where money was raised by public subscription to pay funeral and care expenses for cadets, and a surplus remained after those purposes were fulfilled. Harman J held the fund was not charitable, so cy-près was unavailable, and applied the "ordinary rule" of resulting trust, treating both named and anonymous donors as having given for a single specific object, so the surplus was held on resulting trust pro rata for them and paid into court as "money held upon a trust for which no beneficiary can be found" (at 314).

Similarly here, contributors to [FUND] can be taken to have given for the single purpose of [PURPOSE], so any surplus is presumptively held on resulting trust rateably for them, with practical difficulties of locating donors addressed by payment into court.

[Soft prompt: if anonymous donors are significant, note that *Re Gillingham* is more generous to them than *Re West Sussex*.]

Step 4 – Refine by source of contributions (Re West Sussex)

Q: What are the different types of contributions making up the surplus?

Work through each that appears on the facts and use the matching template.

(A) Members' subscriptions / regular contributions

Template

To the extent the surplus derives from members' subscriptions or regular contributions paid under a scheme that promised specified benefits, those payments are properly characterised as contractual, not trust contributions. As in *Re West Sussex Constabulary's Trust Funds* [1971] Ch 1, 10, members have received what they contracted for, so there is no resulting trust in their favour over any surplus; that surplus is treated as ownerless and passes bona vacantia.

(B) Entertainments, raffles, sweepstakes, ticket sales

Template

Where surplus arises from money paid for entertainments, raffles or sweepstakes, the price of each ticket is paid for the entertainment or the chance of a prize, not as a direct trust contribution. Any surplus is simply profit from those activities. Following *Re West Sussex* [1971] Ch 1, 11, 22, such receipts do not give rise to a resulting trust; any surplus from these sources is likely to pass bona vacantia.

(C) Collecting boxes / small anonymous cash donations

Template

If part of the surplus comes from coins placed in collecting boxes or similar anonymous small donations, Goff J in *Re West Sussex* treated donors as intending outright, non-recoverable gifts and described any contrary view as "inconceivable and absurd" (at 13–14). On that approach, there is no resulting trust for such donors and any surplus attributable to these contributions passes bona vacantia.

However, relying on *Re Gillingham* [1958] Ch 300, 314, it can be argued that even anonymous donors to a specific disaster fund give for a single object and that surplus should, in principle, be held on resulting trust pro rata for all donors, with anonymity handled by paying into court.

[Soft prompt: choose *Re West Sussex* if you want clean categories; cite *Re Gillingham* if you want a more donor-protective analysis.]

Thieves and volunteers with notice of the theft can be fixed with a constructive trust over identifiable stolen funds. Here, [THIEF] stole [MONEY] from [OWNER] and paid it into [RECIPIENT]'s account. The money remained identifiable. Under *Black v S Freedman*, the thief holds the funds on constructive trust for [OWNER], and [RECIPIENT], as a volunteer, must repay the amount once they know they have benefited from the fraud. By asserting the funds as their own after learning the circumstances, [RECIPIENT] effectively joins in the fraud and becomes a constructive trustee.

Misappropriation and fraud - modern proprietary claims

- Modern authority supports proprietary remedies for misappropriation and fraud, underpinning tracing into mixed bank accounts and complex fraud schemes (*Fistar v Riverwood Legion*; *Wambo Coal*; *Robb Evans*).

Template conclusion
A non bona fide purchaser who still holds misappropriated property or its traceable proceeds will normally be treated as holding it on constructive trust. Accordingly, because [RECIPIENT] still holds [PROPERTY / TRACEABLE PROCEEDS] and is not a bona fide purchaser for value without notice, equity will treat them as holding on constructive trust for [BENEFICIARIES], entitling [BENEFICIARIES] to recover the property itself, subject to tracing rules and any competing equities.

PART C - CONSTRUCTIVE TRUSTS FOR UNCONSCIONABLE CONDUCT: COMMON INTENTION AND JOINT ENDEAVOUR

[Soft prompt: for couple or joint venture property disputes, always check resulting trust and family law first; if that is not decisive, pivot to common intention CT and joint endeavour CT, often alongside proprietary estoppel.]

C1. Common intention constructive trusts

Use this where parties have an actual or inferred common intention about beneficial ownership of specific property and the claimant has acted to their detriment.

Core formulation
Equity may enforce a common intention that property is to be held in a particular way by imposing a constructive trust, provided the claimant has relied on that intention to their detriment and it would be unconscionable for the legal owner to deny the interest (*Allen v Snyder* [1977] 2 NSWLR 685; *Ogilvie v Ryan* (1976) 2 NSWLR 504; *Green v Green* (1989) 17 NSWLR 343; *Shepherd v Doolan* [2005] NSWSC 42; *Imam Ali Islamic Centre v Imam Ali Islamic Centre Inc* [2015] VSC 223).

Elements (Australian approach)
[1] Actual or inferred common intention

- There must be a common intention (express or inferred) that the claimant is to have a beneficial interest in the specific property.
- Courts insist on actual or inferred, not imputed, intention. They will not simply impose what is fair (*Shepherd v Doolan*; *Imam Ali Islamic Centre*; compare *Stack v Dowden* [2007] 2 AC 432 in England).
- Evidence of intention includes:
  - express statements such as "this is your house", "this is for you and me" (*Hohol v Hohol*; *Zaborskis v Zaborskis* [2012] NSWCA 34)
  - financial contributions to purchase or mortgage supporting an inference of shared beneficial ownership (*Shepherd*).
  - treatment of property in wills or estate planning.
- Statements made long after acquisition are only admissible against interest and where closely linked to the transaction.

[2] Detrimental reliance

- Claimant must show material detriment incurred in reliance on the common intention, such as providing funds for purchase or mortgage, paying other expenses that free up funds for the property, or giving up opportunities (*Ogilvie v Ryan*; *Imam Ali Islamic Centre*).

PART F - REMEDIAL CONSTRUCTIVE TRUSTS: CHOOSING THE RIGHT REMEDY

F1. Institutional vs remedial; unjust enrichment vs unconscionability

1. Canadian unjust enrichment model
   - In Canada, remedial CTs are often used to reverse unjust enrichment, especially in domestic property disputes (*Pettkus v Becker* [1980] 2 SCR 834; *Soulos v Korkontzilas* [1997] 2 SCR 217).
   - *Soulos* clarified that CTs may also remedy wrongful conduct and maintain fiduciary norms, not just unjust enrichment.
2. Australian position
   - The High Court in *Muschinski* rejected unjust enrichment as a free standing basis for CTs, insisting on unconscionability as the governing principle (160 CLR 583, 620–622).
   - In *Baumgartner*, CT was imposed to prevent unconscionable assertion of sole ownership after a pooled resources relationship had broken down (164 CLR 137, 148–150).
   - *Giumelli* treated CT as one remedial response to estoppel and refused it where a less invasive remedy would do justice (196 CLR 101, 112–114, 125).

Template
The rule is that Australian law uses CTs to remedy unconscionable retention of benefits and serious fiduciary wrongdoing, not as a general unjust enrichment tool. Here, where the conduct gives rise to an equity (for example estoppel, fiduciary breach), the court must decide whether to recognise an existing institutional CT or to impose a remedial CT from the date of judgment, balancing [CLAIMANT]'s expectations against the rights of third parties and creditors (*Muschinski*; *Baumgartner*; *Giumelli*; *Discotrnics*; *VUT v Wilson*).

F2. Giumelli framework - CT as last resort

Steps
1. Identify the equity
   - Proprietary estoppel, unconscionable conduct, fiduciary breach giving rise to an obligation to confer or not deny a proprietary interest.
2. Prima facie remedy
   - Fulfil the expectation by conveying property, implemented via a CT.
3. Consider less intrusive remedies
   - Ask whether an award of equitable compensation, possibly secured by a charge over land or other property, would adequately satisfy the equity without unduly impacting third parties.
   - Consider:
     - third party occupation and improvements (for example sibling living on land)
     - pending litigation between parties (for example partnership claims)
     - family context and practicalities of subdividing land.
4. Choose proportionate remedy
   - If a CT would unfairly prejudice others or be impractical, order money plus security instead (*Giumelli* 196 CLR 101, 112–114, 125).

Template
The rule is that in cases like estoppel and family property disputes, a CT is a last resort after considering proportionate money and charge remedies. Here, applying *Giumelli*, [CLAIMANT]'s equity arising from [PROMISES] could be satisfied by a constructive trust over [PROPERTY]. However, the court must also consider [THIRD PARTY]'s position as a bona fide occupant who has improved the property, and the complexity of [FAMILY / COMMERCIAL] arrangements. A monetary award equal to the present value of the promised interest, secured by a charge over [PROPERTY], may be a more proportionate remedy. CT remains a last resort where no lesser remedy will adequately vindicate the equity without causing injustice to others.

F3. Interaction with insolvency and creditors

Rule

TRACING

0. ONE LINE TO START A TRACING ISSUE

Use this whenever misapplied trust / fiduciary money has been turned into other assets, mixed in bank accounts, or passed to third parties.

Tracing is not itself a cause of action or a remedy; it is the evidential process by which [CLAIMANT] may follow value from original trust/fiduciary property into its substitutes and mixtures, in order to assert legal or equitable title over the traceable proceeds (*Foskett v McKeown* [2001] 1 AC 102). Here, [TRUST / FIDUCIARY FUNDS] have been misapplied and used to [DESCRIBE USE], so [CLAIMANT] will try to trace those funds into [ACCOUNT / ASSET / HANDS OF VOLUNTEER] and then seek an appropriate proprietary remedy.

[Soft prompt: if there is mixture or complex bank account movement, think **equity**; if simple substitute with no mixture, think both **law** and **equity**.]

PART A – PRECONDITIONS, NATURE OF TRACING, LAW v EQUITY

A1. Preconditions

There must be a breach of trust or fiduciary duty before you can trace trust property

Rule sentence
Tracing allows beneficiaries (or others with an equitable interest) to assert rights in respect of property that has been substituted for the original trust/fiduciary property, and sometimes in the hands of third parties.

Checklist – have the preconditions been met?

1. **Is there a proprietary base?**
    - [CLAIMANT] must have:
        - legal title (for tracing at common law), or
        - an equitable proprietary interest in the property (for tracing in equity), usually under an express/resulting/constructive trust or unadministered estate (*Foskett*).
2. **Has there been a breach / misapplication?**
    - Usually a breach of trust or fiduciary duty so that property has left the authorised sphere.
3. **Does any property or traceable substitute still exist?**
    - If the property has been dissipated (eg trust funds placed in an account that is exhausted/overdrawn, or gambled away), tracing ends; nothing to follow.
    - Example: trust money gambled away so account is empty → no traceable proceeds [eg "Chong Chanell" problem].

Template
Here, [CLAIMANT] had [LEGAL / EQUITABLE] title to [PROPERTY] before the breach, and [TRUSTEE / FIDUCIARY] misapplied it by [DESCRIBE BREACH]. The misapplied funds can still be located in [ACCOUNT / ASSET / HANDS OF X], so the preconditions for tracing are satisfied, subject to whether tracing is at law or in equity.

A2. Tracing at Law

Use this where there is no mixture, and [CLAIMANT] has/retains **legal** title.

Core rule
Although Lord Millett in *Foskett* thought there is nothing inherently legal or equitable about tracing, Australian courts maintain distinct rules. At common law you can trace into **substitutes**, but you **cannot trace through a mixture** (*Brady v Stapleton* (1952) 88 CLR 322).

Checklist

1. **Is [CLAIMANT] trying to defeat a bona fide purchaser for value without notice (BFPFV)?**

Similarly, in *AG (NSW) v Perpetual Trustee* (Milly Milly) a farm training scheme for orphan lads was impracticable due to inadequate land and funds, but the High Court inferred a general intention to benefit community training, allowing a cy pres scheme to sell the farm and apply proceeds to similar charitable purposes.

Template – initial impossibility cy pres
Here, at the time the gift took effect it was impossible or impracticable to carry out [SPECIFIC SCHEME] because [eg named institution never existed, discriminatory condition made institution refuse, scheme under funded]. As in *Re Lysaght* and *Gray v Australian Cancer Foundation*, the court will first try to correct trivial misdescriptions or treat institutional name changes as continuity (*Re Medgwood*; *Davis v ADRA*; *Public Trustee v Cerebral Palsy Association*). If that is not possible, it will ask whether [SETTLOR] had a general charitable intention.

The instrument's [language / context] indicates a general intention to benefit [AREA eg medical education / cancer research / children in care], of which [SPECIFIC SCHEME] was only one mode. Under the general law, and reinforced by s 10(2) Charitable Trusts Act 1993 (NSW), which presumes a general charitable intention unless the contrary appears, the court may disregard unworkable detail and apply the funds cy pres to a similar charitable object, such as [ALTERNATIVE CHARITY OR PURPOSE].

Template – supervening impossibility and surplus
Where [TRUST] was initially capable of performance but has become impossible or unsuitable due to changed circumstances, or where the original purpose has been fully satisfied leaving surplus property, cy pres may be ordered without the need to show general charitable intention, since the property is already dedicated to charity. Examples include closure or deregistration of a hospital or association after the donor's death (*Re Graham*), retirement villages or homes for veterans becoming obsolete due to demographic change (*RSL Veterans Retirement Villages*), and institutional care models for disabled children becoming inappropriate (*Cram Foundation v Corbett Jones*).

Similarly, where the original object has been fulfilled but a cottage or fund remains, as in the *Anzac Cottage Trust* case, surplus may be applied cy pres to housing for needy families of deceased service personnel. On these facts, [TRUST] has become [impossible / unsuitable] because [REASON], so a cy pres scheme redirecting property to [SIMILAR PURPOSE] would be ordered.

3.4 Statutory cy pres – Charitable Trusts Act 1993 (NSW) ss 9 and 10

s 9 – extension of occasions for cy pres
Section 9(1) allows cy pres where the original purposes, wholly or in part, "have ceased to provide a suitable and effective method" of using the property, having regard to the spirit of the trust. This goes beyond strict impossibility and includes obsolescence or ineffectiveness.

Cases such as *AG (NSW) v Fulham* and *Free Serbian Orthodox Church Diocese v Bishop Irinej* emphasise:

1. "Wholly or in part" – schemes can adjust part of the trust.
2. "Suitable and effective method" – focus on practical usefulness.
3. Regard to "spirit of the trust" – the basic charitable intention, not literal wording.

s 10 – presumption of general charitable intention
Section 10(1) preserves the requirement of general charitable intention for initial impossibility. Section 10(2) presumes such an intention unless the instrument shows otherwise, making cy pres easier to apply.

Template – applying ss 9 and 10
In NSW, s 9 Charitable Trusts Act 1993 extends cy pres beyond strict impossibility to cases where the original purposes, wholly or in part, have "ceased to provide a suitable and effective method" of using the property, having regard to the spirit of the trust. The court must identify the basic purposes and then decide whether the original terms are still suitable and effective in modern conditions, as explained in *AG (NSW) v Fulham* and *Free Serbian Orthodox Church Diocese v Bishop Irinej*.