

e.g The rule is strict and irrebuttable. Even if the trust could not have taken the opportunity, the trustee cannot retain it personally (Keech v Sandford).

classic secret commission. *Williams v Barton*

e.g they learned of any opportunity for investment while administering the trust and trust lost a potential gain.

REMEDY- ACCOUNT OF PROFITS

- Strict liability applies regardless of motive; the HCA confirmed Keech in Australia (Chan v Zacharia).
- Honesty is irrelevant — a fiduciary cannot retain a profit obtained by reason of their position, though the court may grant a generous allowance for skill and effort (Boardman v Phipps).
- Modern Australian restatement: there must be a SIGNIFICANT POSSIBILITY that the profit was obtained because of the breach (Ancient Order of Foresters v Lifeplan).

APPLICATION

WRITE THIS

I turn next to [T]'s fiduciary duties. [T] is a fiduciary subject to the no-conflict and no-profit rules. The rule is strict: even an honest trustee, and even one who could not have used the opportunity for the trust, cannot retain a benefit obtained by reason of their fiduciary position (Keech; Chan; Boardman). [X] must show a significant possibility the profit came from the breach (Lifeplan).

SPOT THIS

Fiduciary issues arise wherever the trustee has a personal interest, holds another fiduciary role, or takes up an opportunity that came to them through the trust.

CONCLUSION

On balance [conclude whether the duty/right/defence is made out], so [outcome for the parties]. State the position and, where the law is split, flag the Victorian position first.

EXAM TRAPS

- Treating ANY benefit as automatically caught — you still need a fiduciary position plus a significant possibility the profit came from it (Lifeplan).
- Arguing the trustee was honest as if that mattered — it does not (Boardman).

STEP 4 — Trust dealings — self dealing v fair-dealing- this is application of conflict

EXAM TIP: Memory hook — SELF-dealing is automatically VOIDABLE at the beneficiary's election regardless of price or good faith (Clay v Clay). FAIR-dealing is valid only if the trustee proves full disclosure and a fair price.

WHAT TO LOOK FOR

Trustee buys trust property or sells personal property to the trust (self-dealing). Trustee buys a beneficiary's beneficial interest (fair-dealing). Trustee mixes trust assets with their own.

Raise it when: the trustee buys trust property (self-dealing) or buys a beneficiary's interest (fair-dealing) — classify which one, because the consequence differs.

STEP 8 — Duty to act impartially — s 7(2)(c)

EXAM TIP: Re Mulligan is the go-to: holding only fixed-interest to favour the life tenant, starving the remaindermen of capital growth, breaches impartiality. Tanti v Carlson is the Victorian authority.

WHAT TO LOOK FOR

Trust has MULTIPLE beneficiaries or CLASSES (life tenants entitled to income + remaindermen entitled to capital). Does the investment favour one class over another? Also watch for a sale to the trustee's spouse or a related party.

Raise it when: there are income (life-tenant) and capital (remainder) beneficiaries and the strategy favours one — impartiality is a duty (s 7(2)(c)).

ISSUE

Did [T] act impartially between beneficiaries and between classes?

RULE

s 7(2)(c) preserves the equitable duty to act impartially in investment scenarios. Impartiality means FAIRLY, not equally (Nestle; Re Mulligan). The duty is to have regard to the interests of the estate AS A WHOLE (VBN v APRA).

Classic issues: wasting assets (depreciating, to the detriment of remaindermen/capital Bs); reversionary or non-income-producing assets (to the detriment of life tenants/income Bs). Tax benefits to the trust as a whole may justify some inequality (Nestle).

E.G [Betty] favoured her own income investments over capital growth for the children, BENEFICIARIES. Classic income vs capital beneficiary tension. Link to s8 factors.

A sale to the trustee's spouse or related party raises TWO heads: (1) impartiality / interests of all Bs; (2) a presumption of benefit to the trustee, which the trustee must REBUT by proving full value and absence of benefit (Tanti v Carlson — not rebutted there).

APPLICATION

WRITE THIS

I turn next to the competing interests of the beneficiaries. [T] is under a duty to act impartially between beneficiaries and classes (s 7(2)(c); Re Mulligan), having regard to the interests of the estate as a whole (VBN v APRA). The trust has [life tenants] entitled to income and [remaindermen] entitled to capital; [T] invested [predominantly] in [type], favouring [income / capital] at the expense of the other class. Impartially means fairly, not equally (Nestle). [Where sale to a related party:] the sale to [T]'s [spouse] raises a presumption of benefit to [T] which must be rebutted (Tanti v Carlson).

RED FLAG

Life-interest / remainderman split, or a change from capital-growth to income-bearing assets, triggers the s 7(2)(c) impartiality analysis. A spouse / family member / close associate as purchaser triggers both impartiality AND the Tanti presumption of benefit.

CONCLUSION

On balance [conclude whether the duty/right/defence is made out], so [outcome for the parties]. State the position and, where the law is split, flag the Victorian position first.

EXAM TRAPS

38. Reading 'impartially' as 'equally' — it means fairly (Nestle).
39. Missing the second Tanti layer — the presumption of benefit, which the trustee must rebut.
40. Judging the split with hindsight rather than contemporaneously.

Case	Proposition
Speight v Gaunt (1883)	Equitable management standard — a reasonably prudent businessperson managing their own affairs; trustee not an insurer of an agent's honesty.
Byrnes v Kendle (2011)	Allowing a beneficiary to live rent-free, or any productive asset to sit idle, is an investment decision, not management.
Perpetual Trustees Co Ltd v Cheyne [2011] WASC 225	An 'investment' is a transaction expected to provide a profitable return; no expected return = not an investment.
Re Sherriff [1971] 2 NSWLR 438	Merely holding money without generating a return may not be an 'investment'; pairs with Cheyne on the threshold question.
Bartlett v Barclays Bank [1980] Ch 515	Professional trustee held to a higher standard; speculative land development before approval = breach; honest but unreasonable defeats s 67.
ASC v AS Nominees (1995) 133 ALR 1	Confirms the Bartlett professional standard for corporate trustees and directors; duty not to mix trust funds.
Re Hayes	Mixed professional + non-professional trustees are all held to the higher s 6(1)(a) standard; the non-professional may seek s 67 relief.
HLB v Trust Company Ltd (2010)	Annual review is a floor, not a ceiling; trustee must shop around and review more frequently in volatile markets / for large or vulnerable funds.
Nestle v NWB	Prudence judged contemporaneously, not with hindsight; impartiality means fairly, not equally; endorses Modern Portfolio Theory.
Jones (NZ)	MPT endorsed alongside Nestle; diversification is central.
Debeljak	Breaches are identified at the portfolio level, but losses are quantified asset-by-asset.
Re Mulligan [1998] 1 NZLR 481	Trustees must act fairly between income and capital beneficiaries; inflation must be actively considered; decisions judged contemporaneously.
VBN v APRA (1998)	No positive duty to take advice in every case; the duty is to the interests of the estate as a whole.
Cowan v Scargill	The duty to take advice bites when the trustee lacks expertise; trustees must act in beneficiaries' financial interests, not personal moral preferences.
Tanti v Carlson (1948 Vic)	Sale to the trustee's spouse raises two heads — impartiality and a presumption of benefit to the trustee, which must be rebutted.
Youyang v Minter Ellison (2003) 212 CLR 484	Equitable compensation on the but-for standard restores the trust to the position it would have occupied.
Dalrymple; Re Stuart	On a s 67 application the onus is on the trustee for all three limbs.