

LAWS2385 • SAMPLE PREVIEW

Equity and Trusts — Complete Exam Package

87 pages • 17 problem-question frameworks • 10 critical-analysis frameworks • master flowchart • case table • legislation

This preview: full contents, the master flowchart and issue-spotting checklist (section 2), problem framework P12 and essay framework E2.

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2. Master flowchart and issue-spotting checklist

2.1 Order of play for any problem question

Step	What to do	Go to
1. Identify the issue	What type of equity or trust claim is this? Who are the parties and what is their relationship? Is the claim from a common law right with an equitable defence, a claim to an equitable interest, a breach of fiduciary duty or trust, an assignment or constitution question, or a tracing / accessorial / monetary remedy claim?	2.2; P1
2. Establish the wrong	Is there a recognised equitable obligation? Is there a valid trust or fiduciary relationship? Has a duty been breached?	P2–P10, P12
3. Identify the remedy	Personal or proprietary (insolvency consequences)? Disgorgement (account of profits) or compensation (loss)? Election — the plaintiff chooses whichever is higher-yielding (Tang Man Sit).	P1, P11, P13, P15, P16
4. Consider defences	Exculpation clause (Armitage v Nurse); statutory excuse (s 85 Trustee Act 1925 (NSW)); equitable defences (consent, acquiescence, release); BFP defence; change of position; bars to relief.	P10, P13, P17
5. Acknowledge contested areas	State the disagreement, apply the preferred or ratio view, note the alternative.	E1–E10

2.2 Issue-spotting checklist — fact triggers

Fact trigger in the problem	Issue to raise	Go to
A party wants something other than money — performance, an order to stop, a document fixed or set aside	Selecting an equitable remedy; exclusive vs auxiliary jurisdiction; discretion	P1; P16
Defendant is insolvent or bankrupt; other creditors compete	Personal vs proprietary remedy; constructive trust or lien; tracing	P1; P13; P15
Two or more people claim the same property; a sale or mortgage to a third party	Priority dispute: legal vs equitable, equitable vs equitable, mere equity vs equitable interest; doctrine of notice; BFP	P2
A right that may not be "property" (information, a licence, a contractual right to return equivalent shares)	Ainsworth test	P2
Oral agreement for a lease; specifically enforceable contract	Walsh v Lonsdale equitable lease; vendor-purchaser constructive trust	P2; P15
A promise of land or property, relied on to the promisee's detriment, then broken	Proprietary estoppel; remedy (expectation measure; Giumelli; Sidhu)	P3; P15
An agent, director, solicitor, adviser, partner or joint venturer takes a profit, opportunity or bribe, or acts for both sides	Fiduciary relationship, scope, no-conflict and no-profit rules, informed consent	P4
A gift of shares, a debt, royalties, future dividends, or a beneficial interest; an oral direction to a trustee	Assignment: assignability, consideration, Corin v Patton, Norman, s 12 and s 23C	P5
Words like "I hope", "I desire", "on condition that", a deed "to take effect" later, "my old friends", a share of a bulk	Three certainties	P6
Settlor signs a transfer but something is left undone; settlor is one of several trustees	Constitution: Milroy v Lord; Corin v Patton; Choithram; timing of declaration and vesting	P6
Trustee mixes funds, sells to themselves, refuses to show documents, follows the settlor's wishes, decides "until further notice"	Trustee duties; self-dealing / fair dealing; information; Karger v Paul review	P7
Trustee invests in risky or undiversified assets, or ignores one class of beneficiary; ethical investment	Power to invest, s 14A prudence, s 14B duties, s 14C factors, s 90, s 90A	P8

Fact trigger in the problem	Issue to raise	Go to
Trustee incurs costs or debts; trustee is sued; beneficiaries want to wind up or change the trust	Indemnity (s 59(4); Buckle), Hardoon / s 100A, s 63 advice, Saunders v Vautier, variation (s 81, s 86A)	P9
Trustee breaches but relies on a clause, on advice, or on the beneficiary's consent; trustee should be replaced	Exculpation clauses, s 59(2), s 85, consent / acquiescence / release, standing, removal	P10
Loss caused, or profit made, by the wrongdoer	Equitable compensation (substitutive vs reparative); account of profits (Warman; Lifeplan); election	P11
A bank, adviser, family member or company helped with or received the proceeds of a breach	Barnes v Addy: knowing receipt, knowing assistance; knowing inducement	P12
Money mixed in an account, spent, invested, paid to a volunteer, used to pay a mortgage	Tracing rules; defences (BFP, change of position, Torrens)	P13
One person paid for property in another's name; family transfer; loan for a specific purpose; illegal purpose	Resulting trusts; presumption of advancement; Quistclose; Nelson v Nelson	P14
Partners or family members pool resources and the relationship ends; theft or fraud; mutual wills	Constructive trusts by category	P15
Long delay; plaintiff's own misconduct; severe hardship to the defendant; third parties affected	Bars to equitable relief	P17

2.3 Master decision table (rebuilt flowchart)

Question	If YES	If NO
Q1. Is the claim to an equitable proprietary interest (beneficial interest, equitable mortgage, charge, lien)?	Apply Ainsworth; classify as legal interest, equitable interest or mere equity → P2	Go to Q2
Q2. Is there a priority contest between competing interests?	Identify the competing interests and apply the priority rule → P2	Go to Q3
Q3. Did someone promise an interest in property and the claimant rely to their detriment?	Proprietary estoppel → P3 (remedy → P15)	Go to Q4
Q4. Is there a fiduciary relationship (status-based, undertaking test, or mutual trust and confidence)?	Scope → no-conflict / no-profit → consent → remedy → P4	Go to Q5
Q5. Has property been transferred or gifted (legal or equitable chose, future property)?	Assignment → P5	Go to Q6
Q6. Has an express trust been created (three certainties, mode of creation, formalities, public policy)?	P6; then duties → P7, investment → P8, rights → P9	Go to Q7
Q7. Has a trustee breached a duty?	Defences and remedies → P10; money remedies → P11	Go to Q8
Q8. Did a third party receive trust property, assist or induce the breach?	Barnes v Addy → P12	Go to Q9
Q9. Does the claimant want specific property or its substitute back?	Tracing and claiming → P13	Go to Q10
Q10. Does the law impose a trust regardless of intention (failure of express trust, purchase in another's name, unconscionable denial)?	Resulting trust → P14; constructive trust → P15	Go to Q11
Q11. Does the claimant seek performance or restraint?	Specific performance or injunction → P16	—

Question	If YES	If NO
FINAL STEP (every claim)	Personal or proprietary? Election? Bars to relief → P1, P11, P17	—

TRAP FUSION FALLACY: The Judicature Acts effected procedural fusion only. Legal and equitable rights remain distinct. Do not assume equitable remedies always supplement contractual ones (Streetscape).

TRAP Maxims are NOT rules. They cannot solve a problem on their own and must not be applied mechanically: Corin v Patton (1990) 169 CLR 540.

3. Problem-question frameworks (sample: P12)

P12. Accessorial liability — Barnes v Addy

Source of power or rule

When the primary fiduciary is insolvent, the plaintiff pursues third-party participants with "deep pockets". Third parties may be held accountable in equity as constructive trustees — personally and sometimes proprietarily (but cannot be made to account for more than was misappropriated).

DEFINITION CONSTRUCTIVE TRUSTEE (accessorial sense)

A person accountable in equity as if she were an express trustee. Minimum duties: restore property received in breach of fiduciary obligation; compensate the trust or principal for loss caused by the breach.

RULE Barnes v Addy (1874) 9 Ch App 244 (Lord Selborne LC): strangers are not constructive trustees merely for acting as agents "unless those agents receive and become chargeable with some part of the trust property [FIRST LIMB], or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees [SECOND LIMB]."

FIRST LIMB — knowing receipt	SECOND LIMB — knowing assistance
Defendant received property transferred in breach	Defendant assisted the commission of the breach with knowledge
Personal + potentially proprietary remedies	Personal remedies ONLY
Breach need NOT be dishonest	Breach MUST be dishonest and fraudulent (Farah — Australian position)
Requirements: (1) breach of fiduciary obligation; (2) beneficial receipt of property; (3) knowledge Baden (i)–(iv)	Requirements: (1) dishonest and fraudulent breach; (2) assistance in a significant way; (3) knowledge Baden (i)–(iv)

The Baden knowledge scale

Category	Sufficient?
(i) Actual knowledge	ACTUAL — sufficient for both limbs
(ii) Wilfully shutting one's eyes to the obvious ("Nelsonian" knowledge)	ACTUAL — sufficient for both limbs
(iii) Wilfully and recklessly failing to make the inquiries an honest and reasonable person would make	ACTUAL — sufficient for both limbs
(iv) Knowledge of circumstances which would indicate the facts to an honest and reasonable person	CONSTRUCTIVE — sufficient for both limbs (Farah; Grimaldi v Chameleon Mining (2012) 200 FCR 296)
(v) Knowledge of circumstances which would put an honest and reasonable person on inquiry	CONSTRUCTIVE NOTICE — NOT sufficient alone: Farah Constructions v Say-Dee (2007) 230 CLR 89

TRAP CRITICAL AUSTRALIAN RULE: category (v) ALONE is NOT sufficient for knowing receipt OR knowing assistance: Farah Constructions v Say-Dee (2007) 230 CLR 89 (HCA). The strict liability / unjust enrichment approach to knowing receipt was rejected as "unhistorical".

First limb — knowing receipt

Step	Question	Rule
1	Was there a BREACH OF FIDUCIARY OBLIGATION?	Any fiduciary breach qualifies (directors treated as trustees: Belmont Finance [1980]); it need NOT be dishonest and need not be a breach of trust. NO → no first-limb liability
2	Did the defendant BENEFICIALLY RECEIVE PROPERTY (or its traceable proceeds)?	(a) Must be legally recognised PROPERTY — information is not property (Farah: wife and daughters received information enabling purchase of adjoining properties → no liability). (b) Receipt must be BENEFICIAL, not ministerial — as principal, not agent: "the recipient must have received the property for his own use and benefit" (Agip (Africa) Ltd v Jackson [1990] Ch 265). Banks generally receive as the customer's agent → not liable (Agip); but a bank that applies the money for its OWN benefit (e.g. reducing the customer's overdraft) receives beneficially → liable (Stephens Travel Service v Qantas (1988) 13 NSWLR 331)
3	Did the defendant have knowledge at Baden (i)–(iv)?	Ask (1) what the defendant actually knew [fact]; (2) what type of knowledge is required [law]. Burden on the principal. Grimaldi: liability is fault-based and turns on the defendant's conscience; Baden categories are not rigid formulae. Liability attaches from the time knowledge is acquired — money spent before awareness is not accountable (Re Blundell (1888) 40 Ch D 370)
Result	YES to all → liable, accountable as a constructive trustee	—

Situation	Remedy
Recipient no longer holds the property	Personal: equitable compensation (value of property received) or account of profits
Recipient still holds the property	Possibly proprietary: trace and claim the property (P13)
Registered (Torrens) land	Indefeasible title, except (1) party to fraud; (2) the in personam principle (primary wrongdoers only, per Farah)

- **Alternative claim — common law unjust enrichment:** although Farah rejected strict equitable liability, a common law claim for money had and received can coexist — strict liability at law, subject to defences (change of position, bona fide purchase): Fistar v Riverwood Legion and Community Club Ltd (2016) 91 NSWLR 732. Knowing receipt is still needed where the victim claims consequential losses or an account of profits from the third party. A bona fide purchaser for value without notice is under no liability to a claimant whose title is equitable.

Second limb — knowing assistance

Step	Question	Rule
1	Was the breach of fiduciary obligation DISHONEST AND FRAUDULENT?	The breach ITSELF must be dishonest and fraudulent; a purely innocent or negligent breach is insufficient (Farah). "Dishonest and fraudulent designs" can include breaches of trust and breaches of fiduciary duty. The HCA did not adopt the Royal Brunei test (assister's dishonesty sufficient) but left the door open. Meaning of dishonesty: "a transgression of ordinary standards of honest behaviour ... it is not necessary to demonstrate that the person thought about what those standards were" — Hasler v Singtel Optus Pty Ltd (2014) 87 NSWLR 609; endorsed in Lifeplan. NO → no second-limb liability → consider knowing inducement
2	Did the defendant ASSIST in a significant way?	Must participate "in a significant way" (Farah). Assistance where the breach would not have occurred without it ("but for") or where it would have occurred anyway but was

Step	Question	Rule
		facilitated — both suffice (Harstedt v Tomanek). It should "forward or advance the primary breach or misconduct in some way. Mere passive acquiescence in the breach would not, in the ordinary case, suffice" (Re-Engine v Fergusson). Omissions short of passive acquiescence can (left open) constitute assistance
3	Did the defendant have knowledge at Baden (i)–(iv)?	Same as knowing receipt; (v) alone is not enough (Farah, approving Consul Development). A person cannot escape through "moral obtuseness" where an ordinary person would have recognised the impropriety (Consul)
Result	YES to all → liable — PERSONAL remedies only	—

Remedies for knowing assistance (personal only):

- **Equitable compensation** — the usual remedy: full loss caused by the breach; the assister may seek contribution from the fiduciary and co-assisters; compound interest may be awarded (Westpac v Bell Group (No 3)).
- **Account of profits** — where the assister independently profited from participating; it must be the ASSISTER'S profits, not the fiduciary's (Chameleon Mining NL v Murchison Metals Ltd [2010] FCA 1129). Lifeplan: account for the full value of the business (P11).
- **Election** — if the breach causes both loss and gain, the plaintiff must elect.

Other forms of participatory liability

Knowing inducement	Trusteeship de son tort
Separate cause of action (predates Barnes v Addy) — fills the gap where knowing assistance fails because the breach was not dishonest. Recognised as available in Grimaldi v Chameleon Mining (2012) 200 FCR 296	A person who acts as trustee WITHOUT being properly appointed and administers the trust ("trustee by his own wrong") is liable as if properly appointed — full fiduciary obligations apply
Elements (Pittmore Pty Ltd v Chan (2020) 104 NSWLR 62): (1) intentional conduct that CAUSES and is INTENDED TO CAUSE a breach of trust or fiduciary duty; (2) the third party KNEW she was bringing about a breach. No difference between inducing and procuring	Requires SUFFICIENT CONTROL over trust property to dispose of it: Re Barney [1892]. Equity also recognises the executor de son tort and agent de son tort
No dishonest breach required — key advantage over knowing assistance. Knowledge: Baden (iv) sufficient. Personal remedies only	—

Tracing claims can be combined with both limbs of Barnes v Addy (P13). Defence: bona fide purchaser for value without notice of the claimant's equitable interest. Where a knowing receipt claim also entitles the principal to recover specific property, the applicable standard for the purchaser's defence (knowledge test vs notice) remains uncertain.

Element	Knowing receipt	Knowing assistance	Knowing inducement
Dishonest breach required?	No	Yes (Farah)	No
Receipt needed?	Yes — beneficial receipt	No	No
Knowledge	Baden (i)–(iv)	Baden (i)–(iv)	Baden (iv) sufficient
Remedies	Personal + possibly proprietary	Personal only	Personal only
Key case	Farah (2007, HCA)	Farah (2007, HCA)	Pittmore (2020, NSWCA)

Exam tips and common traps

TRAP Knowing assistance in Australia: the BREACH ITSELF must be dishonest and fraudulent. Even a dishonest assister escapes if the breach is innocent — then argue knowing inducement. This differs from Royal Brunei Airlines v Tan [1995] 2 AC 378 (English position — NOT followed in Australia).

TRAP Information is NOT property (Farah) — it cannot found knowing receipt.

EXAM TIP Run both limbs (and inducement) for every third party in the facts; for each, finish on remedy and whether the defendant still holds traceable property.

4. Essay and critical-analysis frameworks (sample: E2)

E2. When should the law recognise a fiduciary relationship, and what should it demand?

Question themes: undertaking vs vulnerability; status vs fact-based relationships; proscriptive vs prescriptive duties; contracting out.

Position A — narrow, undertaking-based, proscriptive	Position B — broader, vulnerability- or expectation-based
Undertaking test (Mason J, Hospital Products (1984) 156 CLR 41): an undertaking to act for or in the interests of another in the exercise of a power or discretion affecting that person's interests	Grimaldi v Chameleon Mining (No 2) (2012) 200 FCR 296: a person is a fiduciary where her undertaking or assumed responsibility "would thereby reasonably entitle that other to expect that he or she will act in that other's interest to the exclusion of" her own
Naaman v Jaken [2025] HCA 1 (majority — Gageler CJ, Gleeson, Jagot and Beech-Jones JJ): undertaking test confirmed; a mere undertaking to cooperate is insufficient; obligations moulded to the relationship; contractual terms define scope	Naaman minority (Gordon, Edelman and Steward JJ): vulnerability is a key independent criterion — a more expansive approach
Only proscriptive obligations: Breen v Williams (1996) 186 CLR 71 — no positive duty to act in the beneficiary's best interests	Canada and other jurisdictions recognise positive duties (including parent-child fiduciary relationships — not followed in Australia)
Courts will not make agreements for the parties (Hospital Products); fiduciary relationships must accommodate the contract; express exclusion is effective (ASIC v Citigroup (2007) 160 FCR 35)	Pre-contractual fiduciary relationships can arise from mutual trust and confidence (UDC v Brian (1985) 157 CLR 1); an attempt to contract out may itself be a breach where a relationship already exists
Do not "read equity backwards" to reach a preferred remedy (criticism of Chase Manhattan)	Multifactorial indicators (Breen) — confidence, inequality, undertaking, unilateral discretion, dependency or vulnerability — capture real relationships of trust

Thesis bank:

- The Naaman majority is right: fiduciary obligations are exceptional and should be confined to relationships where one party has undertaken to act in another's interests; vulnerability is a consequence of, not a substitute for, that undertaking.
- Alternatively: the undertaking test is under-inclusive; vulnerability (the Naaman minority; Grimaldi) better explains why equity intervenes — beneficiaries cannot supervise fiduciaries.
- On content: Australia's proscriptive-only approach (Breen) keeps fiduciary law coherent and prevents it from duplicating contract and negligence (Hill v Van Erp; Streetscape).

Counter-arguments to engage: the strictness of the rules (Regal Hastings; Boardman; Keech v Sandford) justifies a narrow gateway — but it also cuts the other way, as a narrow gateway leaves vulnerable parties unprotected. Note Queensland Mines v Hudson as a warning about letting the board define scope.