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# EQUITY LAW

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A STUDY, TUTORIAL &  
TEACHING GUIDE



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BY DR ADRIAN ADAMS

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# EQUITY LAW

## A Study, Tutorial & Teaching Guide

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By Dr Adrian Adams

This edition integrates the Week 1 and Week 2 live Forums, actual Tutorials 1-3 supplied for Equity 263, the prescribed/recommended resource register, verified primary authorities, and the issue patterns shown in the supplied 2024 and 2025 end-of-semester examinations.

**Current Queensland legislation.** The course resource list displays the repealed *Trusts Act 1973 (Qld)*. Current Queensland trust legislation is the [Trusts Act 2025 \(Qld\)](#), which commenced on 28 April 2026. Historical course references are preserved where relevant, while current-law statements use current legislation.

## How this book teaches Equity

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ISSUE → WHY IT MATTERS → EXACT DOCTRINE / STATUTE → ELEMENTS → AUTHORITY → APPLICATION → COUNTERARGUMENT → REMEDY / CONSEQUENCE → CONCLUSION.

Questions and answers are separated. Each answer section begins on the following page. The rotating light learning palette is the same approved palette used in *Taxation Law in Australia*.

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# Course Resource Register

## **PRESCRIBED — [Equity and Trusts: Commentary and Materials](#)**

Gino Dal Pont, 8th ed, 2023

Core case-and-commentary text identified in the Bond resource list.

## **PRESCRIBED / HISTORICAL — [Trusts Act 1973 \(Qld\)](#)**

Queensland legislation

Course-listed legislation. Repealed on 28 April 2026. Retained here for course/history cross-reference only.

## **CURRENT LAW — [Trusts Act 2025 \(Qld\)](#)**

Queensland legislation

Current Queensland trusts legislation from 28 April 2026. This Act controls where current law differs from the repealed 1973 Act.

## **OTHER RESOURCE — [Equity and Trusts in Australia](#)**

Gino Dal Pont, 8th ed, 2023

Comprehensive Australian equity and trusts text.

## **OTHER RESOURCE — [Equity, Chapter 1: Dual Legal Systems: Common Law and Equity](#)**

Sarah Worthington, 2nd ed, 2006, pp 3-21

Historical and conceptual foundation for the dual common law/equity system.

## **OTHER RESOURCE — [Meagher, Gummow and Lehane's Equity: Doctrines and Remedies](#)**

J D Heydon, M J Leeming, P G Turner, 5th ed, 2015

Leading Australian treatise on equitable doctrines and remedies.

## **OTHER RESOURCE — [Principles of Australian Equity and Trusts - Chapter 4: Nature of Equitable Estates and Interests](#)**

Peter Radan and Cameron Stewart, 5th ed, 2022, pp 61-77

Nature and classification of equitable interests.

## **OTHER RESOURCE — [Cases and Materials on Equity and Trusts](#)**

J D Heydon and M J Leeming, 9th ed, 2018

Casebook bringing together leading equity and trust authorities.

**OTHER RESOURCE — [Principles of Australian Equity and Trusts - Chapter 5: The Law of Assignment](#)**

Peter Radan and Cameron Stewart, 5th ed, 2022, pp 78-106

Equitable assignment, transfer and priority concepts.

**OTHER RESOURCE — [Trusts Law in Australia](#)**

Denis S K Ong, 5th ed, 2018

Comprehensive Australian trusts law text.

**OTHER RESOURCE — [Ong on Equity](#)**

Denis S K Ong, 2011

Detailed Australian analysis of equitable interests, fiduciary law, estoppel and remedies.

**OTHER RESOURCE — [Equity and Trusts](#)**

Michael Evans, Theresa Power and Joseph Power, 5th ed, 2024

Current Australian student text on equity and trusts.

**OTHER RESOURCE — [Fiduciary Reflections](#)**

Paul Finn, (2014) 88(2) Australian Law Journal 127-144

Scholarly reflection on the nature and development of fiduciary principle.

**OTHER RESOURCE — [Fiduciary Reflections](#)**

Paul Finn, in *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (2016), pp 356-380

Book chapter republication / extended fiduciary scholarship.

**OTHER RESOURCE — [Tracing, Mixing, and Innocent Claimants](#)**

Jordan English and Mohammad Jaamae Hafeez-Baig, (2021) 84(3) *Modern Law Review* 593-607

Modern analysis of competing innocent claimants and mixed funds.

**CASE — [Paul v Constance \[1977\] 1 All ER 195; \[1977\] 1 WLR 527](#)**

Court of Appeal (England and Wales)

Certainty of intention: ordinary words and conduct can objectively manifest an immediate trust.

**CASE — [Gross v Lewis Hillman Ltd \[1970\] Ch 445; \[1969\] 3 All ER 1476](#)**

Court of Appeal (England and Wales)

Course-listed authority. Relevant to representation/transactional analysis and must be used only for its actual proposition in the relevant topic.

**CASE — [Re Armstrong \[1960\] VR 202](#)**

Supreme Court of Victoria

Certainty of intention; formal words such as “trust” are not indispensable where the objective circumstances establish a trust.

**CASE — [Dickinson v Burrell \(1866\) LR 1 Eq 337; 55 ER 894](#)**

Court of Chancery

Important distinction between assigning property with an incidental right to sue and assigning a bare right to litigate.

# Development of Equity, Fusion and the Nature of Equitable Interests

**Chapter purpose.** This chapter teaches why equity exists, how it developed alongside the common law, how the Judicature reforms changed court administration without simply erasing doctrinal distinctions, and how to classify legal, equitable, proprietary and personal rights before choosing a remedy. It incorporates the Week 1 live forum and the actual Tutorial 1 questions.

## 1.1 Equity is nuanced: start with the right, not a free-standing appeal to fairness

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Equity is not a licence for a court to decide a dispute by asking only what seems fair. The Week 1 forum repeatedly stressed that the subject is nuanced, difficult to reduce to templates, and driven by *intention*, *substance over form* and the exact legal relationship created by the facts. The exam method follows from that point: identify the claimant, the defendant, the right or obligation, the source of that right, the scope of the doctrine, and only then the remedy.

## 1.2 From common law writs to Chancery

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After the Norman conquest of 1066, royal administration gradually produced a body of law common to the realm. Access to the royal common-law courts was historically controlled through forms of action and writs. When no suitable writ existed, when the common-law machinery was too rigid, or where enforcement of a legal right would operate unconscionably, petitions to the Crown and later to the Lord Chancellor became an alternative route

to justice. Chancery therefore developed alongside, rather than simply replacing, the common law.

The historical point matters today because it explains three recurring features of equity. First, equitable orders traditionally act *in personam*: the court directs the defendant's conscience and conduct. Secondly, equity developed doctrines unknown to the common law, including trusts and fiduciary obligations. Thirdly, equitable remedies historically responded to shortcomings in common-law remedies, which is why the origin and jurisdictional basis of the remedy still matter.

## 1.3 Earl of Oxford's Case: why the conflict mattered

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[Earl of Oxford's Case \(1615\) 21 ER 485](#) is the classic institutional conflict. Magdalen College conveyed land through Queen Elizabeth I to Benedict Spinola, and the property ultimately passed to the Earl of Oxford. The purchasers and under-tenants developed the land extensively, including the construction of about 130 houses. The College later sought to reassert title under the statute restricting alienation of college lands. The common-law and Chancery positions collided. Lord Chancellor Ellesmere restrained enforcement of the common-law outcome. King James I referred the institutional dispute for advice, including to Sir Francis Bacon, and the settlement confirmed the priority of equity where the two systems were irreconcilably in conflict.

**Precision correction from the live transcript.** The Lord Chancellor in the case was Lord Ellesmere, not the Earl of Oxford. The case takes its name from the Earl as a litigant/title-holder. This distinction is important in a publication-quality case note.

## 1.4 The three jurisdictions of equity

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**Exclusive jurisdiction** covers rights and obligations created by equity itself, such as trusts and fiduciary obligations. **Concurrent jurisdiction** concerns areas in which both common law and equity may respond to the same factual field, though often by different doctrines or remedies.

**Auxiliary jurisdiction** describes equity assisting the enforcement of common-law rights, historically through remedies such as injunctions, specific performance or discovery where the legal right existed but the common-law process or remedy was inadequate.

## 1.5 Judicature reforms, administrative fusion and the fusion fallacy

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The Judicature Acts 1873 and 1875 reorganised the administration of law and equity so that one court system could administer both. That did not mean that every common-law rule or remedy became automatically available for every equitable cause of action, or vice versa. A strong answer distinguishes **fusion of administration** from **substantive doctrinal fusion**.

The course uses [Digital Pulse Pty Ltd v Harris \[2002\] NSWSC 33](#) and [Harris v Digital Pulse Pty Ltd \[2003\] NSWCA 10; \(2003\) 56 NSWLR 298](#) to make this concrete. Palmer J at first instance accepted that exemplary damages could be awarded for deliberate fiduciary wrongdoing. On appeal, the majority set that award aside. Heydon JA took the broader anti-fusion position that equity did not possess power to award exemplary damages for equitable wrongs; Spigelman CJ's reasoning was narrower in the contractual employment setting; Mason P dissented and favoured a more flexible approach. The examination lesson is not to say simply "fusion yes" or "fusion no". Identify the cause of action, the historical/remedial jurisdiction and the authority governing the requested remedy.

## 1.6 Legal title and equitable ownership

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The live forum used a phone as a simple trust example. If A owns the phone outright, it is inaccurate to imagine two separate titles merely because equity exists. But if A validly declares that A holds the phone on trust for B, A retains legal title as trustee while B acquires the beneficial or equitable interest. From that point, A cannot deal with the phone solely as A pleases; A's dealings are constrained by the trust. A cannot meaningfully be sole trustee for A's own sole benefit, because legal and beneficial ownership would merge and there would be no separate beneficiary capable of enforcing the trust.

Equitable interests may arise intentionally through an express trust or assignment, or by operation of law through resulting or constructive trust principles. The source matters because it determines the content, transferability, priority and remedies attached to the right.

## 1.7 When is an asserted right proprietary?

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[\*National Provincial Bank Ltd v Ainsworth\* \[1965\] AC 1175](#) supplies a classic proprietary-right checklist: the right should be definable, identifiable by third parties, capable in its nature of assumption by third parties, and possess some degree of permanence or stability. The checklist is not a substitute for the underlying doctrine, but it helps students ask whether a claimed “interest” is truly proprietary or merely personal.

## 1.8 Mere equities: *Dickinson v Burrell* and *Gross v Lewis Hillman*

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The Week 1 forum contrasted *Dickinson v Burrell* (1866) LR 1 Eq 337 with *Gross v Lewis Hillman Ltd* [1970] Ch 445; [1969] 3 All ER 1476. In *Dickinson*, a right to set aside a transaction induced by undue influence was treated as sufficiently connected with the property interest transferred so

that the relevant equitable right travelled with the assigned interest. In *Gross*, by contrast, the later purchaser could not use the original buyer's personal right to rescind for misrepresentation simply to throw the property back on the original vendor. The distinction teaches that “a right to rescind” is not automatically proprietary or automatically assignable: identify what the right is attached to and what the assignee is actually seeking to enforce.

## 1.9 Unadministered estates and fixed trusts: Official Receiver v Schultz

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[\*Official Receiver in Bankruptcy v Schultz\* \(1990\) 170 CLR 306; \[1990\] HCA 45](#) is central to the course. A beneficiary under an unadministered deceased estate does not, merely because a will names them, hold a present equitable proprietary interest in each specific asset of the estate. The beneficiary instead has an equitable chose in action - a right to due administration of the estate. That right is itself property, but it is a right *in respect of* the estate rather than immediate beneficial ownership of a particular estate asset. A beneficiary of a fixed trust is different: subject to the trust terms and any powers, the beneficiary can have an equitable proprietary interest in the trust property itself.

This difference affects remedies. The estate beneficiary can compel proper administration and restrain maladministration, but ordinarily cannot demand a specific asset before administration permits distribution. A fixed-trust beneficiary can enforce the trust and may have proprietary remedies against the trust asset or substitutes, subject to priority and third-party rules.

## 1.10 Chapter 1 exam method

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1. Identify the asserted right and the person against whom it is asserted.
2. Classify it: legal right, equitable proprietary interest, equitable chose in action, mere equity or personal claim.

3. Identify the jurisdictional source: exclusive, concurrent or auxiliary.
4. Ask whether the requested remedy belongs to that cause of action or is available in aid of it.
5. Apply the governing authority before using broad maxims or “fairness”.
6. State the counterargument and explain why the classification changes the remedy or priority.

## Leading authorities

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### [Earl of Oxford's Case \(1615\) 21 ER 485](#)

Historical authority for the priority of equity where common law and equity irreconcilably conflict.

### [Digital Pulse Pty Ltd v Harris \[2002\] NSWSC 33](#)

First-instance decision accepting exemplary damages for deliberate breach of fiduciary duty; important because it generated the fusion debate on appeal.

### [Harris v Digital Pulse Pty Ltd \[2003\] NSWCA 10](#)

NSW Court of Appeal majority set aside exemplary damages and debated the limits of remedial fusion.

### [National Provincial Bank Ltd v Ainsworth \[1965\] AC 1175](#)

Classic formulation of qualities associated with proprietary rights.

### [Official Receiver in Bankruptcy v Schultz \(1990\) 170 CLR 306](#)

High Court authority on the proprietary character of a beneficiary's right to due administration of an unadministered estate.

## Tutorial 1 (Week 2) - actual course questions

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### Question 1

Read both extracts of *Digital Pulse v Harris* and *Harris v Digital Pulse* in your prescribed text. In each instance, what was the Court's decision and the reasons underpinning it?

What do the judgments in those cases tell us about the broader relationship between equity and common law, and about the concept of fusion, if anything?

If common law remedies are not available in equity, why are some, but not all, equitable remedies available for breaches of common law rights? Give some examples and consider the difference between equitable remedies in aid of common law rights and equitable remedies in the exclusive jurisdiction of equity.

### Question 2

Read the extract of *Official Receiver in Bankruptcy v Schultz* in your prescribed text. What are the facts and the Court's decision? What rights does the beneficiary under an unadministered estate have?

How are these rights similar to and different from the rights of a beneficiary under a fixed trust?

How do these differences impact the remedies available to a plaintiff where those rights have been infringed?

## FAQs - questions

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FAQ 1. Did the Judicature reforms merge common law and equity into one body of substantive rules?

FAQ 2. Why does the distinction between a proprietary interest and a personal claim matter?

FAQ 3. What is the difference between a fixed-trust beneficiary and a beneficiary of an unadministered estate?

FAQ 4. What is the “fusion fallacy”?

## Multiple-choice questions

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MCQ 1. Which statement best describes the effect of the Judicature reforms?

1. Equity was abolished.
2. One court system could administer both law and equity, while substantive distinctions could remain.
3. Every common-law remedy became available for every equitable cause of action.
4. Equity became a statutory code.

MCQ 2. Under *Schultz*, a beneficiary of an unadministered estate ordinarily has:

1. Immediate legal title to each specific asset left by the will.
2. A right to due administration of the estate, rather than immediate beneficial ownership of each specific asset.
3. No enforceable right at all.
4. Only a contractual claim against the executor.

MCQ 3. Which case is central to the Week 1 discussion of punitive/exemplary monetary relief for breach of fiduciary duty?

1. *Ainsworth*.
2. *Harris v Digital Pulse*.
3. *Schultz*.
4. *Corin v Patton*.

MCQ 4. Which is the best sequence in an Equity problem?

1. Remedy first, then invent a right that supports it.
2. Fairness first, authority later.
3. Classify the right, identify doctrine and authority, apply facts, then determine remedy.
4. Quote a maxim and conclude.

## Short-answer questions

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Short answer 1. Explain exclusive, concurrent and auxiliary jurisdiction with one example of each.

Short answer 2. Explain why *Digital Pulse* is about more than exemplary damages.

Short answer 3. Explain the practical difference between an equitable proprietary interest and an equitable chose in action.

## High-distinction IRAC problem

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Problem.

Eva dies leaving her apartment to Liam under a valid will. Before the executor has completed administration, Liam becomes bankrupt. The executor still needs to pay estate debts and may have to sell the apartment. Liam insists that he already “owns the apartment in equity” and purports to assign the apartment itself to his sister. Separately, Liam is the sole fixed beneficiary of a trust that holds a parcel of land for him. Advise the trustee in bankruptcy, Liam and his sister as to the character of Liam’s rights and the remedies each may assert.

# Development of Equity, Fusion and Equitable Interests - Answers

## Tutorial 1 model answers

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Tutorial 1 - Question 1: Digital Pulse / Harris v Digital Pulse and fusion

**Decision at first instance.** In [Digital Pulse Pty Ltd v Harris \[2002\] NSWSC 33](#), Palmer J found the employees had deliberately breached contractual and fiduciary obligations by secretly competing with their employer and diverting business. In addition to orthodox relief, his Honour held that exemplary damages could in principle be awarded for breach of fiduciary duty and made such an award.

**Decision on appeal.** In [Harris v Digital Pulse Pty Ltd \[2003\] NSWCA 10](#), the Court of Appeal majority set the exemplary award aside. Heydon JA rejected a power in equity to award exemplary damages for equitable wrongs and strongly defended doctrinal separation. Spigelman CJ reached a narrower conclusion in the contractual employment context. Mason P dissented and considered punitive monetary relief available in an appropriate fiduciary case.

**Why it matters.** The cases teach that procedural or administrative fusion does not automatically transpose a remedy from one doctrinal system into another. Courts can administer legal and equitable rights in one proceeding, and the bodies of law can influence each other, but a student must still identify the source and conditions of the

remedy sought. The “fusion fallacy” is the mistake of treating joint administration as sufficient reason to erase doctrinal boundaries.

**Why some equitable remedies assist common-law rights.** Equity historically exercised auxiliary/concurrent jurisdiction to protect legal rights when common-law relief was inadequate. Specific performance may enforce a valid contract where damages are inadequate; an injunction may restrain a threatened breach of a legal right. By contrast, remedies tied to exclusively equitable obligations - for example an account of profits for breach of fiduciary loyalty - depend on the relevant equitable duty and cannot simply be demanded because the same court also administers common law.

Tutorial 1 - Question 2: Official Receiver in Bankruptcy v Schultz

**Facts and result.** [\*Official Receiver in Bankruptcy v Schultz\* \(1990\) 170 CLR 306; \[1990\] HCA 45](#) concerned a bankrupt beneficiary named in a deceased estate. The High Court treated the beneficiary's right to proper administration of the estate as property capable of vesting in the bankruptcy administration, even though the beneficiary did not have immediate beneficial ownership of each particular estate asset during administration.

**Nature of the estate beneficiary's right.** Before administration is complete, the beneficiary has an equitable chose in action: a right to have the estate properly administered according to the will and law. That is a proprietary form of right, but it is a right in respect of the estate as a whole and its due administration, not a present proprietary interest in each specific asset.

**Comparison with a fixed trust.** A fixed-trust beneficiary ordinarily has an equitable proprietary interest in the trust property itself, subject to the trust terms. Both beneficiaries can invoke equity to compel

fiduciaries to perform their duties. But only the fixed-trust beneficiary ordinarily starts with a present beneficial proprietary interest in identified trust property.

**Remedial consequence.** The estate beneficiary may compel due administration, seek accounts, restrain misapplication and obtain relief against the executor for maladministration. The beneficiary usually cannot demand delivery of a particular asset before debts, expenses and other administration steps have been completed. A fixed-trust beneficiary can enforce the trust and may pursue proprietary relief, tracing and substitution where the equitable proprietary interest is misapplied, subject to third-party and priority rules.

## FAQ answers

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FAQ 1. Did the Judicature reforms merge the substantive rules?

**Answer.** No. They unified administration so the same court could administer both. Substantive distinctions remain where doctrine and authority require them.

FAQ 2. Why does proprietary classification matter?

**Answer.** Proprietary rights can affect priorities, insolvency, tracing, substitution and claims against third parties. Purely personal claims usually bind only the person liable.

FAQ 3. Fixed trust versus unadministered estate?

**Answer.** A fixed-trust beneficiary ordinarily has an equitable proprietary interest in trust property; an estate beneficiary ordinarily has a right to due administration until administration produces a distributable entitlement.

FAQ 4. Fusion fallacy?

**Answer.** Treating joint court administration of law and equity as a sufficient reason to transplant rules or remedies from one system into another without doctrinal authority.

## MCQ answers and explanations

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MCQ 1

**Answer: B.** Administrative fusion allows one court to administer both systems without necessarily merging all substantive doctrines.

MCQ 2

**Answer: B.** *Schultz* distinguishes the right to due administration from immediate beneficial ownership of each estate asset.

MCQ 3

**Answer: B.** *Harris v Digital Pulse* is the core fusion/remedies authority used in Tutorial 1.

MCQ 4

**Answer: C.** Equity problem solving begins with classification and authority, not a preferred remedy.

## Short-answer model answers

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Short answer 1.

**Model answer.** Exclusive jurisdiction concerns equitable rights such as trusts/fiduciary duties; concurrent jurisdiction concerns fields where law and equity may both respond, such as fraud or mistake; auxiliary jurisdiction supplies equitable assistance such as an injunction or specific performance in aid of a legal right where common-law relief is inadequate.

Short answer 2.

**Model answer.** *Digital Pulse* forces the court to articulate the relationship between common law and equity after the Judicature

reforms. The real examination issue is when doctrinal development or remedial borrowing is legitimate and when it becomes a fusion fallacy.

Short answer 3.

**Model answer.** A proprietary equitable interest attaches to property and can support priority/tracing consequences. An equitable chose in action is itself property but may consist of a right to compel administration or performance rather than beneficial ownership of a particular asset.

## High-distinction IRAC model answer

**Issue.** Whether Liam's rights under the unadministered will amount to present equitable ownership of the apartment; whether those rights pass to the trustee in bankruptcy; and how that differs from his fixed-trust interest.

**Rule/Law.** Under [\*Official Receiver in Bankruptcy v Schultz\*](#), a beneficiary of an unadministered estate has an equitable chose in action - the right to due administration - rather than a present equitable proprietary interest in each specific estate asset. The right to due administration is itself property. A fixed beneficiary under a constituted trust ordinarily holds an equitable proprietary interest in the trust property, while the trustee holds legal title.

**Application.** Liam cannot accurately say that the apartment itself is already his equitable property merely because the will leaves it to him. The executor must first administer the estate, satisfy debts and expenses, and determine what can be distributed. Liam's

transmissible property is his right to proper administration and the entitlement that administration may ultimately produce. His purported assignment of the apartment itself therefore overstates what he presently owns. The trustee in bankruptcy has the stronger claim to whatever proprietary right vested in Liam during bankruptcy, including the chose in action and its fruits, subject to bankruptcy law. The fixed-trust land is different: Liam's beneficial interest is directly proprietary in the trust property, subject to the trust terms, so any bankruptcy consequences attach to that interest as property without waiting for estate administration.

Counterargument. Liam can argue that the will identifies a specific apartment and that no contest is expected. That may make eventual distribution likely, but it does not eliminate the executor's prior administration duties or convert the pre-administration right into present ownership of the apartment.

Remedy/Consequence. Liam or the trustee in bankruptcy can insist on due administration and challenge maladministration. Neither can ordinarily compel premature transfer of the apartment. The fixed-trust interest may support direct trust enforcement and proprietary remedies.

Conclusion. Liam has a proprietary chose in action in relation to the unadministered estate, not immediate beneficial ownership of the apartment. His fixed-trust interest is a stronger, direct equitable proprietary interest in identified trust property.

# Fiduciary Relationships: Existence, Scope, Loyalty and Breach

**Chapter purpose.** Chapter 2 now integrates the Week 2 live Forum into the existing Tutorial 2 framework. The central method is disciplined and sequential: **(1) identify whether a fiduciary relationship exists; (2) define the precise scope of the fiduciary undertaking; (3) identify the conflict, profit, dealing or opportunity within that scope; (4) determine whether fully informed consent or other authorisation exists; and (5) only then move to remedies and consequences.** The point is not to label every unfair relationship "fiduciary". The point is to identify when equity requires undivided loyalty and exactly what that loyalty attaches to.

**Week 2 Forum exam guidance.** The lecturer described the final examination as open book and emphasised that students may bring substantial notes and books, but warned that a two-hour examination does not reward searching through an unstructured pile of material. The practical lesson for this book is therefore: understand the doctrine first, know where your authorities are, and use the book as an indexed reasoning tool rather than as a template bank. A problem answer must respond to the exact facts and identify the relationship, scope and alleged breach before reaching remedies.

**Forum opening note - non-assessable context.** The Week 2 Forum opened with the lecturer's recurring nature feature, this time on dragonflies. The legal teaching began immediately afterwards. The animal material is preserved here only as a short course-context note and is not treated as examinable Equity doctrine.

## 2.1 The fiduciary notion: loyalty at equity's highest standard

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Fiduciary obligations are obligations developed by equity to police relationships in which one person has undertaken a role that gives them a special ability to affect another person's legal or economic interests. The Week 2 Forum described the standard as a form of "morality of aspiration": the fiduciary is held to a demanding standard of loyalty, not merely a minimum standard of reasonable care.

This strictness matters. A fiduciary can breach the no-conflict or no-profit rules even where the fiduciary is honest, well intentioned, believes the conduct will benefit the principal, and causes no proven loss. That is because the central concern is **loyalty**. Equity removes the temptation to prefer self-interest or another duty over the interest that the fiduciary undertook to protect. This is why the lecturer repeatedly returned to the idea that a person cannot serve two masters where the duties pull in different directions.

**Exam translation.** Do not begin by asking whether the defendant behaved badly. Ask: **what loyalty undertaking existed, to whom was it owed, in relation to what matter, and did the impugned conduct create an unauthorised conflict or profit within that matter?**

## 2.2 Relationship is only the vehicle; scope does the real work

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The phrase "fiduciary relationship" can mislead students into thinking that every interaction between the parties becomes fiduciary. It does not. The relationship is the vehicle through which fiduciary obligations arise. The obligations attach only to the aspects of the relationship that fall within the fiduciary undertaking.

That distinction is decisive. A trustee may owe fiduciary duties concerning trust property but may also separately rent a private house to the beneficiary. The landlord-tenant dealings are not automatically fiduciary merely because the same people also stand in a trustee-beneficiary relationship. Likewise, a solicitor may be fiduciary for the subject matter of a retainer without becoming a fiduciary for every unrelated aspect of the client's life. Scope is therefore the bridge between **status** and **breach**.

To define scope, examine the undertaking actually accepted, any contract or retainer, the powers conferred, the property or transaction entrusted, and the parties' course of conduct. The narrower and more precise the undertaking, the more precise the fiduciary analysis should be.

## 2.3 Established categories: where fiduciary status is recognised

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Some relationships are conventionally recognised as fiduciary in relation to characteristic functions. The Week 2 Forum identified trustee-beneficiary, solicitor-client, agent-principal and partner-partner. Director-company is also a recognised fiduciary relationship in Australian law. But even within an established category, **scope still must be defined**.

- **Trustee - beneficiary:** the trustee administers trust property and powers for the beneficiary or trust purposes.
- **Solicitor - client:** loyalty and confidentiality attach to the retainer and the matters for which the solicitor acts.
- **Agent - principal:** the agent must act loyally within the agency actually undertaken.
- **Director - company:** directors owe fiduciary duties to the company; duties to individual shareholders require special facts rather than assumption.
- **Partners inter se:** this is a "horizontal" fiduciary relationship: partners owe fiduciary obligations to one another in relation to the partnership business.

The lecturer's emphasis on the horizontal nature of partnership is useful. In many fiduciary categories, the obligation is primarily one-directional for the relevant function. Partnership is different because the parties may simultaneously owe loyalty obligations to each other in pursuing the partnership enterprise.

## 2.4 Ad hoc or fact-based fiduciaries: indicia, not a mechanical checklist

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Equity can recognise fiduciary obligations outside established categories. The leading Australian authority discussed in the Forum is [\*Hospital Products Ltd v United States Surgical Corporation\* \(1984\) 156 CLR 41](#). The High Court rejected the idea that there is a single comprehensive formula that automatically identifies every fiduciary relationship.

Justice Mason's well-known discussion in *Hospital Products*, although part of a dissent on the ultimate classification of that distributorship, has been highly influential in describing the relevant indicia. The critical idea is an undertaking to act for or on behalf of another in the exercise of a power or discretion capable of affecting that other's legal or practical interests, creating a special opportunity for abuse and corresponding vulnerability.

### Indicia that may support an ad hoc fiduciary relationship:

1. an express or implied undertaking to act for or on behalf of another;
2. trust and confidence in the relevant function;
3. a reasonable expectation that the alleged fiduciary will act loyally in the defined matter;
4. power or discretion capable of affecting the other person's legal or practical interests;
5. vulnerability to abuse of that power or discretion.

**Important:** these are indicia, not independent elements that must all be ticked. No single indicium is determinative.

Inequality alone is insufficient. Parties to ordinary contracts are rarely perfectly equal, yet commercial inequality does not convert every contract into a fiduciary relationship. Subjective trust is also not essential. A beneficiary may distrust a trustee, but the trustee remains a fiduciary because the legal role and undertaking attract fiduciary obligations. Conversely, a person may subjectively trust a commercial counterparty without creating fiduciary law.

## 2.5 Hospital Products: why arm's-length commerce is usually different

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### *Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41*

**Facts taught in the Forum.** USSC manufactured surgical stapling products. Alan Blackman, a former salesman, became the exclusive Australian distributor through Hospital Products. Instead of simply building USSC's Australian market, Hospital Products reverse engineered products, repackaged genuine products and ultimately became a competitor. USSC sued, including in fiduciary law.

**Holding and principle.** The majority did not treat the distributorship as fiduciary. The commercial relationship and its contractual structure were central. The case is a warning that contractual loyalty language, dependence, unequal bargaining power or commercial trust do not automatically require one party to subordinate its own interests as a fiduciary.

**Why it matters.** It is the first authority to reach for when a problem tries to turn a hard commercial bargain or distributorship into fiduciary liability. Ask whether the defendant actually undertook to act for the claimant, or whether each party remained free to pursue its own commercial interests.

## 2.6 Reasonable expectation requires an undertaking: Galambos v Perez

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[Galambos v Perez, 2009 SCC 48, \[2009\] 3 SCR 247](#)

**Status.** Canadian and therefore persuasive rather than binding in Australia, but useful because the Week 2 Forum used it to clarify the idea of reasonable expectation in ad hoc fiduciary claims.

**Facts.** Ms Perez worked for Mr Galambos's law firm and voluntarily advanced money to the financially troubled firm, sometimes without Galambos even knowing she had done so. When the firm failed, she sought to characterise the relationship surrounding the advances as fiduciary.

**Principle.** A reasonable expectation of fiduciary loyalty cannot be created unilaterally. In an ad hoc relationship, the alleged fiduciary must have undertaken - expressly or by implication - to act in the other's interests in the relevant matter. Power or vulnerability without such an undertaking is not enough.

**Exam use.** If a claimant says "I trusted them" or "I was vulnerable", immediately ask: *what did the defendant undertake to do for this claimant in relation to this transaction?*

The Forum also stressed a temporal point. Fiduciary vulnerability is generally vulnerability created by the fiduciary role or undertaking itself. It is not enough that one party was already vulnerable in life before the relationship began. The legal question is whether the relationship places one party in a position where the other's entrusted power can be abused.

## 2.7 Breen v Williams: strict duties, but narrow subject matter

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[Breen v Williams \(1996\) 186 CLR 71; \[1996\] HCA 57](#)

**Facts taught in the Forum.** Ms Breen had silicone breast implants inserted by Dr Williams. Years later, after the implants were removed by another doctor, she sought access to medical records for possible litigation

concerning the implants. Dr Williams would provide access only if she gave an undertaking releasing him from claims. She pursued several legal bases, including fiduciary law.

**Result relevant to Chapter 2.** The High Court did not recognise the broad fiduciary obligation asserted by the patient to require access to the records. The doctor-patient relationship is not simply treated as a status-based fiduciary category for all purposes.

The case is essential because it shows both the **strictness** and the **narrowness** of Australian fiduciary law. A doctor may owe contractual and tortious duties of reasonable care and skill. A doctor may owe duties of confidence. Some particular doctor-patient dealings may also attract fiduciary obligations where the doctor has undertaken a function affecting the patient's legal or economic interests. But these different duties must not be collapsed into one another.

Australian fiduciary duties are classically **proscriptive**: they tell the fiduciary what must not be done - do not obtain an unauthorised profit; do not place duty in conflict with personal interest or another duty. They are not generally a free-standing source of broad positive duties to act in the principal's best interests in every respect.

**Forum examples of a possible fiduciary incident in medical practice.** If a doctor recommends a private hospital in which the doctor has an undisclosed financial interest, or chooses between equally suitable drugs because one manufacturer provides undisclosed benefits, the patient's legal/economic interests and the doctor's conflicting financial interest may engage fiduciary loyalty. The correct analysis is not "doctor = fiduciary for everything"; it is "does this particular function involve an undertaking of loyalty over the patient's relevant legal or economic interest?"

**Information and property.** The Forum contrasted Australia with broader Canadian approaches. *Breen* rejected the proposition that information in medical records was simply trust property of the patient. That does not remove duties of confidence or other legal rights of access; it simply shows

why the proprietary trust argument and the fiduciary argument must be analysed separately.

## 2.8 How to determine scope: undertaking, contract and course of conduct

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Once fiduciary status is established, ask what the fiduciary actually undertook. A contract or retainer can be especially important because it defines what the parties agreed the fiduciary would do and can shape the limits of the fiduciary obligation. Course of conduct can also reveal the function undertaken.

### Scope questions to ask in every problem:

1. What task, office, power or discretion was entrusted?
2. What property, transaction, opportunity or decision was the fiduciary asked to handle?
3. What did any contract, retainer, trust instrument or partnership arrangement require?
4. What did the parties' conduct show about the role actually assumed?
5. Did the alleged conflict or profit arise because of, or in the course of, that role?
6. Is the claimant trying to extend fiduciary law into an unrelated aspect of the parties' dealings?

This is also why principles drawn from one fiduciary category should be used carefully in another. A rule articulated in a partnership or trustee case may illuminate loyalty generally, but the particular scope of a director, solicitor, agent or partner depends on that relationship and its undertaking.

## 2.9 Strict loyalty in action: Keech and Regal (Hastings)

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### [Keech v Sandford \(1726\) Sel Cas Ch 61; 25 ER 223](#)

A trustee held a lease for an infant beneficiary. The lessor refused to renew the lease for the infant, so the trustee took the renewal personally. Equity required the trustee to hold the renewed lease for the beneficiary and account for profits. The importance of the case is its strictness: even though the beneficiary could not obtain the renewal, the trustee could not personally appropriate an opportunity connected with the trust office.

### [Regal \(Hastings\) Ltd v Gulliver \[1942\] UKHL 1; \[1967\] 2 AC 134](#)

Directors personally subscribed for shares needed to complete a cinema acquisition structure and later made a profit. They acted honestly and the company itself could not provide all the required capital. Nevertheless, the directors who profited were accountable because the opportunity and knowledge came to them by reason of their fiduciary office. Good faith, absence of fraud and absence of loss did not answer the no-profit rule. Proper shareholder authorisation could have protected them.

Together, these cases explain why the Week 2 Forum repeatedly emphasised that intention and actual loss are not essential to a no-profit/no-conflict breach. The law is prophylactic: it removes temptation by requiring the fiduciary to obtain proper authorisation before taking a position-derived benefit.

## 2.10 Context can create a special duty: directors and solicitors

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### [Bunninghausen v Glavanics \[1999\] NSWCA 199; 46 NSWLR 538](#)

The ordinary proposition is that directors owe fiduciary duties to the company, not automatically to each shareholder. But the Court of Appeal recognised that the special facts of a closely held company and negotiations for the sale of shares/company assets could create a fiduciary

duty from the controlling director to the other shareholder. **Exam significance:** do not convert the exception into a universal rule. Identify the special transaction, informational control and undertaking that justified direct loyalty to the shareholder.

**Farrington v Rowe McBride & Partners [1985] 1 NZLR 83**

The Forum used this New Zealand solicitor case to illustrate conflict and disclosure. A client sought advice about investing compensation funds; the solicitors recommended an investment connected with another important client and interests associated with the firm without adequate disclosure. The principle is undivided loyalty: where a solicitor's duties or interests conflict, material facts must be disclosed and informed consent obtained. **Australian use:** persuasive authority, consistent with Australian solicitor-fiduciary doctrine.

## 2.11 Boardman v Phipps: information, potential conflict, informed consent and allowances

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**Boardman v Phipps [1966] UKHL 2; [1967] 2 AC 46**

**Facts taught in the Forum.** The trust held a minority shareholding in Lester & Harris. Boardman, the trust's solicitor, and a beneficiary investigated the company, obtained valuable information while acting in connection with the trust, and eventually acquired shares personally. Their actions improved the company and benefited the trust substantially.

**Why liability still arose.** Boardman's fiduciary position gave him access to information and created at least a possibility of conflict. Consent had been sought, but it was not fully informed. The fact that the trust itself could not readily make the investment, that the transaction ultimately benefited the trust, and that Boardman acted honestly did not eliminate the fiduciary problem.

**Remedial fairness.** Boardman had to account for profits, but his skill and work justified a generous allowance. This demonstrates the separation

between *liability* and *remedy*: strict liability can coexist with a fair allowance when quantifying the gain to be disgorged.

**Potential conflict matters.** The no-conflict principle is preventative. A fiduciary need not wait until a conflict actually causes disloyal conduct. A real possibility of conflict within the scope of the undertaking may be enough to engage the rule.

## 2.12 When fiduciary obligations begin and end: Chan and Fraser Edmiston

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### [Chan v Zacharia \(1984\) 154 CLR 178](#)

Partners operated a medical practice from leased premises. After dissolution, one partner pursued renewal of the lease for himself. The High Court held that fiduciary obligations continued so far as necessary to wind up the partnership affairs and deal with partnership assets/opportunities. Formal dissolution did not instantly free a former partner to appropriate an opportunity connected with unfinished partnership business.

### [Fraser Edmiston Pty Ltd v AGT \(Qld\) Pty Ltd \[1988\] 2 Qd R 1](#)

The Forum used this Queensland authority for the opposite temporal problem: fiduciary obligations can arise before a formal partnership agreement is completed where the parties have already entered a relationship of mutual trust and confidence in pursuing the proposed joint venture. One party cannot necessarily exploit for itself an opportunity received through that developing relationship merely because the final partnership document has not yet been signed.

The combined lesson is that labels and dates are not conclusive. Ask when the loyalty-generating relationship actually began, what opportunity or asset arose from it, and whether unfinished business continued after formal termination.

## 2.13 Agents dealing with principals and competing principals

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### [McKenzie v McDonald \[1927\] VLR 134](#)

A real estate agent acting for Mrs McKenzie in relation to Queensland property gave misleading valuation advice and entered a transaction involving his own property on terms favourable to himself. The case illustrates why a fiduciary who proposes to deal with the principal personally must remove the conflict through full disclosure, accurate information and genuinely informed consent - commonly with independent advice. The agent cannot use the informational and bargaining advantage created by the agency to obtain a personal benefit.

### [Kelly v Cooper \[1993\] AC 205](#)

An estate agent acted for multiple vendors of competing properties. The Privy Council recognised that the scope of an agent's fiduciary obligations is shaped by the express and implied terms of the agency. Because estate agents are ordinarily expected to act for multiple sellers, the law cannot impose a duty that would make that business model impossible. **Exam significance:** "no conflict" is not applied in the abstract; the contract and commercial context help define what loyalty the agent actually undertook.

## 2.14 Why fiduciary classification matters - and why remedies come later

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Fiduciary classification can unlock powerful equitable responses, including an account of profits, rescission in appropriate cases, equitable compensation, and in some circumstances proprietary relief such as a constructive trust. That remedial strength explains why courts are careful not to label every wrong fiduciary.

The Week 2 Forum also noted that equitable time-bar rules can differ from common law limitation analysis. The precise position depends on the cause of action, applicable limitation legislation, analogy and equitable doctrines

such as laches and acquiescence. Therefore do not write "equity always gives more time" as a universal proposition. The safer exam method is to identify the particular equitable claim and then analyse the relevant limitation and defence rules.

## 2.15 The complete Chapter 2 problem-solving sequence

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1. **Identify the alleged fiduciary and principal/beneficiary.**
2. **Classify the relationship.** Established category or ad hoc/fact-based?
3. **If ad hoc, identify the undertaking.** What power or discretion was accepted? What legal/economic interest was entrusted?
4. **Define scope.** Use the contract, retainer, trust instrument, partnership arrangement and course of conduct.
5. **Identify the precise conflict/profit/opportunity.** Did it arise by reason of, or in the course of, the fiduciary function?
6. **Apply the loyalty rules.** No unauthorised conflict; no unauthorised profit; consider duty-duty conflict where there are multiple principals.
7. **Ask about authorisation.** Was there full disclosure and informed consent by the person/body legally capable of consenting?
8. **Consider timing.** Did the opportunity arise before formal commencement, during the relationship, or during winding up after termination?
9. **Separate other causes of action.** Contract, negligence, confidence, consumer law and property claims may exist without being fiduciary.
10. **Only then address remedy and defences.** Account of profits, rescission, compensation, constructive trust, allowances, laches, acquiescence and other relevant consequences.

## Leading authorities from the Week 2 Forum

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### [\*Hospital Products Ltd v United States Surgical Corporation \(1984\) 156 CLR 41\*](#)

Ad hoc fiduciary relationships; undertaking, power/discretion and vulnerability; arm's-length commerce is not automatically fiduciary.

### [\*Breen v Williams \(1996\) 186 CLR 71\*](#)

Australian fiduciary law is principally proscriptive; doctor-patient status does not create a general fiduciary duty for every aspect of the relationship.

### [\*Galambos v Perez, 2009 SCC 48\*](#)

Persuasive authority that an ad hoc fiduciary claim requires an undertaking; unilateral expectation or vulnerability is insufficient.

### [\*Keech v Sandford \(1726\) Sel Cas Ch 61\*](#)

Strict no-profit principle for trustees; a fiduciary cannot appropriate a position-connected opportunity merely because the principal could not obtain it.

### [\*Regal \(Hastings\) Ltd v Gulliver \[1967\] 2 AC 134\*](#)

Profit obtained by reason of fiduciary office is accountable despite good faith, benefit to the company or absence of loss.

### [\*Bunninghausen v Glavanics \[1999\] NSWCA 199\*](#)

Special circumstances may generate a direct director-shareholder fiduciary duty even though the ordinary duty is owed to the company.

### [\*Farrington v Rowe McBride & Partners \[1985\] 1 NZLR 83\*](#)

Solicitor conflict, material disclosure and informed consent; persuasive in Australia.

### [\*Boardman v Phipps \[1967\] 2 AC 46\*](#)

Potential conflict, position-derived information, inadequate consent, account of profits and generous allowance for skill/work.

### [\*Chan v Zacharia \(1984\) 154 CLR 178\*](#)

Fiduciary obligations can continue after formal dissolution for partnership winding up and position-connected opportunities.

### [\*Fraser Edmiston Pty Ltd v AGT \(Qld\) Pty Ltd \[1988\] 2 Qd R 1\*](#)

Fiduciary obligations may arise during a sufficiently developed pre-partnership/joint-venture relationship before formal execution.

**McKenzie v McDonald [1927] VLR 134**

Agent-principal self-dealing; full disclosure and informed consent are critical where an agent transacts personally with the principal.

**Kelly v Cooper [1993] AC 205**

The scope of agency fiduciary duties is shaped by the express and implied contractual setting, including known multiple-principal business models.

## **Tutorial 2 (Week 3) - actual course questions**

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### **Question 1 - the required method**

For each scenario identify: (a) whether a fiduciary relationship arises; (b) whether the scope of the relationship extends to the conduct; and (c) whether any breach occurred.

### **Scenario 1 - Jack and Jill at the estate auction**

Jack asks Jill to attend an auction and bid on his behalf for antique pottery, but only if each item is no more than \$500,000. Jill has access to Jack's banking details. A Ming Dynasty Bowl starts at \$300,000. Jill uses her own funds to buy it for herself for \$400,000 and does not tell Jack. How would the answer differ if the starting bid were \$550,000 and Jill used Jack's funds to purchase it for him?

### Scenario 2 - David's compulsory textbook

David, a university professor, writes a textbook under a pseudonym, makes it the only acceptable textbook for his subject, receives significant royalties, prevents second-hand substitution, and publishes it through his own company despite significant errors and outdated law. Identify any fiduciary relationship, its scope and any breach.

### Scenario 3 - Meredith and Jacob's bird-food arrangement

Meredith buys Jacob's pre-packaged bird food for resale. Sales are poor. She develops her own competing blend and refuses the next agreed order. Identify whether the commercial relationship is fiduciary, its scope, and any breach.

### Question 2 - Arthur, Martin and the Springbrook trust property

Martin is trustee for Arthur and is instructed to sell a trust property valued at \$1.5 million. After a \$900,000 offer is the only offer, Martin resigns, Paul becomes trustee, and five months later Martin buys the property for \$1.1 million, consistent with local comparable sales. Arthur receives the sale proceeds. By 2026, after Martin's improvements and road repairs, the property is worth \$1.75 million and generates substantial short-stay profits. Arthur now seeks to reverse the sale. Address existence, scope and breach of fiduciary duty.

## Week 2 Forum consolidation questions

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### Forum Question 1.

Why is saying "there is a fiduciary relationship" only the beginning of the analysis?

### Forum Question 2.

What is the difference between a proscriptive fiduciary duty and a prescriptive duty, and why is *Breen v Williams* important in Australia?

### Forum Question 3.

Using *Hospital Products*, explain why inequality, trust and confidence, or commercial dependence do not automatically create a fiduciary relationship.

### Forum Question 4.

What does *Galambos v Perez* add to the idea of a "reasonable expectation" of loyalty in an ad hoc fiduciary relationship?

Forum Question 5.

Why could the fiduciaries in *Regal (Hastings)* and *Boardman v Phipps* be liable even though they acted honestly and the relevant companies/trust beneficiaries were not necessarily worse off?

Forum Question 6.

How do *Chan v Zacharia* and *Fraser Edmiston* show that fiduciary obligations do not always begin and end on the formal date of a partnership agreement?

## FAQs - questions

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FAQ 1. Does friendship create a fiduciary relationship?

FAQ 2. Does every employee owe fiduciary duties in every aspect of employment?

FAQ 3. Why can a commercial contract exist without fiduciary obligations?

FAQ 4. Can fiduciary constraints survive resignation or dissolution?

FAQ 5. Is vulnerability enough by itself?

FAQ 6. Does good faith prevent a breach?

FAQ 7. Is a duty of confidentiality the same as a fiduciary duty?

FAQ 8. Can informed consent authorise a conflict or profit?

## Multiple-choice questions

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MCQ 1. Jill's strongest fiduciary status in Scenario 1 is:

1. Friend.
2. Agent appointed to bid for Jack.
3. Competitor.
4. Trustee of all Jack's property.

MCQ 2. The best authority warning against automatically making an arm's-length distributorship fiduciary is:

1. *Hospital Products*.
2. *Boardman v Phipps*.
3. *Keech v Sandford*.
4. *McKenzie v McDonald*.

MCQ 3. The correct sequence is:

1. Breach -> relationship -> scope.
2. Relationship -> scope -> breach.
3. Remedy -> loss -> relationship.
4. Fairness -> conclusion.

MCQ 4. *Breen v Williams* is most useful for which proposition?

1. Every doctor is a fiduciary for every interaction with a patient.
2. Australian fiduciary duties are generally proscriptive and must be confined to the relevant undertaking/scope.
3. Medical information is always trust property.
4. Negligence and fiduciary duty are identical.

MCQ 5. Which statement best reflects *Boardman v Phipps*?

1. Good faith eliminates fiduciary liability.
2. Only an actual conflict can breach fiduciary duty.
3. A potential conflict and position-derived opportunity can trigger liability, but an allowance may be made at the remedial stage.
4. Beneficiary consent is effective even if material information is withheld.

MCQ 6. A former partner who exploits a lease-renewal opportunity during winding up:

1. Is automatically free because dissolution has occurred.
2. May remain subject to fiduciary obligations under *Chan v Zacharia*.
3. Can only be liable in negligence.
4. Is liable only if the partnership proves actual loss.

## Short-answer questions

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Short answer 1. Explain the difference between vulnerability and a fiduciary undertaking.

Short answer 2. Why must scope be defined before applying the no-conflict rule?

Short answer 3. Explain why an arm's-length supply agreement may produce contractual breach without fiduciary breach.

Short answer 4. Explain why good intentions and absence of loss do not necessarily defeat the no-profit rule.

Short answer 5. Explain how fully informed consent operates in a fiduciary problem.

## High-distinction IRAC problem

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Problem.

Nora appoints Felix to negotiate and purchase a rare manuscript for no more than \$300,000. Felix discovers the owner will sell for \$250,000. Without telling Nora, Felix buys it through a company owned by his spouse and immediately offers to resell it to Nora for \$340,000. Felix argues that he used no money belonging to Nora, that Nora suffered no loss because she never owned the manuscript, and that his agency ended the moment he privately decided not to bid for her. Advise Nora.

# Fiduciary Relationships - Tutorial, Forum and Model Answers

**How to use these answers.** The answers deliberately follow the Week 2 Forum method: **relationship -> scope -> breach -> consent/authorisation -> remedy**. They are not templates to memorise. In an examination, the exact facts determine whether the undertaking exists and how far it extends.

## Tutorial 2 model answers

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Question 1, Scenario 1 - Jack and Jill

**Issue.** Whether Jill owes Jack fiduciary duties in relation to the bowl, whether the bowl falls within the scope of the agency, and whether buying it personally is an unauthorised conflict/profit.

**Relationship.** Once Jill accepts Jack's instruction to attend the auction and bid on his behalf, she is his agent for that acquisition task. Agent-principal is a recognised fiduciary relationship for the entrusted function.

**Scope.** The scope is defined by the undertaking: antique pottery at the auction, with a maximum price of \$500,000 per item. The \$300,000 opening bid on the Ming Dynasty Bowl puts the opportunity squarely inside that scope. The analysis resembles the position-derived opportunity reasoning in [\*Keech v Sandford\*](#) and [\*Regal \(Hastings\) Ltd v Gulliver\*](#): the fiduciary cannot take personally an

opportunity encountered through the entrusted role without authorisation.

**Breach.** Jill's personal purchase at \$400,000 creates a direct conflict between her own interest in obtaining the bowl and Jack's interest in having his agent pursue it for him. The fact she uses her own money does not remove the conflict. Nor would honest motives or an argument that Jack suffered no proven loss answer the strict loyalty rule. Her non-disclosure also means there is no informed consent.

**Variation - opening bid \$550,000.** If the bowl is already outside Jack's stated ceiling, the opportunity to purchase it for Jack at that price falls outside the acquisition authority he gave Jill. Jill therefore has a stronger argument that she may use her own money to buy it after the agency task has no application to that item. However, if she instead uses *Jack's* money to purchase it at \$550,000, she exceeds authority and misuses entrusted funds. That conduct is wrongful even though the price ceiling complicates the no-conflict analysis. The exam point is to separate (i) scope of agency, (ii) misuse of principal property, and (iii) self-interested appropriation.

**Conclusion.** On the original facts, Jill is very likely in breach of fiduciary loyalty. On the \$550,000 variation, personal purchase with her own funds is more defensible because the opportunity falls outside the price-limited scope, but using Jack's funds is plainly unauthorised.

### Question 1, Scenario 2 - David's compulsory textbook

**Issue.** Whether David owes fiduciary obligations to students and/or the university in relation to selecting compulsory course materials, and whether undisclosed royalties and control of the publisher create a conflict or unauthorised profit.

**Students.** Professor-student is not a conventional fiduciary category. Expertise, trust and educational vulnerability do not by themselves establish an ad hoc fiduciary relationship. Under [Hospital Products](#), the question is whether David undertook to exercise a relevant power or discretion for the students' legal/economic interests such that they were entitled to expect undivided loyalty. That is arguable but should not be assumed.

**University/employer.** The stronger fiduciary analysis concerns David's delegated institutional function. If his employment authorises him to select or prescribe course materials for the university, he may be exercising an entrusted power for the institution while simultaneously receiving royalties through a pseudonym and his own company. The conflict exists between the proper exercise of delegated academic/procurement judgment and his personal financial interest.

**Scope.** Not every aspect of employment is fiduciary. The precise question is whether textbook selection, approval and use fall within a function in which David undertook to exercise judgment for the university rather than for himself. The course's Week 2 emphasis on scope is critical here.

**Breach.** If fiduciary status and scope are established, undisclosed royalties, compulsory adoption and preventing substitution can engage both no-conflict and no-profit rules. [Regal \(Hastings\)](#) shows that a position-derived profit can be accountable even if the fiduciary says the arrangement was beneficial. Proper advance disclosure and informed institutional authorisation could materially change the result.

**Other law.** Employment obligations, university policy, contract, consumer law, academic integrity and disciplinary rules may also apply. Those causes of action should be kept analytically separate from fiduciary law.

**Conclusion.** A direct fiduciary duty to each student is contestable. The strongest fiduciary case is a conflict between David's personal royalty interest and any entrusted university function over compulsory materials.

Question 1, Scenario 3 - Meredith and Jacob

**Issue.** Whether an arm's-length reseller/supply relationship makes Meredith a fiduciary for Jacob and, if not, whether her competing product and refusal of the next order are instead contractual matters.

**Relationship.** The facts are closest to [\*Hospital Products\*](#). Meredith buys pre-packaged bird food for resale. Nothing indicates that she undertook to act *for* Jacob, to subordinate her own commercial interests, to act as his agent, or to exercise a discretionary power over his legal/economic interests.

**Scope.** Because no fiduciary undertaking is established, there is no fiduciary scope within which the competing blend must be tested. Commercial trust or Jacob's dependence on Meredith's orders would not be enough by itself.

**Breach.** Developing a competing blend is therefore not, without more, a breach of fiduciary loyalty. Refusing the next agreed order may breach contract if the contract required purchase, but a contractual breach is not automatically a fiduciary breach. This distinction is exactly why *Hospital Products* matters.

**Conclusion.** The better answer is contractual rather than fiduciary unless additional facts show Meredith undertook a loyalty function on Jacob's behalf.

## Question 2 - Arthur, Martin and the Springbrook trust property

**Issue.** Whether Martin's later purchase of former trust property is sufficiently connected to his earlier trusteeship to remain constrained by fiduciary loyalty, and what relief Arthur could seek if breach is established.

**Relationship.** Martin was trustee for Arthur. Trustee-beneficiary is a recognised fiduciary relationship and the administration/sale of trust property sits at its core.

**Scope while trustee.** Martin was instructed to sell the property, obtained the valuation and became informed about offers and market conditions. Those matters were acquired within the trusteeship. The strict trustee cases, especially [\*Keech v Sandford\*](#), show why equity is suspicious when a trustee personally acquires a benefit or opportunity connected with trust property.

**Effect of resignation.** Resignation is relevant but not conclusive. [\*Chan v Zacharia\*](#) establishes that fiduciary obligations may continue after formal termination where the impugned opportunity relates to unfinished fiduciary business or winding up. The question is therefore whether Martin's purchase five months later was genuinely independent of the trusteeship or was the exploitation of a sale opportunity and information generated while he was trustee.

**Arthur's argument.** Martin was the trustee responsible for the sale, knew the \$1.5 million valuation and the \$900,000 offer, then resigned and acquired the same asset from the successor trustee. Arthur can argue that the transaction "relates back" to the fiduciary administration and that a trustee should not be able to escape a no-conflict rule merely by resigning immediately before becoming purchaser. *Keech* supports a strict approach to position-connected opportunities.

**Martin's counterargument.** Paul became the independent trustee and made the sale decision; five months passed; the \$1.1 million price exceeded the prior \$900,000 offer and was said to accord with local comparables; Arthur received the proceeds; and much of the later \$1.75 million value and short-stay profitability resulted from Martin's subsequent improvements and external road repairs. These facts support an argument that the purchase was a new arm's-length transaction rather than exploitation of an unfinished fiduciary opportunity.

**Consent/authorisation.** The problem does not state that Arthur gave fully informed consent to Martin's personal acquisition. If Martin relies on consent, he would need to show disclosure sufficient to permit a genuinely informed decision about the conflict, including his former role and relevant information.

**Remedies.** If breach is established, potential relief may include rescission where restoration is possible, an account of profits, constructive-trust relief in an appropriate proprietary setting, or equitable compensation. The later increase in value does not automatically all belong to Arthur. [\*Boardman v Phipps\*](#) and [\*Warman International Ltd v Dwyer\*](#) illustrate that allowances may be made for the fiduciary's independent capital, work, skill and causal contribution when calculating gains-based relief.

**Defences/time.** Delay from 2021 to 2026, knowledge, receipt/retention of proceeds, affirmation, acquiescence and laches may become important. They do not erase the need to decide breach first.

**Conclusion.** Arthur has a substantial fiduciary argument because the asset and sale opportunity arose squarely within Martin's former trusteeship, but the independent successor trustee, lapse of time, market-consistent sale price and Martin's later improvements create serious counterarguments. The outcome turns on the factual connection between the purchase and the former fiduciary office.

## Week 2 Forum consolidation answers

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### Forum Answer 1 - Why relationship is only the beginning

A fiduciary label does not make every interaction fiduciary. The court must identify the function for which loyalty was undertaken. A trustee-beneficiary relationship can exist while the same parties also deal as landlord and tenant in a separate matter. The fiduciary rules attach only to the relevant undertaking. Therefore the proper sequence is relationship -> scope -> breach.

### Forum Answer 2 - Proscriptive versus prescriptive duties

A proscriptive duty restrains conduct: do not make an unauthorised profit and do not enter an unauthorised conflict of interest/duty. A prescriptive duty commands positive conduct, such as a general obligation to act in another's best interests. [Breen v Williams](#) is important because Australian fiduciary law is principally proscriptive and does not use fiduciary status as a general source of positive duties that may instead arise in contract, tort, confidence or statute.

### Forum Answer 3 - Why inequality/trust are not enough

[Hospital Products](#) rejects a mechanical approach. Commercial parties are often unequal in bargaining strength and commonly trust one another to perform contracts. Fiduciary law requires more: an undertaking to act for or on behalf of another in a way that attracts loyalty, ordinarily involving entrusted power/discretion and

corresponding vulnerability. Otherwise ordinary commerce would be converted into fiduciary law.

#### Forum Answer 4 - Galambos and reasonable expectation

[Galambos v Perez](#) shows that a claimant cannot create fiduciary loyalty simply by expecting it. In an ad hoc relationship, the expectation must be grounded in an express or implied undertaking or mutual understanding that the alleged fiduciary will exercise a relevant power for the claimant. Ms Perez's voluntary advances, sometimes made without Galambos's knowledge, could not support an undertaking by him to protect her interests in those advances.

#### Forum Answer 5 - Honest fiduciaries can still breach

[Regal \(Hastings\)](#) and [Boardman v Phipps](#) demonstrate the prophylactic nature of the loyalty rules. Liability does not turn on dishonesty or proof that the principal was worse off. The question is whether the fiduciary obtained an unauthorised benefit or entered a prohibited conflict by reason of the fiduciary position. Fairness to an honest fiduciary can be addressed later through authorisation rules or remedial allowances; it does not dissolve the duty.

#### Forum Answer 6 - Duties before and after formal partnership

[Fraser Edmiston](#) shows that fiduciary obligations can arise before a partnership is formally completed where the parties have already embarked on a relationship of mutual trust and confidence around a

joint venture. [Chan v Zacharia](#) shows that duties can continue after dissolution for winding up and opportunities connected with unfinished partnership affairs. Formal dates are relevant, but the substance and timing of the entrusted relationship control.

## FAQ answers

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FAQ 1. Does friendship create fiduciary status?

**Answer.** No. Friendship may explain trust, but it is not a fiduciary category. Jill is fiduciary because she accepts an agency to bid for Jack, not because they are friends.

FAQ 2. Is every employee fiduciary in every function?

**Answer.** No. Employment can contain fiduciary functions, particularly where an employee is entrusted with power, property, clients or opportunities, but the court must define the particular undertaking and scope. The label "employee" is not a shortcut.

FAQ 3. Commercial contract without fiduciary duty?

**Answer.** Yes. Under *Hospital Products*, parties can contract at arm's length while remaining entitled to pursue their own commercial

interests. A broken promise can sound in contract without any undertaking of fiduciary loyalty.

FAQ 4. Can duties survive resignation or dissolution?

**Answer.** Yes. *Chan v Zacharia* shows that duties may continue for winding up or a position-connected opportunity. Termination does not automatically cleanse an opportunity generated by the former office.

FAQ 5. Is vulnerability enough by itself?

**Answer.** No. Vulnerability is an indicium, especially in ad hoc claims, but it must be connected to an undertaking and entrusted power/discretion. Otherwise many ordinary unequal relationships would become fiduciary.

FAQ 6. Does good faith prevent a breach?

**Answer.** No. *Regal (Hastings)* and *Boardman v Phipps* show that honest, well-intentioned fiduciaries can still be accountable for unauthorised profits or conflicts.

FAQ 7. Is confidentiality the same as fiduciary duty?

**Answer.** No. *Breen v Williams* is a useful reminder that duties of confidence, contractual/tortious care and fiduciary loyalty are distinct.

They may coexist, but breach of one does not automatically prove breach of another.

FAQ 8. Can informed consent authorise a conflict or profit?

**Answer.** Potentially yes. The fiduciary must make disclosure sufficient for the person/body entitled to consent to understand the material conflict or profit. Partial disclosure is not enough, as illustrated by *Boardman v Phipps*.

## MCQ answers

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MCQ 1

**Answer: B.** Jill's recognised fiduciary status arises from the agency she accepted.

MCQ 2

**Answer: A.** *Hospital Products* is the leading Australian warning against automatically converting an arm's-length distributorship into a fiduciary relationship.

MCQ 3

**Answer: B.** Relationship -> scope -> breach is the required sequence.

#### MCQ 4

**Answer: B.** *Breen v Williams* resists broad prescriptive fiduciary duties and keeps Australian fiduciary doctrine focused on the relevant undertaking and proscriptive loyalty rules.

#### MCQ 5

**Answer: C.** *Boardman* demonstrates strict liability for potential conflict/position-derived profit, while allowing remedial recognition of valuable work through an allowance.

#### MCQ 6

**Answer: B.** *Chan v Zacharia* confirms that partnership fiduciary obligations can continue during winding up after formal dissolution.

## Short-answer model answers

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Short answer 1.

**Model answer.** Vulnerability describes exposure to another's ability to affect one's interests. A fiduciary undertaking is the express or implied assumption of responsibility to act for or on behalf of another in a defined matter. Vulnerability may support an ad hoc fiduciary claim, but without the undertaking or entrusted power it is not enough.

Short answer 2.

**Model answer.** The no-conflict rule only restrains conflicts within the function for which loyalty was undertaken. Scope prevents fiduciary law becoming a general prohibition on self-interest. A trustee can be fiduciary concerning trust shares while remaining an ordinary landlord in a separate lease with the same beneficiary.

Short answer 3.

**Model answer.** Contract can regulate promised performance while leaving each party free to advance its own commercial interests. Fiduciary law requires a separate loyalty undertaking. *Hospital Products* therefore allows a commercial agreement to be breached contractually without necessarily engaging fiduciary no-conflict/no-profit rules.

Short answer 4.

**Model answer.** No-profit and no-conflict rules are prophylactic. *Regal (Hastings)* establishes that liability can arise even where the fiduciary acted in good faith and the principal suffered no loss. Equity seeks to

remove the temptation and evidentiary difficulty that would arise if fiduciaries could retain unauthorised position-derived gains whenever they claimed good motives.

Short answer 5.

**Model answer.** Fully informed consent can authorise conduct that would otherwise breach fiduciary loyalty. The fiduciary must disclose the material facts and nature of the conflict/profit to the person or body legally capable of consenting. *Boardman v Phipps* illustrates that incomplete information prevents consent from being fully informed.

## High-distinction IRAC model answer

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**Issue.** Whether Felix owes Nora fiduciary duties in relation to the manuscript, whether buying it through his spouse's company breaches the no-conflict/no-profit rules, whether his asserted termination of the agency changes the result, and what relief may follow.

**Rule/Law.** Agent-principal is a recognised fiduciary relationship for the scope of the agency. Under the Chapter 2 method, the court first identifies the undertaking, then scope, then breach. Felix undertook to negotiate and purchase the identified manuscript for Nora up to \$300,000. A fiduciary must not place personal interest in conflict with the entrusted duty or make an unauthorised profit/opportunity gain by reason of the fiduciary position. [\*Keech v Sandford\*](#) demonstrates the strict rule against appropriating a position-connected opportunity;

*Regal (Hastings) Ltd v Gulliver* confirms that honesty and absence of principal loss are not defences to an unauthorised fiduciary profit; and *Chan v Zacharia* shows that formal termination cannot necessarily be used to appropriate an opportunity that relates back to the fiduciary relationship. Fully informed consent can authorise the transaction, but none is present on the facts.

Application - relationship and scope. Felix was expressly appointed to negotiate and buy the rare manuscript for Nora with a ceiling of \$300,000. The owner's willingness to sell for \$250,000 is therefore exactly the opportunity Felix was retained to pursue. The opportunity is not merely adjacent to the agency; it is the agency's subject matter.

Application - conflict and profit. Felix chooses to acquire for himself, through a company owned by his spouse, the same asset he was appointed to acquire for Nora. His personal economic interest is directly opposed to Nora's interest. Interposing a related company does not change the substance: Felix uses a position-derived opportunity for personal benefit and then attempts to extract a \$90,000 margin from Nora.

No loss/good faith argument. Felix's argument that Nora never owned the manuscript and therefore suffered no loss misunderstands the strict loyalty rule. As *Regal (Hastings)* demonstrates, fiduciary accountability is not confined to compensating proven loss. An account of profits is gain-based.

Termination argument. Felix says the agency ended when he privately decided not to bid for Nora. That is weak. The sale opportunity had already been discovered squarely within the agency, and a fiduciary cannot ordinarily manufacture termination in order to appropriate the matured opportunity. The reasoning in *Chan v Zacharia* supports continuing restraint where conduct relates back to the former fiduciary function.

Counterarguments. Felix may argue that Nora did not direct him to purchase automatically at any price below \$300,000, that he had discretion whether to proceed, and that the spouse's company is a separate purchaser. Those points may affect factual characterisation, but they do not remove the direct conflict created by taking the very opportunity Felix was retained to evaluate for Nora without disclosure.

Remedies. Nora may seek an account of the profit, rescission of any subsequent sale between her and the related company, and potentially proprietary/constructive-trust relief if the requirements for that relief are satisfied. Equitable compensation may be relevant if she proves loss. Because the profit is closely tied to the entrusted opportunity, Felix would face difficulty arguing that the \$90,000 markup is independent of the breach.

Conclusion. Felix is very likely in breach of fiduciary duty. The relationship is established, the manuscript falls squarely within scope, the personal acquisition creates a direct conflict and unauthorised profit, no informed consent exists, and the private assertion of termination is unlikely to sever an already-matured fiduciary opportunity.

## CHAPTER 3

# Fiduciary Duties and Remedies for Breach

**Chapter purpose.** The no-conflict and no-profit rules; misuse of position; informed consent; account of profits; constructive trust; equitable compensation; allowances; and choosing the remedy that matches the wrong.

## 3.1 From relationship to breach

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After establishing fiduciary status and scope, the next task is to identify the loyalty rule engaged. The no-conflict rule restrains a fiduciary from acting where personal interest conflicts, or may conflict, with duty. The no-profit rule prevents unauthorised gains obtained by reason of the fiduciary position or opportunity. The strictness of the rules is prophylactic: equity seeks to remove temptation and preserve undivided loyalty.

## 3.2 Conflict and profit are related but analytically distinct

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A fiduciary may breach because personal interests conflict with duty even before a measurable profit is made. Conversely, a gain may be recoverable because it was obtained through the position even if the principal cannot prove an equivalent loss. This is why an account of profits is conceptually different from compensation.

## 3.3 Account of profits

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An account of profits focuses on stripping unauthorised gain rather than measuring the claimant's loss. *Warman International* is central because it

shows that the remedy can be adjusted where the fiduciary's own skill, effort, capital or other factors contributed to profits. The purpose is not punitive confiscation but principled disgorgement of gains attributable to the breach.

### 3.4 Equitable compensation

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Equitable compensation seeks monetary relief for loss caused by breach of equitable duty. The exact approach depends on the duty and context. *Youyang* is a significant High Court authority on breach of trust and restoration/compensation. A strong answer does not simply label every monetary remedy "damages". It explains whether the relief is substitutive, restorative or gain-based and why the selected measure fits the breach.

### 3.5 Proprietary responses and constructive trusts

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In some cases, equity may recognise a proprietary response over an asset or its traceable substitute. That can be especially powerful in insolvency. However, a constructive trust is not a universal response to fiduciary breach. The court must identify the doctrinal basis and remedial consequences rather than assuming that every breach automatically transfers beneficial ownership.

### 3.6 Remedy selection

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Ask what the client wants: reversal of a transaction, recovery of a specific asset, stripping of profit, restoration of a trust fund, compensation for loss, or protective relief. Then match the remedy to the established wrong, causation and available property. Remedies are a distinct stage of analysis, not an afterthought.

## Exam rule map

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- Separate breach analysis from remedy analysis.
- No-conflict can operate even before a profit is realised.
- Account of profits is gain-based; equitable compensation is loss/restoration based.
- Do not call every equitable monetary remedy “damages”.
- Consider allowances and the contribution of the fiduciary’s own skill or capital where relevant.

## Leading authorities

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### [Chan v Zacharia \(1984\) 154 CLR 178](#)

Strict application of fiduciary obligations where a former partner appropriated an opportunity connected with the partnership.

### [Warman International Ltd v Dwyer \(1995\) 182 CLR 544](#)

Leading High Court authority on account of profits, causation of gains and allowances for skill and effort.

### [Maguire v Makaronis \(1997\) 188 CLR 449](#)

Important High Court authority on fiduciary obligations, informed consent and the strict approach to solicitor-client conflicts.

### [Youyang Pty Ltd v Minter Ellison Morris Fletcher \(2003\) 212 CLR 484](#)

High Court authority on breach of trust and monetary relief designed to restore the trust position.

## Course source spine

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- [Paul Finn, Fiduciary Reflections \(2014\)](#)
- [Ong on Equity](#)
- [Meagher, Gummow & Lehane's Equity](#)
- [Dal Pont, Equity and Trusts: Commentary and Materials](#)

These sources are teaching/research references. Primary legislation and judgments control where commentary differs.

## FAQs — questions

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FAQ 1. Must the principal prove loss to obtain an account of profits?

FAQ 2. Is a constructive trust automatic after every fiduciary breach?

FAQ 3. Why can a fiduciary receive an allowance after wrongdoing?

FAQ 4. What is the safest exam structure?

## Multiple-choice questions

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MCQ 1. An account of profits is principally designed to:

1. Compensate emotional distress.
2. Strip gains attributable to fiduciary breach.
3. Punish criminal conduct.
4. Transfer legal title automatically.

MCQ 2. Warman International is especially important for:

1. Allowances and attribution of profit.
2. Three certainties.
3. Charitable purpose.
4. Notice in assignment.

MCQ 3. Youyang is most closely associated with:

1. Breach of trust and restorative monetary relief.
2. Criminal fraud.
3. Company incorporation.
4. Charitable trusts.

MCQ 4. Fully informed consent is best analysed:

1. Before deciding whether any fiduciary relationship exists.
2. After identifying the duty/scope and the conduct that would otherwise breach it.
3. Only at remedy stage.
4. Never in fiduciary cases.

## Short-answer questions

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Short answer 1. Distinguish account of profits and equitable compensation.

Short answer 2. What is the role of an allowance?

Short answer 3. Why does remedy selection matter in insolvency?

## High-distinction IRAC problem

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A senior employee, Priya, uses confidential commercial information and a customer opportunity obtained through her fiduciary role to establish a competing venture. The venture earns \$2 million over three years, but Priya argues that most of the profit resulted from her personal expertise and later

market growth. The former employer seeks all profits and a constructive trust. Advise on remedies.

Darius / 4KTrust / A4Effort / Desserto / Ophore

The actual Week 4 tutorial is now part of the Chapter 3 learning map. It requires separate analysis of Darius in his capacities as solicitor/ adviser, trustee of 4KTrust, executor and beneficiary of Oscar's estate, and investor on behalf of the trust. The key examination discipline is to identify the claimant and the specific fiduciary undertaking before asking whether a conflict, unauthorised profit, misuse of information, or breach of trustee investment duties arises. The complete facts supplied in the tutorial are used to structure the Chapter 3 model analysis.

## Tutorial 3 (Week 4) - integrated problem map

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# Fiduciary Duties and Remedies for Breach — Answers

## FAQ answers

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FAQ 1. Must the principal prove loss to obtain an account of profits?

**Answer.** No. The remedy is directed to the fiduciary's unauthorised gain, though causation and attribution of profit remain important.

FAQ 2. Is a constructive trust automatic after every fiduciary breach?

**Answer.** No. The proprietary response must have a doctrinal basis and must fit the circumstances.

FAQ 3. Why can a fiduciary receive an allowance after wrongdoing?

**Answer.** Warman shows that the court may distinguish profits attributable to the breach from profits attributable to the fiduciary's own skill, effort or capital.

FAQ 4. What is the safest exam structure?

**Answer.** Duty and scope -> breach -> consent/defences -> remedy -> causation/quantification -> conclusion.

## MCQ answers and explanations

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MCQ 1. An account of profits is principally designed to:

**Answer: B.** It is gain-based rather than loss-based.

MCQ 2. Warman International is especially important for:

**Answer: A.** The case explains the account of profits and allowance issues.

MCQ 3. Youyang is most closely associated with:

**Answer: A.** It is a leading High Court trust remedy case.

MCQ 4. Fully informed consent is best analysed:

**Answer: B.** Consent addresses otherwise disloyal conduct after the fiduciary obligation is identified.

## Short-answer model answers

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Short answer 1. Distinguish account of profits and equitable compensation.

**Model answer.** An account strips the defendant's gain; compensation responds to the claimant's loss or restorative entitlement. Different causal and quantification questions follow.

Short answer 2. What is the role of an allowance?

**Model answer.** It can recognise the defendant's own contribution to profits so that disgorgement remains tied to gains attributable to breach.

Short answer 3. Why does remedy selection matter in insolvency?

**Model answer.** A proprietary remedy can remove an asset from the insolvent estate, while a personal monetary claim ranks with creditors subject to insolvency rules.

## High-distinction IRAC model answer

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**Issue.** The issues are the remedy for a proven fiduciary breach, the extent of profit attributable to the breach, whether an allowance is appropriate, and whether a proprietary constructive trust is justified.

**Law.** The no-profit principle supports an account of profits where a fiduciary makes unauthorised gains through the fiduciary position or opportunity. Warman International requires a principled causal inquiry into the profits attributable to breach and recognises that an allowance may be appropriate for the fiduciary's skill, effort or capital. A constructive trust is a potentially proprietary response but should not be assumed to arise automatically whenever an account is available.

**Application.** The employer should identify the diverted customer opportunity and information as the causal springboard for the competing business. Profits earned because the opportunity was captured through breach are strong candidates for disgorgement. Priya's argument is stronger for later profits that depended substantially on new clients, independent capital, market conditions and work not traceable to the original opportunity. The court may require detailed accounting evidence and may grant an allowance so the employer does not receive profits that are not fairly attributable to the breach. If a specific asset was acquired with the unauthorised gain, the employer can consider a proprietary claim and tracing. If the only issue is a business profit stream, an account may be more appropriate than automatically imposing a constructive trust over the entire enterprise.

**Counterargument.** Priya will argue that the breach merely created an initial opportunity and that subsequent profits were produced by independent effort and market conditions. The employer will respond that the venture would not have existed but for the disloyal appropriation and that equity should resolve evidential uncertainty against the fiduciary.

Conclusion. An account of profits is strongly available, but the recoverable amount requires attribution. A high-distinction answer should argue both the employer's broad disgorgement claim and Priya's allowance/causation position, then treat any constructive trust as a separate proprietary question.

Darius / 4KTrust / A4Effort / Desserto / Ophore

**Method.** Treat each capacity separately. As trustee, Darius is fiduciary to Luca and Mara in administering 4KTrust. As solicitor/adviser to A4Effort, he may owe fiduciary obligations within the scope of the legal retainer. As executor, he is fiduciary in administering Oscar's estate, while his status as a beneficiary does not itself give him present ownership of estate assets before administration ([Schultz](#)).

**Desserto advice.** The key question is not whether Darius's legal advice was negligent - the facts say it was not - but whether his trustee investment in Desserto created a conflict with his solicitor duty to A4Effort and whether that conflict fell within the retainer. If Darius's personal/trust interest could consciously influence advice about suing Desserto, the no-conflict rule is engaged unless fully disclosed and authorised. Causation and remedy then require separate analysis.

**Ophore investment.** Profitability alone does not answer trustee duty. The analysis separates fiduciary loyalty (conflict/no-profit) from trustee investment duties, powers and any statutory duties under the current [Trusts Act 2025 \(Qld\)](#). Darius's knowledge obtained as executor and his potential future personal shareholding raise conflict issues. The beneficiaries' ethical objections, standing alone, are not the legal test; the court asks whether the investment was authorised, prudent under governing trust law, and affected by an unauthorised conflict.

**Consequences.** Depending on breach, possible relief includes rescission, account of profits, equitable compensation, injunction and removal, but the remedy must match the proven duty and causal connection.

## Tutorial 3 (Week 4) - model issue map

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# Accessorial Liability and Tracing

**Chapter purpose.** Third-party participation in breaches of trust or fiduciary duty; Barnes v Addy categories; Australian knowing assistance and knowing receipt; the role of Farah and Grimaldi; and the first step in tracing value into substitutes.

## 4.1 Why accessorial liability matters

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Equity would be incomplete if liability stopped with the trustee or fiduciary. Third parties may receive trust property or assist a dishonest and fraudulent design. Australian law therefore requires careful attention to the recognised Barnes v Addy categories and to the authoritative treatment in Farah Constructions. The student must distinguish receipt-based liability from assistance-based liability because the elements are not identical.

## 4.2 Knowing receipt

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Receipt-based liability asks whether the defendant received trust or fiduciary property for their own benefit and possessed the level of knowledge required by Australian authority. A mere volunteer who receives trust property may face proprietary claims even if personal knowing-receipt liability is not established. This is why the answer must separate proprietary recovery from personal liability.

## 4.3 Knowing assistance

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Knowing assistance focuses on participation in a trustee/fiduciary breach of the requisite character with sufficient knowledge. Farah is the controlling High Court authority in Australia and must be used with precision. Students should avoid importing looser overseas formulations without explaining their compatibility with Farah.

## 4.4 Grimaldi and practical characterisation

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Grimaldi provides detailed Full Federal Court analysis of accessorial principles in a corporate context. It is particularly useful for understanding how knowledge can be inferred from circumstances and how third-party participation interacts with fiduciary and corporate wrongdoing.

## 4.5 Tracing is a process, not a remedy

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Tracing identifies value as it moves from original property into substitutes. It does not itself create the final remedy. The first questions are: what property is claimed, what happened to it, can value be followed or traced into an identifiable substitute, and has the property been dissipated? Only after that process succeeds should the claimant choose a proprietary or personal remedy.

## 4.6 Exam method

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For a third party, ask first: receipt or assistance? Then identify the primary breach, the relevant property or conduct, the defendant's participation/receipt, the knowledge standard and the remedy. For tracing, draw the transaction chain before writing paragraphs.

## Exam rule map

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- Separate knowing receipt from knowing assistance.
- Do not confuse proprietary recovery with personal Barnes v Addy liability.
- Use Farah as the controlling Australian starting point.
- Tracing identifies substitutes; it is not itself the remedy.
- Draw the path of value through each transaction before selecting relief.

## Leading authorities

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### [Barnes v Addy \(1874\) LR 9 Ch App 244](#)

Traditional source of the two accessorial categories: receipt of trust property and assistance in a dishonest/fraudulent design.

### [Farah Constructions Pty Ltd v Say-Dee Pty Ltd \(2007\) 230 CLR 89](#)

High Court authority controlling Australian knowing receipt and knowing assistance analysis.

### [Grimaldi v Chameleon Mining NL \(No 2\) \(2012\) 200 FCR 296](#)

Detailed Full Federal Court treatment of fiduciary wrongdoing and accessorial liability.

### [Re Hallett's Estate \(1880\) 13 Ch D 696](#)

Classic tracing authority concerning mixed funds and presumptions against a wrongdoer.

## Course source spine

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- [Meagher, Gummow & Lehane's Equity](#)
- [Dal Pont, Equity and Trusts: Commentary and Materials](#)
- [Ong on Equity](#)
- [Cases and Materials on Equity and Trusts](#)

## FAQs — questions

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**FAQ 1. Is tracing the same thing as knowing receipt?**

**FAQ 2. Can a claimant have a proprietary claim without proving knowing receipt?**

**FAQ 3. Why is Farah essential?**

**FAQ 4. What is the best way to analyse a complex tracing fact pattern?**

## Multiple-choice questions

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**MCQ 1. Knowing assistance focuses principally on:**

1. Receipt of title only.
2. Participation in the relevant breach with the required knowledge.
3. Negligence.
4. Whether a contract is in writing.

**MCQ 2. Tracing is best described as:**

1. A punishment.
2. A process for identifying value in substitutes.
3. A type of contract.
4. An automatic constructive trust.

**MCQ 3. Farah Constructions is particularly significant because:**

1. It abolished fiduciary law.
2. It is controlling High Court authority on Australian accessorial liability.
3. It concerns only criminal law.
4. It created the three certainties.

**MCQ 4. Receipt-based personal liability should be kept separate from:**

1. Any analysis of property.
2. Proprietary claims to trust property or its substitutes.
3. Knowledge.
4. Benefit.

## Short-answer questions

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**Short answer 1. Explain the difference between knowing receipt and knowing assistance.**

**Short answer 2. Why is tracing not a remedy?**

**Short answer 3. What should be drawn before writing a tracing answer?**

## High-distinction IRAC problem

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Trustee T transfers \$300,000 of trust money to Company X. X's director knows the money came from the trust and uses it to pay a debt owed by X and to purchase shares in X's name. The director also prepares documents designed to conceal the transfer. Advise the beneficiaries on potential claims against X and the director.

# Accessorial Liability and Tracing — Answers

## FAQ answers

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### FAQ 1. Is tracing the same thing as knowing receipt?

**Answer.** No. Tracing identifies property/value; knowing receipt is a personal liability doctrine with its own elements.

### FAQ 2. Can a claimant have a proprietary claim without proving knowing receipt?

**Answer.** Potentially yes. Property-based recovery and personal accessorial liability are distinct.

### FAQ 3. Why is Farah essential?

**Answer.** It is the High Court authority that sets the Australian framework and cautions lower courts against departing from binding precedent.

### FAQ 4. What is the best way to analyse a complex tracing fact pattern?

**Answer.** Draw a timeline and money-flow diagram first: source -> transfer -> mix -> substitution -> recipient -> present asset.

## MCQ answers and explanations

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### MCQ 1. Answer B.

Assistance and knowledge are the core ideas.

### MCQ 2. Answer B.

Tracing precedes the choice of remedy.

**MCQ 3. Answer B.**

It is the central Australian authority.

**MCQ 4. Answer B.**

The claimant may have a property claim even if personal knowing-receipt liability is not made out.

## Short-answer model answers

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**Short answer 1. Explain the difference between knowing receipt and knowing assistance.**

**Model answer.** Knowing receipt centres on beneficial receipt of relevant property plus knowledge; knowing assistance centres on participation in a breach/design plus the required knowledge.

**Short answer 2. Why is tracing not a remedy?**

**Model answer.** It is an evidentiary/identification process. Once value is traced, the claimant still must establish the proprietary or personal remedy sought.

**Short answer 3. What should be drawn before writing a tracing answer?**

**Model answer.** A chronological asset-flow map showing every transfer, mixing event, substitution, dissipation and present holder.

## High-distinction IRAC model answer

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**Issue.** The beneficiaries must distinguish proprietary recovery/tracing from personal accessorial liability against Company X and its director.

**Law.** Barnes v Addy principles, as treated in Farah and later Australian authority, distinguish receipt-based and assistance-based liability. A recipient of trust property may also be subject to a proprietary claim where the trust property or its traceable substitute remains identifiable. Knowing assistance focuses on participation in the relevant breach with sufficient knowledge. Grimaldi assists with knowledge and participation analysis.

**Application - Company X.** X received trust money. The beneficiaries should trace into any identifiable shares purchased with that money. To the extent money was used to discharge X's debt, that value may be dissipated for proprietary tracing purposes, although personal claims may remain. For knowing receipt, the beneficiaries must establish the Australian elements including beneficial receipt and the required knowledge. The director's knowledge may be relevant to attribution to the company depending on corporate principles.

**Application - director.** The director's preparation of concealment documents is active participation, not mere receipt. If the primary breach has the character required by the Australian knowing-assistance doctrine and the director possessed the necessary knowledge, personal liability is strongly arguable.

**Remedies.** The beneficiaries should plead proprietary relief over traceable shares, restoration or compensation against the trustee, and appropriate personal relief against X/director if accessorial elements are made out. They should avoid collapsing all claims into "constructive trust".

Conclusion. The shares present the strongest proprietary target; the debt payment raises dissipation issues; and the concealment conduct materially strengthens a knowing-assistance case against the director.

# Tracing Continued: Mixing, Substitution and Competing Claimants

**Chapter purpose.** Following versus tracing; mixed bank accounts; *Re Hallett* and *Re Oatway*; gains and substitutions; dissipation; competing innocent claimants; *Caron v Jahani*; and remedial elections after successful tracing.

## 5.1 Following and tracing

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Following tracks the same asset as it changes hands. Tracing identifies value when the original asset is exchanged for another. A bank transfer, share purchase or property acquisition can therefore require tracing rather than following. The student should state this distinction because it clarifies why a substitute asset can still represent the claimant's value.

## 5.2 Mixed funds and presumptions

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A wrongdoer cannot ordinarily defeat a proprietary claim simply by mixing trust money with personal funds. *Re Hallett* and *Re Oatway* demonstrate complementary protections. The presumptions are tools for working out what value is represented in a mixed account or purchased asset; they are not invitations for the wrongdoer to choose whichever assumption benefits the wrongdoer.

## 5.3 Dissipation

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If trust money is spent on ordinary consumption and no substitute asset remains, the proprietary chain may end. The claimant may still have personal claims against the trustee/fiduciary or accessories. The exam distinction is therefore between “can the property be traced?” and “does another cause of action survive even though tracing fails?”

## 5.4 Appreciation and the claimant’s election

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Where trust value contributes to the purchase of an asset that later appreciates, equity may permit a claimant to assert a proportionate beneficial interest or a lien/charge depending on the circumstances. *Foskett v McKeown* is influential in explaining that tracing is based on property rights rather than judicial discretion about fairness.

## 5.5 Competing innocent claimants

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A particularly difficult problem occurs when multiple innocent claimants contributed to a mixed fund that is insufficient to satisfy everyone. The traditional first-in-first-out rule in *Clayton’s Case* has been criticised. The course-listed English and Hafeez-Baig article discusses alternative methods, including *pari passu* and rolling-charge approaches, and the Australian reasoning associated with *Caron v Jahani* (No 2).

## 5.6 Strategic remedy choice

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Tracing success does not answer whether the claimant should take a proportionate share, lien, charge, account, compensation or another remedy. In insolvency, proprietary relief may be commercially decisive. The lawyer should compare available remedies and choose the one that best protects the client without double recovery.

## Exam rule map

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- State whether you are following the same asset or tracing into a substitute.
- Separate mixing from dissipation.
- Use *Re Hallett* and *Re Oatway* together, not mechanically.
- For appreciation, consider proportionate ownership versus lien/charge.
- For multiple innocent contributors, identify the allocation methodology and authority.

## Leading authorities

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### [Re Hallett's Estate \(1880\) 13 Ch D 696](#)

Classic presumption in mixed-account tracing.

### [Re Oatway \[1903\] 2 Ch 356](#)

Prevents a wrongdoer from selecting an accounting assumption that leaves the beneficiary with the worthless residue.

### [Foskett v McKeown \[2001\] 1 AC 102](#)

Influential modern authority explaining tracing and proportionate proprietary recovery.

### [Caron v Jahani \(No 2\) \(2020\) 102 NSWLR 537](#)

Australian appellate authority important to competing innocent claimants and the simplified rolling-charge approach.

## Course source spine

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- [English & Hafeez-Baig, Tracing, Mixing, and Innocent Claimants \(2021\)](#)
- [Trusts Law in Australia, Ong](#)
- [Dal Pont, Equity and Trusts in Australia](#)
- [Cases and Materials on Equity and Trusts](#)

## FAQs — questions

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**FAQ 1. Does mixing destroy a beneficiary's proprietary claim?**

**FAQ 2. What is dissipation?**

**FAQ 3. Why is Foskett important?**

**FAQ 4. Why does the English/Hafeez-Baig article matter?**

## Multiple-choice questions

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**MCQ 1. If trust money is used to buy shares, the beneficiary is generally attempting to:**

1. Follow the same cash notes.
2. Trace value into a substitute asset.
3. Create a criminal charge.
4. Prove negligence only.

**MCQ 2. Re Oatway is used to prevent:**

1. A trustee choosing a presumption that leaves the beneficiary with the depleted residue.
2. Any tracing through bank accounts.
3. Recovery of profits.
4. The creation of express trusts.

**MCQ 3. Dissipation means:**

1. The asset increased in value.
2. The value was spent without an identifiable substitute remaining.
3. The money was mixed.
4. The trustee confessed.

**MCQ 4. A successful trace automatically determines the final remedy.**

1. True.
2. False.

## Short-answer questions

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**Short answer 1. Distinguish mixing and dissipation.**

**Short answer 2. Why can insolvency make tracing strategically important?**

**Short answer 3. Name three possible responses after tracing succeeds.**

## High-distinction IRAC problem

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A trustee places \$100,000 of trust money into a personal account containing \$50,000. The trustee then buys shares for \$120,000 and later spends the remaining \$30,000 on a holiday. The shares rise to \$240,000. Advise the beneficiary.

# Tracing Continued: Mixing, Substitution and Competing Claimants — Answers

## FAQ answers

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### FAQ 1. Does mixing destroy a beneficiary's proprietary claim?

**Answer.** Not automatically. Equity developed tracing rules precisely because wrongdoers often mix funds.

### FAQ 2. What is dissipation?

**Answer.** Value is dissipated when it is spent without producing an identifiable substitute asset, such as ordinary consumption.

### FAQ 3. Why is Foskett important?

**Answer.** It explains tracing as vindication of property rights and supports proportionate claims to appreciated substitute assets in appropriate cases.

### FAQ 4. Why does the English/Hafeez-Baig article matter?

**Answer.** It analyses how courts should allocate losses among multiple innocent contributors to an insufficient mixed fund and discusses the Australian approach in *Caron v Jahani*.

## MCQ answers and explanations

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### MCQ 1. Answer B.

The shares are a substitute for the original value.

**MCQ 2. Answer A.**

It prevents the wrongdoer exploiting presumptions.

**MCQ 3. Answer B.**

There is no substitute asset to trace into.

**MCQ 4. Answer B.**

Tracing identifies value; remedy is a separate inquiry.

## Short-answer model answers

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**Short answer 1. Distinguish mixing and dissipation.**

**Model answer.** Mixing combines trust value with other value but may leave an identifiable fund or substitute; dissipation consumes value without a substitute.

**Short answer 2. Why can insolvency make tracing strategically important?**

**Model answer.** A proprietary claim can give the claimant rights to a specific asset rather than merely an unsecured personal claim against the insolvent estate.

**Short answer 3. Name three possible responses after tracing succeeds.**

**Model answer.** A proportionate beneficial interest, lien/charge, or personal relief such as account/compensation, depending on doctrine and facts.

## High-distinction IRAC model answer

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**Issue.** Whether the beneficiary can trace trust value through the mixed account into the shares and what proprietary remedy is available in relation to the appreciated asset.

**Law.** Mixing does not itself defeat tracing. *Re Hallett* and *Re Oatway* provide equitable presumptions designed to protect the beneficiary and prevent the trustee choosing an allocation that benefits the wrongdoing trustee. *Foskett* supports tracing into substitute assets and, where appropriate, a proportionate proprietary claim to appreciation. Dissipated expenditure does not yield a substitute asset.

**Application.** The account contained \$150,000, of which two-thirds was trust money. The \$120,000 share purchase is an identifiable substitute. The remaining \$30,000 holiday expenditure is dissipated. The trustee should not be allowed to argue that the profitable shares were bought solely with personal money while trust money funded the holiday. *Re Oatway* is especially important to resisting that allocation. Depending on the applicable tracing methodology and exact transaction order, the beneficiary can argue that trust value is represented in the shares and seek a proportionate beneficial interest in the appreciated shares or an equitable lien/charge for the trust contribution.

**Counterargument.** The trustee may argue for a cash-limited lien rather than a share of appreciation. The beneficiary should compare remedies and elect the one supported by the tracing rules and facts.

**Conclusion.** The beneficiary has a strong tracing claim into the shares; the holiday expenditure is dissipated; and appreciation makes the choice between proportionate ownership and a security-style remedy commercially important.

# Express Trusts: The Three Certainties

**Chapter purpose.** Certainty of intention, subject matter and objects; objective construction; fixed and discretionary trusts; imperfect gifts versus declarations of trust; and the interaction between course-listed Trusts Act 1973 (Qld) and current Trusts Act 2025 (Qld).

## 6.1 Trust creation begins with classification

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Before applying the three certainties, identify what the alleged settlor was trying to do. Was there an outright gift, a transfer to trustees, a self-declaration of trust, a contractual arrangement, or merely a non-binding wish? Equity will not convert a failed gift into a declaration of trust merely to rescue the transaction. The mode of creation matters.

## 6.2 Certainty of intention

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The question is objective: did the words and conduct manifest an immediate intention to impose enforceable trust obligations? Technical words are unnecessary. *Paul v Constance* and *Re Armstrong* show that ordinary language and surrounding conduct can be enough. Conversely, expressions of hope, confidence or future intention may be merely precatory. *Byrnes v Kendle* confirms the objective character of the inquiry and the importance of the legal effect of the instrument and circumstances.

## 6.3 Certainty of subject matter

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The court must be able to identify the property held on trust and, where necessary, the beneficial entitlement. If the property or shares are conceptually or evidentially uncertain, the trust may fail. In problem questions, distinguish uncertainty about the existence of property from difficulty valuing or administering an otherwise identifiable asset.

## 6.4 Certainty of objects

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A private trust must have beneficiaries who satisfy the applicable certainty test. Fixed trusts require a complete list or otherwise ascertainable beneficial entitlements. Discretionary trusts use the is-or-is-not conceptual test associated with *McPhail v Doulton*, subject to administrative workability and capriciousness concerns. Always identify the trust type before stating the test.

## 6.5 Queensland statutory context

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The Bond resource list shown by the user identifies the Trusts Act 1973 (Qld). That Act was repealed on 28 April 2026 when the Trusts Act 2025 (Qld) commenced. The 1973 Act should remain in the book as a course-listed historical source, but current legal propositions must be checked against the 2025 Act. The common-law/equitable requirements for express trust creation continue to require careful doctrinal analysis; statutory provisions may govern administration, powers, variation and other trust matters.

## 6.6 Exam method

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Identify the method of trust creation; isolate the alleged trust property; state intention, subject matter and objects separately; apply the correct objects

test for the trust type; consider statutory/formality issues; then state the consequence if one certainty fails.

## Exam rule map

- Do not let equity perfect an imperfect gift by re-labelling it a trust without intention.
- Intention is objective and does not require the word “trust”.
- Analyse subject matter and objects separately.
- Identify fixed versus discretionary trust before stating the objects test.
- Treat Trusts Act 1973 as historical/course-listed; use Trusts Act 2025 for current Queensland law.

## Leading authorities

### [Paul v Constance \[1977\] 1 All ER 195; \[1977\] 1 WLR 527](#)

Ordinary repeated words and conduct objectively demonstrated an immediate trust; technical language was unnecessary.

### [Re Armstrong \[1960\] VR 202](#)

Victorian authority that formal trust language is not essential where words and circumstances objectively establish an intention to constitute a trust.

### [Byrnes v Kendle \(2011\) 243 CLR 253](#)

High Court authority emphasising objective construction of trust intention and legal effect.

**[Kauter v Hilton \(1953\) 90 CLR 86](#)**

Australian authority concerning certainty of intention and the distinction between binding trust language and non-binding expressions.

**[McPhail v Doulton \[1971\] AC 424](#)**

Leading discretionary-trust authority for conceptual certainty of objects.

## Course source spine

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- [Dal Pont, Equity and Trusts: Commentary and Materials](#)
- [Trusts Law in Australia, Ong](#)
- [Trusts Act 2025 \(Qld\) - current](#)
- [Trusts Act 1973 \(Qld\) - course-listed historical](#)

## FAQs — questions

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**FAQ 1. Must a settlor use the word “trust”?**

**FAQ 2. Can equity simply treat a failed gift as a trust?**

**FAQ 3. What happens if one of the three certainties fails?**

**FAQ 4. Which Queensland Trusts Act is current in October 2026?**

## Multiple-choice questions

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**MCQ 1. Paul v Constance is authority that:**

1. The word “trust” is mandatory.
2. Intention can be manifested through ordinary language and conduct.
3. All joint bank accounts are trusts.

4. Subject matter is irrelevant.

**MCQ 2. Before applying certainty of objects, a student should identify:**

1. The colour of the trust deed.
2. Whether the trust is fixed or discretionary.
3. The trustee's tax rate.
4. Whether the beneficiary is vulnerable.

**MCQ 3. In Queensland, the current principal trusts statute is:**

1. Trusts Act 1973 (Qld).
2. Trusts Act 2025 (Qld).
3. Trustee Act 1925 (NSW).
4. No statute applies.

**MCQ 4. Re Armstrong is useful principally on:**

1. Certainty of intention.
2. Company incorporation.
3. Criminal intent.
4. Administrative law.

## Short-answer questions

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**Short answer 1. State the three certainties.**

**Short answer 2. Why is Paul v Constance a useful exam authority?**

**Short answer 3. How should the book treat the Trusts Act 1973 (Qld) in 2026?**

## High-distinction IRAC problem

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George places \$200,000 into a term deposit in his own name. He tells the bank manager, “I want the interest while I am alive, but the capital is for my two children when the deposit matures or when I die.” The receipt identifies George “in re” each child. George dies before maturity. His executor says there was only an unenforceable future intention to make a gift. Advise the children.

# Express Trusts: The Three Certainties — Answers

## FAQ answers

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### FAQ 1. Must a settlor use the word “trust”?

**Answer.** No. Intention is determined objectively from words and conduct. *Paul v Constance* and *Re Armstrong* are useful illustrations.

### FAQ 2. Can equity simply treat a failed gift as a trust?

**Answer.** Not without sufficient intention to declare a trust. The court does not rescue every imperfect gift by changing its legal character.

### FAQ 3. What happens if one of the three certainties fails?

**Answer.** The intended express trust may fail, with consequences depending on the failed element, transfer structure and any resulting trust or other doctrine.

### FAQ 4. Which Queensland Trusts Act is current in October 2026?

**Answer.** The Trusts Act 2025 (Qld). The Trusts Act 1973 (Qld) was repealed on 28 April 2026, although it remains relevant historically and appears on the course resource list supplied by the user.

## MCQ answers and explanations

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### MCQ 1. Answer B.

The court looked at substance and context.

### MCQ 2. Answer B.

Different trust types use different objects tests.

**MCQ 3. Answer B.**

The 2025 Act commenced on 28 April 2026.

**MCQ 4. Answer A.**

It is a classic Australian authority on informal trust intention.

## Short-answer model answers

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**Short answer 1. State the three certainties.**

**Model answer.** Certainty of intention, certainty of subject matter and certainty of objects.

**Short answer 2. Why is Paul v Constance a useful exam authority?**

**Model answer.** It demonstrates that the court looks to objective substance and context rather than requiring formal trust terminology.

**Short answer 3. How should the book treat the Trusts Act 1973 (Qld) in 2026?**

**Model answer.** Keep it as a course-listed historical source, but identify that it was repealed on 28 April 2026 and use the Trusts Act 2025 (Qld) for current law.

## High-distinction IRAC model answer

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Issue. Whether George objectively manifested an immediate declaration of trust over the deposit capital for the children, or merely expressed a future intention to make a gift.

Law. An express trust requires certainty of intention, subject matter and objects. No technical words are required. *Re Armstrong* [1960] VR 202 is closely analogous: the court treated deposit arrangements and surrounding statements as sufficient to constitute a trust even though formal terminology was absent. *Paul v Constance* similarly confirms that ordinary words and conduct may demonstrate present trust intention. *Byrnes v Kendle* reinforces the objective approach.

Application. The \$200,000 term deposit is identifiable subject matter. The two children are certain objects. The critical issue is intention. George retained the interest but expressly directed the capital benefit to the children and arranged receipts referring to them. That division between present income enjoyment and future capital entitlement is consistent with George constituting himself trustee of the capital subject to a life interest in income. The executor will stress the future language “when the deposit matures or when I die”, arguing that beneficial entitlement was postponed and no present trust was intended. The children should respond that postponement of enjoyment does not necessarily mean postponement of beneficial ownership: the trust can exist now even though payment is deferred.

Counterargument. If the evidence showed only a revocable plan or a future gift with no present obligation, the trust would fail. The bank manager’s evidence, account labels and segregation of the deposit therefore matter greatly.

Conclusion. On facts closely resembling *Re Armstrong*, the children have a strong argument that George objectively declared a present trust of the capital, retaining the income for life. The executor’s “future gift only” argument is plausible but weakened by the structured deposit arrangement and identified beneficiaries.

# A-Z Glossary of Terms

Concise definitions for revision. Blue links open the controlling or explanatory authority where a stable public source is available.

## **Account of profits**

A gains-based equitable remedy requiring a fiduciary or other accountable wrongdoer to disgorge profit causally connected to the breach.

[Authority / source](#)

## **Administrative fusion**

The post-Judicature arrangement under which one court system administers common law and equity. It does not itself erase every substantive distinction.

[Authority / source](#)

## **Auxiliary jurisdiction**

Equity acting in aid of a legal right, historically by remedies such as injunction, specific performance or discovery where legal relief/process was inadequate.

## **Beneficial interest**

An equitable interest enjoyed by a beneficiary while legal title is held by a trustee or other legal owner.

## **Chancery**

The historical English equitable jurisdiction administered by the Lord Chancellor, from which many modern equitable doctrines and remedies developed.

[Authority / source](#)

## **Concurrent jurisdiction**

A field in which law and equity may each respond, often with different doctrines or remedies.

## **Constructive trust**

A trust imposed by operation of equity rather than by an express declaration; its availability depends on the specific doctrine and remedial context.

## **Equitable chose in action**

An equitable proprietary right consisting of a right enforceable by action, such as the right to due administration of an unadministered estate.

[Authority / source](#)

## **Equitable compensation**

Monetary relief in equity designed to repair loss caused by breach of an equitable obligation; assessment does not necessarily mirror common-law damages.

[Authority / source](#)

## **Equitable interest**

A right recognised and enforced in equity. Some equitable interests are proprietary; others are personal or “mere equities”.

## **Equity acts in personam**

The traditional idea that equitable orders operate against the conscience and conduct of the defendant personally, even though equitable rights can also be proprietary.

[Authority / source](#)

## **Exclusive jurisdiction**

Rights and obligations historically created and administered exclusively in equity, including trusts and fiduciary obligations.

## **Fiduciary**

A person subject to obligations of loyalty because they have undertaken to act for or on behalf of another in a defined matter.

[Authority / source](#)

## **Fiduciary undertaking**

The function or responsibility undertaken for another that defines whether fiduciary obligations arise and how far they extend.

[Authority / source](#)

## **Fixed trust**

A trust in which the beneficiaries and their entitlements are fixed rather than left to trustee discretion. A fixed beneficiary ordinarily has an equitable proprietary interest in the trust property.

[Authority / source](#)

## **Fully informed consent**

Authorisation by the person/body entitled to consent after disclosure sufficient to understand the material conflict, profit or transaction.

[Authority / source](#)

## **Fusion fallacy**

The mistake of assuming that joint administration of law and equity automatically makes the doctrines or remedies of one system available in the other.

[Authority / source](#)

## **Legal title**

The title recognised at law. In a trust, legal title is normally held by the trustee while the beneficiary holds equitable rights.

## **Mere equity**

An equitable right to seek relief such as rescission or rectification which may be weaker than a full equitable proprietary interest for priority purposes.

## No-conflict rule

A fiduciary must not place themselves in a position where personal interest or another duty conflicts, or may conflict, with the fiduciary duty undertaken.

[Authority / source](#)

## No-profit rule

A fiduciary must not retain an unauthorised benefit obtained by reason of the fiduciary position or opportunity.

[Authority / source](#)

## Proprietary interest

A right in or relating to property with consequences for transfer, priority, tracing and insolvency. Ainsworth gives a classic characteristics checklist.

[Authority / source](#)

## Rescission

Equitable relief that sets aside a voidable transaction and seeks substantial restoration of the parties to their pre-transaction position.

## Resulting trust

A trust arising by operation of law in circumstances where equity attributes beneficial ownership back to a contributor/transferor, subject to the governing presumptions and evidence.

## Scope of fiduciary duty

The boundary of the function for which loyalty was undertaken. Conduct outside scope may be wrongful in contract or tort without being fiduciary.

[Authority / source](#)

## Specific performance

A discretionary equitable order compelling performance of a contractual obligation where damages are inadequate and equitable requirements are satisfied.

## Tracing

A process for identifying value as it moves from one asset or account into substitutes; tracing supports, but is distinct from, the underlying proprietary claim/remedy.

## **Trustee**

The legal title-holder who administers trust property subject to the trust terms and fiduciary/trustee duties for beneficiaries or trust purposes.

[Authority / source](#)

## **Unadministered estate**

A deceased estate before administration is complete. A beneficiary generally has a right to due administration rather than present equitable ownership of each specific estate asset.

[Authority / source](#)

## **Writ system**

Historical common-law process under which access to royal courts depended on recognised forms/writs, helping explain why Chancery developed to address gaps and rigidity.