LAWS3114 – Law of Trusts B 2013

UNIVERSITY OF QUEENSLAND LAW SOCIETY INC

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TOPIC 1 – RESULTING TRUSTS

General

- **Resulting trusts = trusts which are implied by law; based on a presumed intention**
  - Resulting trusts are different to express trusts as nobody intends to create a resulting trust
- A resulting trust always has the form of the transferee having the legal title/interest but **the beneficial title/interest 'springs back' to the transferor**
- Two categories of resulting trusts: (*Re Vandervell's Trust No 2*)
  - **Automatic resulting trusts**
    - E.g. A transfers the legal title of some asset "to B on trust". This shows that A intends for B to be the trustee; however, A has not expressed who will be the beneficiary. A has attempted to create an express trust. Equity presumes that B holds the property on resulting trust for A.
  - **Presumed resulting trusts**
    - E.g. A transfer the legal title of land to B; however, A provided the purchase money. Equity presumes that B holds the property on resulting trust for A.
- **Equity presumes against gifts** the onus of proof when proving that a transfer of property was a gift is upon the person who wants to show that it is a gift

Automatic Resulting Trust/Undisposed of Beneficial Interest Situation

- Occurs when **the settlor sets out to create an express trust; however, for some reason, does not succeed in creating that trust** (i.e. **there is a failure to dispose of the entire beneficial interest in the trust property)**
- Four situation in which an automatic resulting trust can arise:
  - **The trust that the settlor intends to create is void or unenforceable**
    - Upon the failure of an express trust, the trustee will hold the property on resulting trust for the settlor (*Re Vandervell's Trusts (No 2)*)
    - An express trust can fail for a number of reasons (e.g. if a purpose trust is not for a charitable purpose, if formalities have not been observed, if the trust offends the rule against perpetuities, etc)
  - **The trust does not refer to the beneficial interest** (e.g. "to X on trust")
    - Exception: if there is evidence which would enable the establishment of a half-secret trust
  - **Failure of the purpose of a trust**
    - Where property has been settled pursuant to an express trust for a specific purpose which cannot be effected, the beneficial interest in the property will be held on resulting trust for the settlor (*Barclays Bank v Quistclose Investments*)

- **Surplus of trust property**
  - A surplus is most likely to arise when the trust is a trust for a charitable purpose (i.e. once the trustees have carried out the charitable purpose and there is money or property left over)
  - Two options for the surplus property:
    - 1. **The funds or property can be applied through a cy-pres scheme** a scheme which the trustees develop and present to the court when the original purpose is impossible or impractical to carry out the specified purpose
      - A cy-pres scheme is only available in relation to charitable trusts
      - s105(1)(b) *Trusts Act* makes it clear that a cy-pres scheme is available in the case where the original purpose provides only part use of the trust property
    - 2. **If the settlor intended only for a specific purpose or if there are no close alternatives, it will be considered whether there is a resulting trust**
      - Why? It is considered that the settlor/donor did not intend to part with their property absolutely but only to the extent that their wishes as declared are carried into effect
  - Two scenarios:
    - **Surplus in public subscriptions**
      - Where the fund for a public subscription exceeds that which is required for the purpose, a resulting trust may operate. **Contributors of the property will be entitled to the residue in proportion to what they contributed to the total sum** (*Re Gillingham Bus Disaster Fund*)
      - The fact that identification of donors is difficult and time consuming is not of itself a bar to the existence of a resulting trust
      - There will not be a resulting trust where:
        - The funds can be applied cy-pres
        - Statute dictates the destination of the surplus
        - **It can be inferred from the evidence that the donor intended to relinquish any right to the money subscribed**
        - The rules of the subscriptions provides a destination for the surplus
    - **Undistributed surplus in dissolution of contributory funds**
      - Whether undistributed surpluses from the dissolution of contributory funds are the subject of a resulting trust will **depend upon the rules of the association or body under which the fund was established** (*Re West Sussex Constabulary's Widows, Children and Benevolvent Fund Trusts*)

- The presumption of an automatic resulting trusts can be displaced

Presumed Resulting Trust/Purchase Money Situation:

- Occurs when **someone transfers property to another where the transferor provided the purchase money**
  - There is an 'outward' appearance of a transfer of property; however, equity presumes that there was no intention for the transferee to have beneficial title
- There are two situations: (*Calverley v Green*)
  - 1. **Volunteer situation where a person pays the purchase price of property and causes it to be transferred to another or to another and himself jointly, the property is presumed to be held by the transferee or transferees upon trust for the person who provided the purchase money**
    - E.g. A purchases a house for $200,000. B does not make any contribution. The legal title is vested in A and B as joint tenants or tenants in common in equal shares. However, in equity, A holds the entire beneficial title as A provided the whole of the purchase money. Thus, B holds their share of the legal title on resulting trust for A.
  - 2. **Unequal contribution of purchase moneys where two or more persons advance the purchase price of property in different shares, it is presumed that the person or persons to whom the legal title is transferred holds or hold the property upon resulting trust in favour of those who provided the purchase price in the shares in which they provided it**
- The transferor's beneficial interest will arise at the time of purchase or transfer
- Presumption of resulting trust can be rebutted due to:
  - **Presumption of advancement** in certain types of cases, **the law presumes that somebody intended to make a gift when transferring property**
    - Traditionally, this presumption only applied where there was a transaction by a **husband in favour of his wife** (not the other way around) and a transaction by a **father in favour of his children** (not a mother)
      - Expanded to include a gift from a mother to child (*Nelson v Nelson*)
    - The presumption of advancement does not apply to de facto relationships (*Calverley v Green*)
    - The presumptions exists due to a moral obligation upon some people to make financial provisions for another
    - The presumption of advancement can be rebutted if there is evidence that no gift was intended by the transferor
      - The onus on rebutting the presumption lies on the person who claim that a resulting trust exists (*Martin v Martin*)
  - **Evidence of an intention that the parties are to share the equitable interest equally**

            - The court will not give effect to the presumption of a resulting trust where it is inconsistent with the true intention of the person upon whose presumed purpose it must depend
            - When considering this, look to the intention of the party/parties who provided the purchase price
            - Relevant evidence to consider includes acts and declarations of the parties before, at the time of and immediately after the purchase, testimonies of agent, express agreements
- Where the disparity between parties contributions cannot be accounted for by way of a resulting trust, it may still be **possible for a court to award some other form of equitable relief in order to account for the disparity** (e.g. *Muschinski v Dodds* – equitable charge, constructive trust)

Constructive Trusts

- If a resulting trust has been rebutted, there is another option the parties may have engaged in conduct that means that in equity, their equitable interests are different to their legal title
- **Constructive trust = construed or deemed intention** (the law determines that because there is some conduct where it would be unconscionable for a party to hold certain title, there is a constructive trust)
- Types of constructive trusts:
    - Institutional constructive trust one that arises directly because of the conduct of a party
    - Remedial constructive trust discretionary (the court may exercise its discretion when looking at its options to impose a constructive trust)
    - **Common intention constructive trust where two or more people acquire property and there is a common intention as to how they intend for the beneficial interest to be shared**
        - Elements:
            - 1. **Common intention** (can be expressed - but not one that can be used to create an express trust)
            - 2. **Detrimental reliance** on the faith of the common intention
            - 3. It would be **unconscionable** for the party holding legal title at variance to the agreed intention to rely simply on his interest (*Stack v Dowden*; *Jones v Kermit*; *Allan v Schneider*)
    - **Joint endeavour constructive trust** (*Muschinski v Dodds*)
        - Elements:
            - 1. A **joint endeavour** (e.g. can be developing the land, entering into a de facto relationship – does not have to be commercial)
            - 2. There has to be **differential contributions** made by the parties, either before or after the acquisition of the property (take into account initial and subsequent financial contributions and non-financial contributions)

- 3. There has been a **failure of some underlying element of the relationship without attributable blame** to the party seeking relief (extension of the clean hands doctrine)
  - The court determines that **in all the circumstances it would be unconscionable for a party to hold certain title**

Case Notes

- ***Barclays Bank v Quistclose Investments***
  - FACTS: A company, Rolls Razor, was in financial difficulty. The company declared a dividend in favour of their shareholders; however, they did not have the cash to pay this dividend. The company borrowed funds from Quistclose Investments to pay the dividends. There was a letter from Quistclose that stated that the funds were to be used solely to pay the dividends of the shareholders and that the money was to be held in a separate bank account. Rolls Razor went into liquidation. They had not yet paid the dividends to the shareholders (and could not as they were in liquidation).
  - ISSUE: Could the money in the special bank account be used to pay other debts of Rolls Razor; particularly, could Barclays Bank take that money for the overdraft of Rolls Razor?
  - HELD: The House of Lord held that Barclays Bank could not take the money in the separate bank account as **at all times, Rolls Razor held their interest in the bank account on trust for somebody else.** Initially, it was held on a **primary trust to pay the dividends to the shareholders** (i.e. the shareholders had the beneficial interest). Once Rolls Razor went into liquidation, it held the money on a secondary trust to pay the money to Quistclose (i.e. Quistclose had the beneficial interest). It is argued by some that the primary trust was resulting. **The secondary trust is a resulting trust in form, as the beneficial interest in the money in the account 'sprung back' to Quistclose, the transferor.**
    - However, there is also an **argument that the secondary trust is actually an express trust**. Lord Wilberforce attached a lot of significance to the letter, which stated what the loan money was to be used for. This letter showed an express intention that the money was to be used solely for the purpose of paying a dividend. It can be inferred that there was an actual intention on the part of Quistclose that the money was to be used to pay dividends. This argument has continued on in Australian case law (e.g. *Re Australian Elizabethan Trust* – Gummow J expressed the view that it is better to think of the secondary trust as an express trust based on an inferred intention)

- ***Re Gillingham Bus Disaster Fund***
  - FACTS: A bus ran over a group of cadets. 24 cadets were killed and more were injured. The mayor of Gillingham launched a public appeal. The proceeds of the appeal were to be first used to pay the funeral expenses of those who were killed, secondly to care for those who had become disabled and if there was money left over, for such worthy causes to remember the boys as the mayor saw fits. The first two purposes were charitable purposes. The appeal raised £9000. This

money was raised in a number of ways – some wrote cheques and received a receipt; thus, there was a record of their donation. However, most of the funds were raised by donations into tins (there were no receipts or record of names). £2368 was spent on funeral expenses and care of those who had been disabled. The government argued that the surplus funds were abandoned poperty and that the Crown was entitled to it bona vacantia.

- HELD: The Crown was not entitled to the funds bona vacantia as there was a **resulting trust in favour of the donors**. The fact that not all of the donors were known was not a problem – the judge held that it could not be said that the intention of an unidentified donor of a small sum is different to the intention of an identified donor of a large sum. Reasoning – **if you donate for a specific cause and the money cannot be used for that cause, there is an assumption that you would want your money back**. The trustees must take reasonable steps to find out who the donors are.

- ***Re West Sussex Constabulary's Widows, Children and Benevolent Trust***
  - FACTS: A fund was set up to pay allowances to widows and dependents of deceased members of the West Sussex Constabulary. The members resolved to wind up the fund and money was left over. The money had come from the members themselves, raffles, sweepstakes, collecting boxes, donations and legacies. The Crown argued that they were entitled to the surplus bona vacantia.
  - HELD: In relation to the member's contributions, the member's contract governed their contributions and gave them no claim to any residue. Those who participated in raffles and sweepstakes also had no right to residue funds. Those who donated money through collection boxes had intended to abandon their property (i.e. an out-and-out payment). Therefore, the Crown was entitled to these surplus funds bona vacantia. However, **those who left identifiable donations and legacies could be regarded as having intended the money to be retained only so long as the fund operated; thus, there was a resulting trust in respect of that money**.

- ***Calverley v Green***
  - FACTS: The plaintiff and the defendant were in a de facto relationship. They acquired a house as joint tenants. Mr Calverley provided a deposit of $9,250. The balance of $18,000 was acquired through a bank loan. Calverley and Green told the bank that they were married. The bank wished for both parties to be parties to the loan agreement as it would be more likely that their loan would be approved. There was a private agreement between the parties that Calverley would make the mortgage repayments from his own income. Green would use her income the pay the expenses of the household. Calverley and Green lived together for another five years until they split up. The house was sold
  - ISSUE: How was the proceeds of sale to be split up?
  - REASONING: When deciding whether or not there is a resulting trust, **focus is to be placed upon the moment of acquisition of the property** – i.e. how did the parties acquire the property? Thus, **as both parties were liable to the mortgage, they were deemed to have both contributed $9000 to the purchase price** (regardless of the private agreement between the parties). The

proceeds were to be split up according to the beneficial title. Prima facie, the title was to be split up 73/109 to Calverley and 36/109 to Green, due to the presumption of unequal contribution of purchase moneys. However, this presumption can be rebutted. In regards to **the presumption of advancement, the presumption is not to be applied to people in a de facto relationship**, as there is not a 'sameness' between all relationships as is required. The presumption of advancement did not apply in this case. There was no intention that the parties should be equal beneficial owners.

  - Note: The *Family Law Act* did not apply to de facto relationships at this time. If this situation arose today, it would be dealt with under this Act. Under this Act, the judge can make a just and equitable distribution between the parties.

- KEY QUOTES:
  - Re: Volunteer situation/Presumption of advancement – *"Equity presumes a trust in favour of the person who contributes the whole of the purchase price when the property is conveyed into the joint names of himself and another … The presumption is displaced if the legal joint tenant who does not contribute any of the purchase price is the wife of the joint tenant who does. Then the presumption is that she takes her legal interest as a gift, not in trust for her husband, and that the beneficial ownership goes with the legal title."* per Mason and Brennan JJ
  - Re: Unequal contribution of purchase moneys situation – *"When two or more purchasers contribute to the purchase of property and the property is conveyed to them as joint tenants the equitable presumption is that they hold the legal estate in trust for themselves as tenants in common in shares proportionate to their contributions unless their contributions are equal."* per Mason and Brennan JJ
  - Re: Three presumptions – 1. *"Where a person pays the purchase price of property and causes it to be transferred to another or to another and himself jointly, the property is presumed to be held by the transferee or transferees upon trust for the person who provided the purchase money."* 2. *"Where two or more persons advance the purchase price of property in different shares, it is presumed that the person or persons to whom the legal title is transferred holds or hold the property upon resulting trust in favour of those who provided the purchase price in shares in which they provided it."* 3. Presumption of advancement – *"There are certain relationships in which equity infers that any benefit which was provided for one party at the cost of the other has been so provided by way of "advancement" with the result that the prima facie position remains that the equitable interest is presumed to follow the legal estate and to be at home with the legal title."* per Deane J

- ***<u>Muschinski v Dodds</u>***
  - FACTS: Mrs Muschinski and Mr Dodds had been living together in a de facto relationship for three years. They decided to purchase a block of land with an old, dilapidated cottage. They wanted to renovate the cottage and turn it into an arts and crafts centre. They also wanted to erect a pre-fabricated house on the

land. The purchase price of the property was $20,000. The agreement was that Muschinski would pay the full purchase price and Dodds would make a contribution later on, in terms of his labour and a financial contribution. They acquired the property as tenants in common in equal shares. The parties later split up. Muschinski sought a declaration that she was the sole beneficial owner of the land.

  - ISSUE: Does the presumption of a resulting trust apply?
  - HELD: The presumption of a resulting trust applies; however, the presumption was **rebutted by evidence of intention**. It was not the intention of either party that Dodd's equal beneficial interest should be acquired in stages as he contributed to the future endeavour; rather, **Dodds was to obtain his beneficial interest immediately.**
  - OUTCOME: Both parties held their respective interests as tenants in common upon trust to repay to each her or his respective contribution and as to the residue, for them both in equal shares. Thus, once they sold the property, from the proceeds, **each party got back the amount they contributed. The residue of proceeds was split equally.**
  - There are other equitable doctrines that Muschinski could draw upon to obtain some relief. As Muschinski made the contribution for the purposes of the planned joint endeavour, she wasn't making an outright gift to Dodds. The **joint endeavour** failed prematurely. Upon this failure, Dodds was left with an interest that was conferred upon him for the purposes of the joint endeavour. It would have been unconscionable for Dodds to retain one half beneficial ownership in the property.
    - Note: unconscionable does not mean unfair it means that what is happening offends some recognised equitable doctrine.
  - KEY QUOTES:
    - *Those circumstances can be more precisely defined by saying that the principle operates in a case where the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in the circumstances in which it was not specifically intended or specially provided that the other party should so enjoy it. The content of the principle is that, in such a case, equity will not permit that other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do."* per Deane J

- ***Baumgartner v Baumgartner*** – (majority agreed with Deane J's reasoning in *Muschinski v Dodds*)
  - FACTS: The parties were in a de facto relationship (the female had changed her name). Mr Baumgartner purchased a block of land in his name. The parties built a house on the land, paid for my Mr Baumgartner. The land was mortgaged. The mortgage and loan were in Mr Baumgartner's name. Mrs Baumgartner wages had been deposited in a joint bank account. The repayment of the loan had been made using the proceeds in the joint bank account. Thus, both parties had repaid

the mortgage. The parties separated. Mrs Baumgartner sought a declaration that Mr Baumgartner held one half of the property on trust for her.

- HELD: The HCA imposed a **constructive trust**. There was a **premature failure of the relationship**. Mr Baumgartner could not retain the full benefit of things purchased with the joint bank account. Held that Mr Baumgartner contributed about 55% to the joint bank account. Subject to minor adjustment (e.g. Mr Baumgartner paid the deposit), Mr Baumgartner held the property on trust, 55% for himself and 45% for Mrs Baumgartner.
  - This is different to *Muschinski v Dodds* as the parties did not get back what they contributed; rather, they got back proportionate shares of the proceeds. This showed that the **de facto cases should not be limited to giving back the parties their contributions - need to take into account indirect contributions and non-financial contributions.**
  - This was not a case for the presumption of a resulting trust (such a presumption only arises when there is a difference between who provided the purchase price and the legal title).

- ***Nelson v Nelson***
  - FACTS: A mother paid the purchase price for a house, but registered it in the names of her son and daughter to take advantage of a benefit she was not entitled to (a subsidised loan under the *Defence Services Home Act 1918* to buy another home). She received a subsidised loan on the basis of an application in which she declared that she did not own or have a financial interest in any other house. The first house was sold. The mother claimed the whole price on the basis of a resulting trust. The daughter argued that she was entitled to the price due to the presumption of advancement.
  - HELD: The daughter was entitled to the price. There is a **presumption of advancement in gift from mother to child**, and not just from father.
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TOPIC 2 – TRUSTEE'S DUTIES AND POWERS

Appointment of Trustee

- **Anyone can be a trustee** (a **natural person** or a **company** (corporate trustees))
- The fact that someone is a beneficiary does not exclude them from being a trustee (i.e. **a person can be both a trustee and a beneficiary**)
    - **A person cannot be the sole trustee and the sole beneficiary of a trust**
        - Why? This essentially means that no trust relationship exists as the legal interest and equitable interest of the trust property is vested in the same person
        - E.g. A is a trustee and A and B are beneficiaries. B assigns their beneficial interest to A. A is the sole beneficiary and the sole trustee. This is a merger of the legal and equitable interest. The trust will cease to exist.
- s11 *Trusts Act 1973* (Qld) (TA) – the **maximum number of trustees is 4**
    - Two trustees is the ideal number, unless the workload is too great
    - Two trustees are better than one as the trustees can check up on each other to ensure that the other trustee does not take advantage of the situation and does not misappropriate trust property and so that if one trustee dies, the legal title to the trust property passes to the surviving trustee (under a joint tenancy)
- s12(1) TA – lists the situations in which trustees would be unable to act as a trustee
    - Includes – if the trustee is dead, outside of the State for more than 1 year, refuses to act as trustee, unfit to act as trustee, is an infant, etc
- **Power to appoint new trustees usually an express provision in the trust instrument delegates the power to appoint new trustees on the continuing trustees or on a distinct person (the appointer)**
    - If no express provision, the power falls to the surviving trustee or if all trustees are dead, the personal representative of the last surviving trustee (executor or somebody else who has been given authority)
    - s80(1) TA – If there is no trustee and no one with power to appoint a new trustee, **the court may appoint new trustees**
        - Thus, a trust will not fail up for lack of trustee as the court can step in and appoint a trustee
        - Someone can apply to the Supreme Court to make them a trustee
- Even if a new trustee is appointed, **unless the trust property is vested in the new trustee, the trustee cannot do anything to administer the trust**
    - s15(1) TA – **the instrument appointing a person as trustee is deemed to vest the trust property in the trustee**, without the need for any conveyance, transfer or assignment
        - Note: if the trust property involves land, the *Land Title Act* must be considered
    - s82 TA – the court has the power to make a vesting order
- Every trustee, regardless of when they are appointed, will have the same powers, authorities and discretions (unless there are contrary intentions in the trust instrument)

Removal of Trustees

- The TA does not provide for the removal of trustees
- The **trust instrument may expressly confers a removal power on a person**
  - If there is no express power in the trust instrument, **the Supreme Court can make an order for the removal** of a trustee in certain circumstances
    - A **mere mistake or neglect of duty is not a reason to remove a trustee** under the inherent jurisdiction. If the trustee's act or omission is such as to **endanger the trust property or to show a want of honesty or want of proper capacity to execute the duties or a want of reasonable fidelity**, the court will be justified in removing the trustee (*Guazzini v Pateson*)
    - The fact that there is a dispute between a trustee and the beneficiaries is not a reason to remove a trustee (*Re Whitehouse*)

Duties and Power

- **A duty is obligatory while a power is not**
  - If a trustee has a duty to do X and they fail to do X, the trustee will be in breach of trust
- Where do trustee's duties and powers come from?
  - **General law**
  - ***Trusts Act 1973* (Qld)**
    - This overrides the case law to the extent of inconsistency
      - s4(4) TA – **the powers conferred by or under this Act on a trustee are in addition to the powers given by any other Act and by the instrument creating the trust**; but the powers conferred on the trustee by this Act, unless otherwise provided, **apply if and so far only as a contrary intention is not expressed in the instrument** creating the trust, and have effect subject to the terms of that instrument.
        - Exception (Part 4): s31(1) TA – except where otherwise provided, **the provisions of this part should apply whether or not a contrary intention is expressed in the instrument** creating the trust
          - However, where a particular section in part 4 states that this section is subject to the trust instrument, the trust instrument will override the Act (e.g. s57(1) - subject to the provision of any other act or the instrument)
  - **Trust instrument**
    - **The general law and the TA is subject to what is stated in the trust instrument**

Trustees' Powers

- **A power relates to something that the trustee is authorised to do but is not obliged to do**
    - If a trustee has a power to do X, the trustee has **discretion** as to whether he does X. He will not be in breach of trust if he does not do X. However, **the trustee will be in breach of trust if he decided whether or not to do X in an improper way**.
- Two types of powers:
    - Powers of appointment powers to decide to whom and when to distribute trust property
    - Machinery powers powers to deal with the trust property
- **A power must be exercised in:** (*Karger v Paul*)
    - **(1) good faith;**
    - **(2) with a real and genuine consideration; and**
    - **(3) in accordance with the purpose for which discretion was granted** (i.e. not for an ulterior purpose)
- The exercise of a power may be impugned if it was exercised **in bad faith, arbitrarily, capriciously, wantonly, irresponsibly, mischievously or irrelevantly to any sensible expectation of the settlor** or **without giving a real or genuine consideration to the exercise of the discretion** (*Wilkinson v Clerical Administrative and Related Employees Superannuation*)
    - Cannot be impugned upon the basis that the trustees decision was unfair, unreasonable or unwise
- **If the process of making the decision was proper at the time of making the decision, then there was a proper exercise of power. It is not concerned on results**

  ** focus on the process**
- Interference by third-parties:
    - **A power must be exercised by the trustee and not by a third-party**, unless there has been proper delegation of the power (*Partridge v Equity Trustees*)
    - The trustee must not allow a third-party to dictate how to exercise a power (*Re Brockbank*)
    - A trustee may consult the settlor, the beneficiaries or a third party before exercising a power but is not bound to do so
- Statutory option to bringing a trustee before the court:
    - **s8(1) TA** – Any person who has, directly or indirectly, an interest, whether vested or contingent, in any trust property or who has a right of due administration in respect of any trust, and who is aggrieved by any act, omission or decision of a trustee or other person in the exercise of any power conferred by this Act or by law or by the instrument (if any) creating the trust, or who has reasonable grounds to apprehend any such act, omission or decision by which the person will be aggrieved, may **apply to the court to review the act, omission or decision, or to give directions in respect of the apprehended act, omission or decision**; and the court may require the trustee or other person to appear before it and to substantiate and uphold the grounds of the act,

omission or decision which is being reviewed and may make such order in the premises (including such order as to costs) as the circumstances require.

    - This section does not change the grounds under which a trustee's exercise of power may be attacked; rather, provides a new procedure to bring an action

  - *Re Whitehouse* – stated that s8(1) conferred a broad power on the court but the court will be reluctant to interfere with the trustee's exercise of power without good reason to. It is not the court's job to second-guess the trustee about what the right thing to do is.
  - *Hennessy v Perpetual Trustees Queensland Limited* – **the court should be reluctant to impugne a trustee's exercise of a power** and will only do so on the grounds of bad faith, irrelevant considerations and the other things referred to in *Wilkinson*
- **A trustee who is uncertain as to how they ought to exercise a power can apply to the court for directions**
  - Trustees who disagree about the exercise of a power can also apply to the court for directions
  - The trustee must present the court with all of the relevant facts

Trustees' Duties

- Justice Tipping sated that there are three categories of trustee's duties –
  - **1. Duties of administration**
  - **2. Duties of loyalty and confidence**
  - **3. Duties of care and skill**

Case Notes

- ***Re Whitehouse***
  - FACTS: The family ran the Carlton Hotel. The business was run in a trust structure. The husband and wife were the trustees and their two sons were the beneficiaries. Mr Whitehouse Sr was also the director of other businesses. There was some evidence that Mr Whitehouse Sr behaved in a dictatorial way. There was an ongoing dispute between the father and sons about the conduct of the business.
  - ISSUE: Could Mr Whitehouse Sr be removed as a trustee?
  - HELD: **The mere fact that there is a dispute between a trustee and the beneficiaries is not a reason to remove the trustee** as it is the trustee who has the responsibility to administer the estate and is not bound but the beneficiaries. In this case, the state of animosity between the parties had built up and was largely due to Mr Whitehouse Sr's attitude. His attitude had lead to general deficiencies in the carrying out of the trust, such as keeping bad records. It was appropriate to remove Mr Whitehouse Sr as trustee. Mrs Whitehouse was also removed as there was evidence that she would do whatever her husband told her to do; thus, effectively keeping Mr Whitehouse Sr still in power.

- ***Karger v Paul***
  - FACTS: In her will, Mrs Smith left her estate to her husband, Mr Smith, for life (life estate). The will provided that upon the death of her husband, the estate would go to her cousin, Mrs Karger (remainder). **A life tenant is entitled to the income from the assets during their lifetime. However, the value of the capital must be retained for the remainder beneficiary** (e.g. if the estate includes shares in the company, the life tenant will be entitled to any dividends paid in respect of those shares during their life. However, the life tenant is not entitled to the shares themselves or the proceeds of the sale of those shares. This value must be retained for the remainder beneficiary.) The will gave a power to the trustees to transfer whole or part of the capital of the estate to the life tenant for their use absolutely. This gave the trustees a power to take what would have been Mrs Karger's under the general law and give it to Mr Smith. Mr Smith was one of the trustees. Mr Paul, Mrs Smith's solicitor, was also a trustee. The power was exercised on several occasions upon Mr Smith requesting that Mr Paul agree to the transfer of capital in Mr Smith's favour. By the time Mr Smith died, the capital had been run down significantly and there was not much left for Mrs Karger. Mrs Karger sued the remaining trustee, Mr Paul.
  - ISSUE: Had Mr Paul (and Mr Smith) acted properly? The case turned upon **whether there had been a real and genuine consideration of the exercise of the power**.
  - HELD: Mr Paul did not engage in any new investigation on each occasion. In this case, this didn't matter as Mr Paul had been Mrs Smith's solicitor and knew quite a lot about the Smith family. He was generally well informed of the financial circumstances of Mr Smith and Mrs Karger. If a trustee is well informed, there is no need to conduct a new investigation. **The key question is whether the trustee has relied upon the relevant considerations.** Mr Paul had acted properly even though there were some minor deficiencies in the information that he relied upon as he had asked the relevant considerations. There was no breach of trust. The court stated that **the exercise of a discretion in such broad an unfettered terms will not be examined or reviewed by the court if the discretion is exercised by the trustee in good faith, upon real and genuine consideration and in accordance wit the purposes for which the discretion is conferred and not for some ulterior purpose.**
  - REASONING: Need to consider the nature of the power and the point of conferring the power onto trustees? What sort of information should be relied upon by the trustees in order to make a proper decision of that type? The trustee needed to consider Mr Smith's financial position and his needs during his life and also Mrs Karger's financial position.

TOPIC 3A – DUTIES OF ADMINISTRATION (CONTENT)

General

- These duties are concerned with the **trustee's duty to perform the administration of the trust** (i.e. a trustee must perform their duties)
- Three aspects of the duty of administration:
  - o **1. The trustee must gain control of the trust property** duty to identify, locate and procure a transfer of the legal title to the trust property (known as '**getting in**' the trust property)
  - o **2. The trustee must manage the trust property in order to advance the ends of the trust** the trustee must, at the very least, maintain the value of the trust assets. However, they do not have to keep the same assets. It is preferred if trustees increase the value of the trust estate.
  - o **3. The trustee must abide by the terms of the trust** the trustee must remain within the scope of their power

Gain Control of the Trust Property

- A trustee must pursue all reasonable and proper measures to gain possession of any outstanding trust property (and ensure that the title is properly vested in the trustee)
- **If a trustee fails to 'get in' the trust property (whether deliberate or negligent), there is a breach of trust**
- The trust may provide the trustee with a power to postpone 'getting in' the trust property such a power **merely qualifies the overriding duty to 'get in' the trust property**
  - o The power must be exercised in a way that is consistent with the ultimate recovery of the debt (*Partridge v Equity Trustees*)
- A trustee must recover any debts owed to the trust by other/previous trustees (e.g. compensation for breach of trust) and third-parties

Maintain the Value of the Trust Property

- The trustee must ensure that the value of the trust property is maintained, or even increased if possible
- **Investment:**
  - o Trust assets should not be wasted way because of inflation thus, **trustee have a duty to invest trust assets** (*Adamson v Reid*)
  - o Trustees should convert investments in hazardous or unauthorised investments into safe and authorised investments (*Hughes v Empson*)
- **Acquiring assets:**
  - o **There are circumstances where the trustee is obliged to acquire assets**
  - o E.g. if the value of the trust estate will only be maintained if certain assets are acquired (*Elder's Trustee and Executor Co Limited v Higgins*)

- **Duty to insure trust property:**
  - s47(1) TA – **a trustee may insure trust property against any loss or damage**
    - The word ‘may’ indicates that this a power, not a duty
  - There is **no general duty to insure trust property** a trustee must ask the question ‘**Would it be negligent not to insure the trust property in certain circumstances?**’
    - It is more likely to be negligent not to insure trust property if the property is a source of income for the trust (e.g. rented real estate)
  - Trustees have a power to use trust money to pay insurance premiums

Carry out the Terms of the Trust

- The trustee is bound to comply with and carry out the terms of the trust the trustee will breach this duty if they depart from the terms of the trust
- The general law, TA or trust instrument may impose duties on trustees to engage in specific transactions or to not engage in specific transactions
- **Duty to invest:**
  - Trustees have a duty to invest the trust property in some way (*Adamson v Reid*); however, **trustees may be prohibited from investing the trust property in certain ways**
  - Authorised investment vs. Unauthorised investment
    - An authorised investment that produces a loss will not be a breach of trust
    - An unauthorised investment that produces a loss will be a breach of trus
  - How to determine whether an investment is authorised or unauthorised look to TA:
    - s21 TA – **a trustee may, unless expressly forbidden by the instrument creating the trust, invest trust funds in any form of investment**
    - s23(1) TA – **a rule or principle of law or equity imposing a duty on a trustee exercising a power of investment continues to apply** except so far as it is inconsistent with this or another act or the instrument creating the trust
    - s23(2) TA provides a non-exhaustive statement of what the duties mentioned in s23(1) TA are:
      - (a) a **duty to exercise the powers of a trustee in the best interest of all present and future beneficiaries of the trust** (mentioned in *Cowan v Scargill*)
      - (b) a **duty to invest trust funds in investments that are not speculative or hazardous**
      - (c) a **duty to act impartially towards beneficiaries and between different classes of beneficiaries**
      - (d) a **duty to obtain advice**
    - **s23(2)(b) TA essentially rules out investing in the stock market**;

- Why? It is not certain whether a return will be made on the investment within the required time frame
- However, a **diversified stock portfolio** (investing in different companies from different industries) may be allowed as this minimises the risk
  - Note: a diversified stock portfolio may not be a good strategy for trusts that need money at a short notice (such as deceased estates) but may be good for long term trusts (such as superannuation funds)

- s23(2)(c) TA – states that **trustees should avoid investments that will produce a lot of income in the short run** (good for life beneficiaries) **but will risk the capital** (bad for remainder beneficiaries) and vice versa (*Re Mulligan*)
- s24 TA – states a number of factors that trustees must consider when exercising their power of investment

- **Misappropriation:**
  - **A misappropriation of the trust property** (e.g. paying the wrong beneficiary) or **applying the trust property in way that they were not entitled to apply it** amounts to a breach of trust (*Armitage v Nurse*)
- **Delegation:**
  - **Trustees have a duty to exercise their own discretion and not to delegate this discretion**
  - Trustees cannot make agreements with other people to exercise their powers in a certain way (including with beneficiaries)
    - *Re Brockbank* – held that a trustee did not have to take into account the beneficiaries' wishes when appointing a new trustee as it was at the trustee's discretion. If they delegated this discretion, they would have been in breach of trust.
  - A distinction is to be made between acting under dictation and employing agents to perform certain tasks (e.g. lawyers, accountants, stockbrokers)
    - s54 TA – **trustees have the power to employ agents**

Case Notes

- ***Partridge v Equity Trustees***
  - FACTS: The estate being administered was owed a debt of £5000 by William Hartley Company. The deceased's will stated that they desired that the trustee not press for payment of the debt but allow the company reasonable time to repay the debt at such rate of interest as they see fit. This was a power, not a duty. Three years after the death of the testator, the debt had not been paid. The defendant trustee entered into a compromise agreement (i.e. if you pay this much by this date, we will relieve you of the rest). The company did not comply with the agreement. The defendant allowed the outstanding amount of £2150 to remain outstanding for a further 5 years and interest was to be charged at 5% pa. Later, the company went into liquidation and did not pay the debt. This amounted to a loss of the trust estate.

- HELD: The trustee had a duty to recover this debt as this debt was owed to the deceased and was part of the deceased's estate. That duty was qualified by a special power to postpone the 'getting in' of the company's debt. However, **the overriding duty is to 'get in' the debt and the duty was merely qualified by the power. The power had to be exercised in a way that is consistent with the ultimate recovery of the debt.** It was the duty of the trustee to examine the financial position of the company and only to grant further time if they were satisfied that the company reasonably required such time to pay the debt. Evidence showed that had the defendant trustee insisted on payment immediately, the company would have been able to pay it. The trustee was in breach of trust and was required to pay a sum of £2150 to the estate.

- ***Adamson v Reid***
  - FACTS: The trustee of a deceased estate sold a block of land included in the deceased's estate. The trustee had the cash from the sale. The will said nothing about investing so the trustee kept the money for six months.
  - HELD: The trustee was in breach of trust by failing to invest, as there was a **general duty on trustees to invest**. The court said that the trustee was liable to pay compensation to the beneficiaries and that **compensation was calculated by reference to the rate of interest that would have been earned had the money been invested in government bonds**.

- ***Elder's Trustee and Executor Co Limited v Higgins***
  - FACTS: The trustees had a power under the will to continue to carry on a grazing business that the testator, Mr Higgins, had been carrying on. This was because the children were not old enough to get the estate. There were two separate properties. One property was owned by Mr Higgins. The other property was held under a lease agreement between the testator and his sister. The lease contained an option to purchase. This option had to be exercised during the lease term. It seemed that the cattle business would not be economically viable unless it operated on both lots of land. Once the option to purchase had been lost, the other property was sold to someone else. Thus, the cattle grazing business was not economically viable. The beneficiaries sued the trustees.
  - HELD: The court stated that we should not think of this as a duty to acquire a new asset but as a situation where **the trustee should have purchased the other property in order to preserve the value of the cattle grazing business**; and thus, preserve the value of the trust.

- ***Re Mulligan***
  - FACTS: The testator left the life interests in a farm to his wife, with nephews and nieces as residual beneficiaries. The farm was sold and the estate was invested in fixed-interest securities until the wife died. At the time of the wife's death, the trust estate was a small proportion of what it was when the testator died. The residual beneficiaries sued the trust company and the wife for breach of trust on the basis that investing in fixed interest securities did not treat the income (wife) and capital beneficiaries (residual beneficiaries) even-handedly.

- HELD: There was a breach of trust. **A trustee has to be strictly impartial and even-handed between income and capital beneficiaries.** The trustees were in breach of trust as the trustees all recognised the corrosive harm of inflation to the estate capital and should have attempted to persuade the wife by explaining the trustee's duty to be even-handed, or applied to the Court for directions.

- ***Cowan v Scargill***
  - FACTS: There was pension funds for British coal miners. There were 10 trustees – 5 appointed by the National Coal Board and 5 appointed by the National Union of Mineworkers (of which Scargill was one). The union trustees wanted to amend the investment plan to eliminate all overseas investments and investments in competing energy companies. The other trustees sought directions from the Court.
  - HELD: Trustees must exercise their powers in the best interest of the present and future beneficiaries. **The purpose of the trust was to provide financial benefit for the members of the pension fund; thus, the primary concern should be getting the best possible return from investments.** The union's strategy would increase the risk by limiting the trustees' power to diversify their share portfolio. The Union argued that their strategy protected the jobs of coal mine workers. However, some beneficiaries were retired workers, widows and children. Thus, their strategy would not be impartial to all beneficiaries. The trustees must put aside their own social or political views when considering what investment to make. However, in the case that all beneficiaries are opposed to something, then it might be the case that the trustees refrain from investing in those industries.

TOPIC 3B – DUTIES OF ADMINISTRATION (REMEDIES)

Preliminary Matters

- A beneficiary will usually be the plaintiff in a suit for breach of trust
    - o Note: where there are co-trustees or successor trustees, they may sue a trustee in breach for compensation to restore the trust property (trustees have a duty to put things right)
- Multiple trustees: **Trustees will be jointly and severally liable for a breach of trust**
    - o Joint liability = every trustee can be sued in respect of a breach of trust, even if that breach is the fault of only one trustee
    - o Several liability = the plaintiff can choose to sue of the trustees, regardless of the fault of the chosen trustee
        - ▪ If the plaintiff sues one trustee and recovers compensation, that trustee may seek a contribution from the other trustees
- Personal claim vs. Proprietary claim
    - o Personal claim → damages/compensation is awarded (the plaintiff may not be satisfied if the defendant does not have sufficient assets to pay compensation)
    - o Proprietary claim → an asset which the defendant owns represents a misappropriated trust asset (i.e. the misappropriated trust assets can be traced to the new asset)
    - o **The plaintiff has a right of election → they can choose whether to pursue a personal or proprietary remedy** (*Foskett v Mckeown*)

Personal Remedies – Compensation

- Equitable compensation = analogous to, but not identical to, common law damages
- Aim of compensation = **put the plaintiff/restore the trust estate to the position they would be in had the trustee performed their undertaking** (*Re Dawson*; *Youyang v Minter Ellison Morris Fletcher*)
- The rules regarding causation and remoteness differ depending on the duty that has been breached
    - o E.g. **For a breach of a duty of administration, there is no reasonably foreseeable rule** → even if the loss that the plaintiff suffered was increased by events that no one could have foreseen, the trustee is still liable to compensate for the entire loss
- **Claim of compensation against the trustee:**
    - o There is a strict duty for the trustee to perform their undertaking (duties of administration) → if the trustee fails to perform their undertaking, **the trustee will be strictly liable for their failure**
    - o When determining the amount of compensation:
        - ▪ The trust estate should get the value of any appreciation (*Re Dawson* – appreciation of the $AUD)

        - If the funds have not been invested or have been improperly invested and caused a loss, the default measure of interest that would have been earned had the funds been properly invested is based on **the interest earned on government bonds** (*Adamson v Reid*)
            - This measure should only be used if appropriated (e.g. this measure will not be appropriate if the trust instrument restricts what funds can be invested in and government bonds is not an authorised investment)
- **Claim of compensation against third parties:**
    - If the claimant has exhausted their remedies against the executor/trustee, they may claim against a third party
    - **If a trustee pays trust funds to the wrong person, that person has an obligation to pay the incorrectly paid money back** (*Re Diplock*)
        - Test: **Did, at the time at which the payment was made, the recipient receive anything more than what he was properly entitled to receive?** (*Re Diplock*)
            - If so, the recipient must pay what they were not entitled to back
        - This is not an obligation to compensate the trust for the loss they have suffered (i.e. loss of interest from inability to invest trust funds) → **third party liability is limited to what was received** (it is a restitutionary measure, not a compensatory measure)
    - **s113 *Trusts Act 1973* (Qld)**
        - *Re Diplock* left a few loose ends – s113 *Trusts Act* sought to deal with these issues
        - *Re Diplock* was about recipients of a deceased estate. Are the same claims applicable against recipients of other trusts? YES (s113(1) TA)
        - **Must a plaintiff enforce any and all claims against the trustee before enforcing a claim against a third party? YES** (s113(2) TA)
        - **Change of position defence:**
            - s113(3) TA – Where a person who received a wrongful distribution of trust property has **received the distribution in good faith** and has so **altered the person's position in reliance on the propriety of the distribution** that, in the opinion of the court, it would be **inequitable to enforce the remedy**, the court may make such order as it considers to be just in all the circumstances.
            - Application of defence: If you received money that you were not supposed to receive and you didn't know that you were not supposed to receive the money and you spent the money on things you would have always bought (e.g. groceries), no such defence would be available as you have not changed your position. Even if you buy something that you wouldn't have bought, such as a new car, it may not be inequitable to enforce the remedy as the car can be sold to repay the money**. The defence will apply when you have spent the money and you do not have any additional assets to show for it** (no increase in wealth

associated with spending money) (e.g. spending money on improvements to your house and there is no provable increase in value to the house).

Proprietary Claims

- A proprietary claim is not a claim against the defendant **it is a claim against an asset in the hands of the defendant**
    - The right being asserted is a right to the asset identified – it is not a personal right against the defendant. The plaintiff is not asking the defendant to pay a sum of money.
- A proprietary claim is a **superior claim**
    - If the defendant is insolvent, **the plaintiff will have priority over others** in relation to the specific asset as it can be traced back to the trust assets
    - **The plaintiff gets the value of appreciation of the asset** (e.g. increase in value of shares)
        - However, a proprietary claim is limited to the surviving value if the asset is now worth less, the plaintiff cannot recover the whole value of what they have lost (as they are not claiming value, they are claiming the asset)
- A remedy of a proprietary claim will either be:
    - A **court order for a transfer of the identified asset** to the plaintiff; or
    - A **declaration that the plaintiff is entitled to a proportionate share of the property**
- **Tracing:**
    - Proprietary claims are based on **tracing the plaintiff must be able to trace the asset back to the trust property** (if funds have dissipated, there is no proprietary claim) (*Foskett v McKeown*)
    - Tracing is an evidentiary **process** of ascertaining where the property went. It is not a remedy.
    - **Tracing rules:**
        - 1. **If trust funds and the trustee's personal funds are mixed in a bank account, the trustee is presumed to dissipate their own money first** (*Re Hallet's Estate*)
            - E.g. A trustee takes $5000 held on trust and deposits that money into his private bank account, which, prior to the deposit, had a balance of $5000. There is a mixture of trust money and personal money in the bank account. The two amounts become indistinguishable. The trustee withdraws $2000 and spends it on a holiday. There is a potential misappropriation of trust money. There is no direct evidence of where that $2000 came from (whether it was personal or trust money). Under this rule, the

$2000 came from the trustee's personal money. The bank account now has $5000 trust money and $3000 personal money.

- Had it been the case that the trustee then took the remaining $8000 and bought shares. The other $8000 must have included the $5000 trust money. Thus, the trustee is the equitable owner of 3/8 of the shares while the trust estate is the equitable owner of 5/8 of the shares.
- **This rule is not limited to mixing money in a bank account.** (*Brady v Stapeleton* - the trustee held 32,280 shares in a company on trust. The trustee held 1,300 shares of his own in the company. One day, the trustee transferred 17,000 shares to a third party. This was not authorised. He must have transferred some of the shares held on trust. He gave away all of his own shares first and then gave away some of the shares held on trust it make up the difference (15,700). Thus, all of the shares that remained (16,580) were held on trust.)

▪ 2. **If trust funds and the trustee's personal funds are mixed in a bank account, the trustee will be assumed to debit the trust funds first if the funds were profitably invested** (*Re Oatway*)

- E.g. The trustee takes $5000 held on trust and deposits this into their personal bank account, which prior to the deposit, had $5000 credit. The trustee withdraws $5000, which he uses to buy shares in his own name. The shares will be deemed to be trust property (as the trust funds can be traced into the shares). The trust estate will obtain the benefit of the appreciation of value of the shares.
- E.g. The trustee spends $8000 on shares and they appreciated to $9000. As this is a profitable investment, it is assumed that the trust money is debited first. The $8000 spent on shares was made up of $5000 of trust funds and $3000 of the trustee's personal money. The increase in value of the shares will be split 5/8 to the trust estate and 3/8 to the trustee.

▪ 3. **When a bank account includes trust funds from two trust estates and the trustee dissipates the money, it is assumed that the funds from each trust estate is dissipated in proportion**

- Two possible rules:
    - o **Proportional distribution rule find the proportion of the funds contributed by Trust A and Trust B. Apply these proportions to the surviving property** (balance of the bank account).
    - o **First in, first out rule apply the deposits to the withdrawal in the order that they occur**
        - ▪ The two rules could potentially give very different answers

- **The proportional distribution rule is applied unless it is impracticable to do so** (*Re British Red Cross Bolton Farm*; *ASIC V Enterprise Solution 2000*)
  - When is it impracticable to apply the proportional distribution rule? *Devaynes v Noble* – where many deposits and withdrawals are mixed up and working out the proportionate distribution be very difficult and laborious as you would need to calculate new proportions each time money is deposited or withdrawn.
- E.g. A trustee opens a personal bank account into which she pays $5000 from Trust A and, a day later, $3000 from Trust B. The following week, she deposits $1000 from Trust A and, a day later, $1000 from Trust B into the same bank account. She withdraws $5000, which she spends on a holiday.
  - Proportional distribution rule in regards to the remaining money, Trust A is entitled to $3000 (3/5ths of the remaining bank account balance) and Trust B is entitled to $2000 (2/5 of the remaining bank account balance)
    - This rule would be used as it is not impracticable to use this rule
  - First in, first out rule the first $5000 from Trust A cancels out the withdrawal of $5000. The $5000 which is remains consists of $1000 from Trust A and $4000 from a Trust B.

- 4. **Where a trustee mixes own funds with two or more trust funds **

1. Apply the rules that establish the claims of the trust funds against the trustee's funds (i.e. the rules in *Re Hallett* and *Re Oatway*). **2. Apply the rules establishing the claims of the trust funds against each other** (proportionate distribution)

- E.g. A trustee takes $5000 from Trust A and deposits it into his personal bank account, which previously had $5000. A day later, he takes $2000 from Trust B and pays this into his personal bank account. A week later, the trustee withdraws $5000, which he uses to buy share in his own name. These shares are now worth $7000. A day after, he withdraws $5000, which he spends on a holiday.
  - The $5000 spent on shares was spent using trust money, as it was a profitable investment (*Re Oatway*).
  - The $5000 spent on the holiday was dissipated; thus, it was spent using the trustee's own money (*Re Hallett*). Therefore, the trustees $5000 is all gone.
  - The total trust money before spending money on shares was $7000 – $5000 from Trust A and $2000 from Trust B.

Therefore, under proportionate distribution, Trust A contributed 5/7 of the purchase price and Trust B contributed 2/7 of the purchase price. Therefore, Trust A will take 5/7 of the value of the shares and Trust B will take 2/7 of the value of the shares. There is still $2000 in the account. This must be trust money as the trustee is deemed to have spent all of his $5000. Trust A is entitled to 5/7 of this money and Trust B is entitled to 2/7 of this money (as any surviving assets are proportioned the same way investments are).

- 5. **Where a third party uses trust money which they innocently but incorrectly received to purchase a new asset, the beneficiary under the trust is entitled to the asset to the proportion that trust money was used to purchase the asset**
  - E.g. A trustee takes $5000 trust money and makes a gift of the money to C. C is not aware that the money is trust money. C uses the money and $5000 from his personal savings to buy shares. The shares fell in value to $8000. As C contributed $5000 and $5000 was contributed by the trust estate, they would share the $8000 equally ($4000 each).
  - *Re Diplock* – A hospital received money from the trust and spent the money, along with some of their own money, on existing wards. Did the next of kin have a claim over the wards? You could not put an individual value on the wards. The court of appeal said there could not be a proprietary claim as they had to treat the expenditure on the hospital wards as a dissipation (no purchase of a new asset).

Two Claims in one Action

- Can a plaintiff make both a personal and proprietary claim in the same action?
  - YES – **if there are two distinct assets which are the products of two distinct transactions, you can make two different types of claims** (e.g. proprietary claim against appreciating asset and personal claim against depreciating asset)
  - If there is only one asset, and you elect to take the asset, that will be the full measure of relief (*Scott v Scott*)
    - The underlying rationale of the proprietary claim is adopting the breach of trust and treating it as if it was an authorised transaction. It would be contradictory to say that it was an unauthorised transaction and claim compensation.

Case Notes

- ***Re Dawson***
  - FACTS: Mr Dawson was a trustee of his deceased father's estate. The estate was being administered in NSW but the estate had some assets in NZ, including a NZ bank account. Dawson made a payment in NZ pounds to someone to whom he

was not supposed to. This was a breach of the duty of administration as it was an unauthorised payment. At the time the payment was made, AUS pounds and NZ pounds were in parity (i.e. 1 AUD pounds = 1 NZ pound). At the time of the court proceedings, the NZ pound had appreciated against the AUS pounds (1 NZ pound > 1 AUS pound). The misappropriation was of NZ pounds, but presumably, as the court proceedings were in Australia, compensation had been calculated in AUS pounds.

- ISSUE: Which exchange rate was to be used to calculate compensation (the exchange rate at the date of payment or the exchange rate at the date of judgment)?
- HELD: If the trustee had performed their undertaking, there wouldn't have been a payment and that amount of NZ pounds would still be in the NZ bank account and would be worth more in AUS pounds at the date of judgment than it was at the time of payment. **The exchange rate at the date of judgment was used. The trust estate should get the benefit of the appreciation**. The fact that the appreciation of the NZ pound was not reasonably foreseeable was irrelevant.
  - This decision was followed in *Target Holdings v Redferns* and ***Youyang v Minter Ellison Morris Fletcher***

- ***Adamson v Reid***
  - FACTS: The trustee failed to invest the trust money.
  - ISSUE: What was the compensation to be?
  - HELD: The compensation to be awarded was the amount of interest that would have been made if the trustee has invested in **government bonds.**

- ***Youyang v Minter Ellison Morris Fletcher***
  - FACTS: Youyang was the trustee of the Bill Haywood discretionary trust. Youyang decided to invest $500,000 in an investment scheme run by EC Consolidated Capital Limited. Minter Ellison acted as the solicitor of the promoters of the scheme. Minter Ellison was the trustee. Youyang executed a bank cheque to Minter Ellison for $500,000. The subscription agreement (trust document) stated that Minter Ellison was to hold the money in their bank account until a certificate of deposit was issued. The certificate of deposit, in proper form, was never issued for this deposit. Someone at Minter Ellison made a mistake and the $500,000 was paid to ECCCL without the proper certificate of deposit being issued. This was a breach of trust, as the money was paid out not in accordance with the trust. ECCCL went into liquidation and the money invested in ECCCL was lost.
  - ISSUE: How is this loss calculated?
  - HELD: The trial judge said that if everything had been done correctly and ECCCL did not go into liquidation, money would have been lost as this was not a good investment; thus, the trial judge limited compensation to $414,000. The HCA overturned this decision, as it did not take into account the precise terms of Minter Ellison's undertaking. The HCA affirmed the decision in *Re Dawson* and stated that the court must consider the content of the particular trustee's undertaking. This trustee was a different type of trustee as in *Re Dawson* – Minter Ellison had only one obligation, to hold on to the $500,000 until a

particular event occurred in which they were to pay the $500,000 to a specified person (in _Re Dawson_, the trustee had responsibility of the on going nature of the trust - they were responsible for investment and hedging against contingencies such as fluctuations in exchange rates). **As a result of Minter Ellison's breach of trust, the trust estate did not have $500,000. Thus, compensation was $500,000.**

- **_Re Diplock_** (also known as _Ministry of Health v Simpson_)
    - FACTS: The will of Mr Diplock directed his executors to apply the residue of his estate for charitable or benevolent objects. The trustee had paid out £203,000 to 139 different charitable or benevolent institutions. The next of kin of Diplock brought an action challenging the validity of the trust. It was argued that the trust was a purpose trust and was not enforceable.
    - ISSUE: Was the trust invalid? If so, were the recipients of the funds liable to repay the money.
    - HELD: While the word 'charitable' is defined by law, 'benevolent' is not. By including both words, it suggests that 'benevolent' includes purposes that are not 'charitable'. Thus, the trust was a purpose trust. The court held that the trust was invalid (meaning that the trust had always been invalid). Thus, any acts done by the trustee were invalid. The institutions had received money that they were not authorised to receive. At first instance, the claim was dismissed on the basis that you cannot make a restitutionary claim where the mistake is a mistake of law (mistake about the validity of a disposition). You can only bring the claim when the mistaken belief in which the payment was made was a mistake of fact (note: this distinction no longer exists – _David's Securities v Commonwealth Bank_). The Court of Appeal stated that there is a distinct equitable, restitutionary claim that enables the plaintiff's to recover the money. The test is: **whether, at the time at which the payment was made, the recipient received anything more than what he was properly entitled to receive. If so, they had to pay this money back.** Thus, prima facie, the 139 institutions had to pay the money back. **The claimant must exhaust their remedies against the executor/trustee before exerting a claim against a third party** (as the breach is the trustees fault, it is appropriate that the trustee is made to pay first). The House of Lords agreed with the Court of Appeal.

- **_Foskett v McKeown_**
    - FACTS: Mr Murphy was a real estate, with supposedly 200 unimproved lots for sale in Portugal. He persuaded people to pay deposits for these lots. Murphy became a trustee of the deposits. Murphy applied some of the money to pay premiums on a life insurance policy. The evidence was that he had paid five premiums on this policy and two of the premiums had been paid using the trust money. Murphy then committed suicide. The life insurance company paid out money to Murphy's estate.
    - ISSUE: Were those who deposited money entitled to a portion of the life insurance paid?
    - HELD: That those who paid deposits were entitled to some of the life insurance money as **you could trace the deposits (trust money) to the payment of two**

of the premiums. Thus, the 200 people were the equitable owners of 2/5ths of the life insurance policy. The court held that plaintiffs have a **right of election (i.e. they can choose whether to pursue a personal or proprietary remedy)**

TOPIC 4A – OBLIGATIONS OF LOYALTY (CONTENT)

Nature of Fiduciary Obligations

- Duties of loyalty = **fiduciary duties/obligations**
  - Fiduciary = the person who owes the fiduciary obligation
  - Principal = the person to whom the fiduciary obligations are owed
- Fiduciary obligations are a recognition that **people in certain types of relationships, by reason of their position, have power to make decisions or exercise discretion on behalf of the other party to the relationship in a way that has the capacity to affect the interests of the other party**
  - E.g. trustee-beneficiary relationships the trustee is the legal owner of the trust property and has the power to make decision in relation to that trust property and to exercise discretion in relation to that property. This will affect the interests of the beneficiaries. **This power should be used to advance the interests of the beneficiaries, but this may not always be the case**. Trustees may be tempted to use the power to advance their own interests.
- Characteristics of fiduciary obligations:
  - **Concerned with loyalty**:
    - This is the feature that distinguishes this obligation from other private law obligations (e.g. a breach of a contractual obligation does not involve the notion of disloyalty. It is merely an obligation to do what you undertook to do)
    - *"The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary ... Breach of fiduciary obligation, therefore connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty." (Bristol and West Building Society v Mothew*)
  - **Proscriptive (as opposed to prescriptive):**
    - **Fiduciary obligations do not prescribe any particular end position** (unlike a contractual obligation) (*Breen v Williams*)
    - The **principal has a right that the fiduciary refrain from pursuing his or her own interests but there is no right to be put in any particular position** (no positive obligation to act in a certain way)
    - If a fiduciary does pursue their own interests and makes a profit, the fiduciary must give up this gain (this does not aim to put the principal in any end position; rather, it is solely concerned with removing any gain that the fiduciary made by breaching their fiduciary obligation)
  - **Protective nature**:
    - Equity ensures that the fiduciary does not give into the temptation to prefer its own interests over that of the principal
  - **Strict liability**:
    - **A fiduciary will be liable for a breach of fiduciary duty even if the breach has caused no loss to the principal**.

        - The fiduciary will be liable for a breach even if the breach of duty in fact benefits the principal and even if the fiduciary has acted in good faith and in the best interest of the principal
- Who do duties of loyalty apply to?
    - Obligations of loyalty applies to people other than trustees
    - **All express trustees are fiduciaries**
    - Two categories of fiduciary relationships:
        - **Relationships that are always fiduciary** trustee/beneficiary, agent/principal, solicitor/client, employee/employer, company director/company, between business partners
        - **Fiduciary relationships that arise out of the certain facts of the case** (not a closed category) courts have been reluctant to lay down a definitive test

<u>Identifying Fiduciary Relationships</u>

- The court are reluctant to define a fiduciary relationship and rather, develop the notion on a case-by-case basis
- Elements suggested by <u>*Hospital Products v United States Surgical Corp*</u>:
    - 1. **Some positive obligation** (e.g. a contractual relationship where they have undertaken to act in a particular way)
    - 2. **The fiduciary has discretion as to how they perform these obligations**
    - 3. **This discretion is what makes the principle vulnerable to possible abuse of the discretion by the fiduciary**
        - Consider the bargaining power of both parties, the degree of delegation of control, whether the 'principal' relied on the fiduciary and whether this reliance gave rise to vulnerability (<u>*Pilmer v Duke Group*</u>)
- The **existence of a position of vulnerability on the part of the principal which cause them to place reliance upon the fiduciary** and require the protection of equity acting upon the conscience of that person is the notion underlying all fiduciary relationships (<u>*Hospital Products v United States Surgical Corp*</u>)

<u>Content of Fiduciary Obligations</u>

- If there is a contract upon which the fiduciary obligation is based, it is the contract that regulates the basic rights and liabilities of the parties and determines the nature and extent of the fiduciary relationship
- There are two rules no profit rule and no conflict rule
- **No profit rule:**
    - **A fiduciary must not make an unauthorised profit out of its fiduciary position**
    - **If the fiduciary obtained the opportunity to make a profit and acquired the knowledge that there was a profit to be made through acting as**

representative of the trust, there will be a breach of the no profit rule (*Regal Hastings* v Gulliver; *Boardman v Phipps*)
    - There will still be a breach even if the fiduciary acted on good faith and the trust couldn't acquire the benefit for itself (*Boardman v Phipps*)
- **No conflict rule:**
  - There must not be a **conflict between the fiduciary duty and personal duty** (*Consul Development v DPC Estate*)
    - A **fiduciary must not put itself in a position where its own private interests conflicts with its positive duties to the principal**
  - Need to ask three questions:
    - 1. What is the positive scope of the fiduciary duties that the fiduciary owes the principal?
    - 2. What is the scope of the fiduciary's private interests?
    - 3. Is there an overlap between these two things?
  - **There does not have to be an actual conflict** (*Boardman v Phipps*)
    - Minority in *Boardman v Phipps* suggested that there must be a real, sensible likelihood of a conflict (adopted in *Queensland Mines v Hudson*)
    - The court in *Pilmer v Duke Group* suggested there must be an actual conflict or a real or substantial possibility of a conflict

Specific Situations

- **Trustee purchasing trust property from the trust:**
  - As legal title in trust property is vested in the trustee, if the trustee attempts to sell the property to themself, the trustee is both vendor and purchaser there is a clear conflict in that the trustee might give a really good price
  - **Self-dealing rule if the trustee purchases the legal interest in trust property for themself, the beneficiary can have that sale set aside as of right** (strict)
  - It does not matter if the trustee has paid the full market value of the property (i.e. it stands upon principle and not the individual circumstances of the case)
    - *Wright v Morgan* – the trustee purchased the property at a public auction (evidence that the price is fair), but the sale could still be set aside by beneficiaries
- **Trustee purchasing beneficial interest from the beneficiary:**
  - In this situation, the trustee is the purchaser and the beneficiary is the vendor
  - There is a conflict in the sense that the trustee is the legal owner of the trust property and, in that capacity, could have obtained knowledge about the trust property that could place them in an advantage when negotiating to purchase the beneficial interest
  - **Fair-dealing rule the rule is that the transaction can be set aside unless the trustee can show that they paid the full market value of the property and that any information they had was provided to the beneficiary prior to the sale** (not absolute)

- **Fiduciaries renewing leases:**
    - If a fiduciary renews a lease in their name for the purpose of a trust, they will hold the lease on constructive trust for the beneficiary (*Keach v Sanford*)
    - In the case of a partnership, if one partner renews the lease, there is a presumption that they used their position to renew the lease (*Chan v Zacharia*)
        - This presumption can be rebutted if the is evidence that the fiduciary obtained the lease by other means.
- **Employees receiving bribes or secret commissions:**
    - The employer/employee relationship is a fiduciary relationship
        - Employees are often required to enter into contracts with third parties on behalf of the employer. They have an obligation to obtain the best possible deal.
    - Sometimes, **the supplier provides a bribe or secret commission to the employee to procure the contract** this breaches the no conflict rule as the employee's private interest (the bribe) is in conflict with their fiduciary duty (to get the best possible deal for the employer) and also the no profit rule as the employee benefits from the bribe
    - **A key issue is whether a constructive trust applies to the bribe/secret commission and property bought with this money**
        - NO – to award a constructive trust would be to confound ownership with obligation (*Lister v Stubbs*)
            - Other cases have held that as soon as a bribe is received, it is held on constructive trust for the employee (*Attorney-General for Hong Kong v Reid*); however, this view is not binding in Australia
        - Two situations: (*Sinclair Investments v Versaille Trade Finance*)
            - Where the fiduciary receives something that he had a duty to give to the beneficiary this asset belongs to the principal (the asset can be held on a constructive trust)
            - Where the fiduciary receives a bribe this assets belongs to the fiduciary (the asset cannot be held on a constructive trust)
- **Doctor and Patient:**
    - The doctor/patient relationship is not automatically a fiduciary relationship but could give rise to one (*Breen v Williams*)
    - The doctor will breach their fiduciary duty if they do not act in the best interest of the patient
- **Informed consent**
    - The fiduciary has a defence to a possible breach of fiduciary duty if **the fiduciary has obtained the informed consent of the principal to conduct the transaction**
    - In order for there to be informed consent, **the fiduciary must disclose its personal interest or its profit to the principal** (*Boardman v Phipps*; *Queensland Mines v Hudson*)
    - Those who provide consent must have legal capacity to do so (e.g. do not suffer from mental incapacity – *Boardman v Phipps*)

Case Notes

- ***Breen v Williams***
  - FACTS: Breen got breast implants. She developed complications. She consulted Williams, a plastic surgeon who had not perform the original surgery. Williams performed some remedial surgery. The complications continued. Breen became a plaintiff in a class action against the manufacturer of the implants. Breen needed access to her medical records, which were in Williams' possession. Williams said that he would only give Breen the records if he released him from any future action. She commenced proceedings against Williams requesting he give her access to the medical records. Breen's claim was based on the claim that Williams owed her a fiduciary obligation.
  - HELD: Williams did not owe Breen a fiduciary obligation because the obligation that Breen said existed was a positive and prescriptive duty to do something. **The doctor/patient relationship is a relationship that could give rise to a fiduciary relationship.** There is obviously a contractual relationship between doctor and patient, which gives rise to a contractual duty on the doctor to advise and treat the patient with reasonable duty and care. There is also a duty of care under the tort of negligence. Were fiduciary obligations imposed upon these common law duties? There can be a fiduciary relationship between doctor and patients as the patient relies on the doctor and reveals confidential information. **It is not always fiduciary but it can be**. **There would be a breach of fiduciary duty if the doctor does not act in the best interest of the patient.** Providing Breen with access to her medical records was not a part of Williams' fiduciary duty. If it was held that providing access to medical records was part of the fiduciary obligation, this would be inconsistent with the fiduciary obligations as fiduciary obligations are proscriptive, not prescriptive.

- ***Hospital Products v United States Surgical Corp***
  - FACTS: The plaintiff (USSC) manufactured surgical equipment. They appointed Hospital Products as its exclusive distributor of. Particular product. There was a contractual relationship, which stated that Hospital Products would do their best to promote the sale of the product in Australia and that either party could terminate the contract at nay time. The contact did not state that Hospital Products had to purchase or sell a specific quantity of the product. Hospital Products began to manufacture their own product in competition with the product they were supposed to be promoting on behalf of USSC. They began to fulfil orders that they had with their own product and not the USSC product. USSC claimed breach of contrast and breach of fiduciary obligation.
  - HELD: There was definite breach of contract (breach of obligation to use their best efforts to sell the product). Majority of HCA held that there was no fiduciary relationship and therefore no liability for breach of fiduciary obligation.

- Mason J – *"The fiduciary undertakes or agrees to act for and on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position."*
    - This shows three key principles – (1) **the fiduciary normally has some positive obligation** (e.g. a contractual relationship where they have undertaken to act in a particular way); (2) **the fiduciary has discretion as to how they perform these obligations**; and (3) **this discretion is what makes the principle vulnerable to possible abuse of the discretion by the fiduciary.**
- Gibbs J – stated that the contract did not oblige Hospital Products to protect USSC's goodwill, as the contract did not require Hospital Products to buy or sell any particular quantity and the contract allowed the parties to terminate the contract at any time. All the contract required was that Hospital Products use their best endeavours to sell the product and if they did not do this, they would be liable for breach of contract. This was not the same thing as a fiduciary duty (fell far short). **This was a contractual relationship between two commercial companies of equal bargaining power; thus, there was an insufficient degree of delegation of control to Hospital Products and insufficient vulnerability.**
    - Note: there is no general rule that there cannot be a fiduciary relationship between two commercial companies (there was just no such relationship of the facts of the case)
    - Minority view – Hospital Products were the custodian of USSC's products goodwill in Australia. It was this feature that gave Hospital Products the ability to affect the interests of USSC and rendered USSC vulnerable to abuse. Thus, this gave rise to a fiduciary obligation.

- ***Pilmer v Duke Group***
    - FACTS: Kia Ora, who was a gold mining company who later changed their name to Duke Group, made a takeover bid for a mining company, Western United Ltd. They offered a particular price for the shares - $1.20 for each share plus one share in Kia Ora for two shares or two shares in Kia Ora for one share in Western United. When there is a takeover bid, the company making the takeover bid must make a report that the price they are offering is fair and reasonable. Kia Ora engaged an accountancy firm, Nelson Wheeler, to make this report. Pilmer was one of the partners of the accountancy firm. Nelson Wheeler made the report, stating that the price was fair and reasonable. The takeover went ahead but shortly after there was a stock market crash. Both companies were badly affected financially. Kia Ora was so badly affected that it became insolvent and went into liquidation. The liquidators came to the conclusion that Kia Ora had paid too much for the shares in Western United and that the report prepared by Nelson Wheeler had grossly overestimated the value of the shares. The liquidators brought an action against PIlmer and the other partners. One of the claims was that Nelson Wheeler, in providing the report, had breached their fiduciary duty.

The liquidators alleged that the partners of Nelson Wheeler put themselves in a position of conflict (breach of no conflict rule) on the basis that the partners of Nelson Wheeler had close business and personal relationships with the directors of both Kia Ora and Western United. The liquidators argued that because the directors of Kia Ora and Western United often referred work to Nelson Wheeler, Nelson Wheeler had a personal interest to maintain good terms with the directors. Thus, they could not be trusted to provide an independent report. The liquidators argued that Nelson Wheeler had a positive duty to provide an accurate and independent report but their personal interest that they would continue to get work from the companies conflicted with their obligation to Kia Ora to provide an accurate and independent report (e.g, were worried that if their report said that the price was not fair and reasonable, they would not get any more work).

- HELD: There was no fiduciary relationship. In a relationship between a financial advisor and a client, there could be a fiduciary relationship. However, on the facts of this case, Nelson Wheeler had not been engaged to provide advice to Kia Ora regarding the takeover, they had only been engaged to give an opinion on whether the price offered was fair and reasonable. **It could not be said that Kia Ora were relying on Nelson Wheeler. It was for Kia Ora itself to make up its own mind to takeover Western United. There was reliance, but no reliance that would give rise to vulnerability.** Nelson Wheeler had been negligent in producing the report but this was a different action (tort of negligence)
- Re conflict: Even though there was no fiduciary relationship, the court addressed the no conflict and held that the facts would not give rise to a real chance of conflict. The formulation that the majority used was – **an actual conflict or a real or substantial possibility of a conflict**.

● *Regal Hastings v Gulliver*

- FACTS: The plaintiff, Royal Hastings, was a company that owned cinemas. It wanted to acquire two further cinemas. In order to do so, they set up a subsidiary company with 5000 shares. Royal Hastings were only financially able to purchase 2000 shares. The owner of the two cinemas said they were not prepared to sell the cinemas unless all 5000 pounds of the share capital was paid up. The directors of Royal Hastings and the company's solicitor decided to purchase the other 3000 shares in their own names. Shortly after the shares in the subsidiary company were sold, Royal Hastings brought an action against the directors and solicitor alleging that they has breached their fiduciary obligations. Clearly, as company directors, there were in a fiduciary relationship with the company. They claimed that there was no breach of fiduciary duty as Royal Hastings did not have sufficient funds to take up all of the shares; thus, it could not be said that purchasing the shares for the company was a transaction which the directors had to do for Royal Hastings. The argued that because there was no positive obligation, there could not be a conflict (i.e. no overlap between personal interest and duty to Royal Hastings).
- HELD: There was no technical conflict (as Royal Hastings could not purchase shares for themselves); however, there was a breach of the no conflict rule and thus, a breach of fiduciary duty. On the facts, this was a situation where **the**

directors had acquired a profit by virtue of their fiduciary position** (they were able to buy shares and sell the shares at a profit because they were directors). **It did not matter that there was no actual conflict.** This is a very wide but strict rule.

- *Boardman v Phipps*
  - FACTS: Boardman was a solicitor for a family trust but not a trustee. However, as solicitor, there was a fiduciary relationship. One of the main items of trust property was a minority shareholding in a private company, which was not performing very well. Boardman, in his capacity as solicitor, and Phipps, one of the beneficiaries, attended the AGM of the company as representatives of the trust estate. At that meeting, they obtained information that suggested that there was potential for significant profit. Boardman and Phipps decided that it would be advantageous for the trust if the trust could obtain a majority shareholding so they could control the direction of the company and turn a profit. The trust was not able to acquire the shares for itself as the trust did not have sufficient funds to make the purchase and there were limitations on the power of investment in the trust instrument. Thus, Boardman and Phipps decided that they would purchase the shares for themselves. They sought the consent of the trustees but one trustee was suffering from dementia and thus lacked legal capacity (in any event, they had not disclosed sufficient information for the trustee to give informed consent). The combined shareholding of the trust and Boardman and Phipps was a majority. Boardman put in a lot of work in running the company and the company was very profitable. One of the beneficiaries brought a claim against Boardman alleging breach of fiduciary duty.
  - HELD (re: profit): There was a breach of the no profit rule. Boardman had made a profit by virtue of his fiduciary position. **He had obtained the opportunity to make a profit and acquired the knowledge that there was a profit to be made through acting as representative of the trust. Even though he acted on good faith and the trust couldn't acquire the benefit for itself and that the trust has benefit from Boardman's actions, there was a breach of no profit rule.** Boardman had to account for the profit he had made.
  - HELD (re: conflict); Two members of the majority expressed the view that the believed that there was also a breach of the no conflict rule (obiter remarks). Boardman was the solicitor who the trustees consulted. He was not bound to advise on any particular point unless he was consulted on that point. Boardman was the person who the trustees would have gone to had they wanted that advice. If that had happened, Boardman would not be able to give unprejudiced advice as to the purchase of shares. **Even though Boardman had not been consulted on the matter, it was sufficient that he would have been the person who was consulted on the matter.**
    - The minority said that a real, sensible likelihood of conflict was required (in this case, Boardman being called upon to advise on this matter was remote)
  - HELD (re: informed consent): Even though consent was sought from the trustees, it was held that no valid consent was given as one of the three trustees was

suffering from dementia and thus, lacked legal capacity. Also, **not enough information was disclosed for that to amount to a fully informed consent.**

- ***Consul Development v DPC Estates***
  - FACTS: Walton was a solicitor who has a property development business. He carried out this business through a company called DPC Estates (plaintiff). DPC looked for properties to be purchased, developed and then sold on for profit. As Walton was a solicitor, he employed a manager, Grey, to run DPC on his behalf. Grey had a duty to scan the property market to see if there were any suitable properties for sale, produce reports on these properties and advise Walton on whether it would be a good idea to develop the properties. There was a fiduciary relationship between Walton and Grey, as Walton relied heavily on Grey on the day to day running of DPC. Mr Close was an article clerk employed by Walton in Walton's legal practice. Close also carried on a property development business, through a company called Consul Development (defendant). Close and Grey knew each other. In 1967, a group of properties came on the market. Grey produced reports on those properties and informed Walton of the properties. Walton instructed Grey to make an offer to purchase the properties on behalf of DPC. The price offered was below the maximum price that Walton was prepared to pay (which G knew). Walton specifically told Grey not to let the purchase fall through. Grey told Close that the properties were available and suggested that Close buy the properties. There was evidence that Grey and Close entered into an agreement that if Close bought and developed the properties and then sold them, Grey would get a share of any of the profits. Grey told Close that Walton had made an offer but that the offer was inadequate and had been rejected. Grey also showed Close photos and reports. Close offered a considerably higher price for the properties. Close's offer was accepted and Consul Developments acquired the properties.
  - ISSUE: Was there a conflict of interest?
  - HELD: The positive duties owed by Grey to DPC were to seek out properties, make reports and make recommendations. Grey had a positive obligation to do his best to negotiate the purchase of the properties on behalf of DPC. Grey had a private interest in Close purchasing the properties because of the agreement between them that he would get a share of profits. This was an obvious conflict.

- ***Queensland Mines v Hudson***
  - FACTS: Queensland Mines was in the business of uranium mining. Hudson was the managing director. Hudson and another director entered into negotiations with the Tasmanian government to obtain licences for an iron ore mine in Tasmania. They were going to create a new company to mine the iron ore but they used the name of Queensland Mines in order to obtain the licences. The government would only allow the licence because they knew Queensland Mines was a well-off company. Hudson decided to resign so he could devote all of his time to the iron ore venture. He made full disclosure of all relevant facts and circumstances to the board of Queensland Mines. The board accepted his resignation and gave its consent.

- HELD: The majority adopted the formulation of Lord Upjohn in *Boardman v Phipps* – **there must to be a real, sensible possibility of conflict in order for the no conflict rule to be breached.** The trial judge found that Hudson had used his fiduciary position to obtain a benefit (i.e. he had used the resources and good name of Queensland Mines to obtain the licences). However, this was a case where Hudson could not be liable for breach of fiduciary duty as the board of Queensland Mines has full knowledge of all relevant facts and allowed him to pursue the iron ore mining in his own name. There was fully informed consent.

- ***Keach v Sanford***
  - FACTS: The trustee held property on trust for a child. Before the lease expired, the trustee applied to the lessor for a renewal of the lease for the benefit of the child. The lessor refused to grant a renewal; however, the lessor was happy to grant a lease to the trustee in his personal capacity.
  - HELD: The trustee was to hold the lease on constructive trust for the child, and make account for any profits (even though there had been no fraud).

- ***Chan v Zacharia***
  - FACTS: Two partners of a medical practice had taken out a lease for three years. The lease contained an option for renewal for a further 2 years. The option had to be exercised by a particular date. The two partners fell out. Chan gave notice that he wanted to dissolve the practice and refused to join Zacharia in exercising the lease. After the date of option, but before the partnership had been wound up, the owner of the premises agreed to let Chan lease the premises in his own name. Zacharia brought an action claiming that this was a breach of a fiduciary obligation as partners were always in a fiduciary relationship.
  - HELD: **That where there is a fiduciary relationship between partners and one partner renews the lease, there is a presumption that they used their position to renew the lease. This presumption can be rebutted if the is evidence that the fiduciary obtained the lease by other means.** As the agreement to grant the lease to Chan occurred before the partnership was wound up, Chan breached his fiduciary duty and held the lease on trust for the partnership.

- ***Lister & Co v Stubbs***
  - FACTS: Lister & Co was a silk spinning company. Stubbs, the former dyer of the company, was entrusted with the task of purchasing all goods needed for the dying. He placed a substantial order with Varley & Co. Stubbs received a large sum as a commission from Varley. Lister did not know of the commission that Stubbs got. Some of the money was used to purchase freehold land, some was used for other investments and other was held as cash. When Lister found out that Stubbs had received a commission, Lister brought a claim against Stubbs on the basis that Stubbs had received a profit from his position.
  - HELD: There was a breach of fiduciary duty. The personal remedy of accounts of profit was available. However, the plaintiff argued that a constructive trust had

arisen over the money that had been paid to Stubbs (this was a proprietary remedy). There are two advantages of this remedy – (1) the plaintiff would obtain priority over other, unsecured creditors; (2) if property bought with the money has appreciated in value, the plaintiff will get the benefit of the appreciation. It was held that the money that Stubbs had received was **not held on constructive trus**t. Rather, the plaintiff was restricted to the personal remedy of account of profits. **To award a constructive trust would be to confound ownership with obligation.**

- ***Attorney-General for Hong Kong v Reid***
  - FACTS: Reid was a solicitor employed by the legal service of the government of Hong Kong. His role was to be Crown Counsel and Crown Prosecutor and eventually became Acting Director of Public Prosecution. Over his career, Reid accepted bribes from some criminals in return for obstructing the prosecution of those criminals. In total, he had received $12.4 million. Reid used some of this money to buy properties in NZ. These properties had appreciated greatly. The Attorney-General argued that the properties were held on constructive trust for the government of Hong Kong.
  - HELD: There was a breach of fiduciary duty and an accounts of profit was available. There was a constructive trust. The NZ Court of Appeal considered themself bound by the decision in Lister. However, the Privy Council said there was a constructive trust. **The fiduciary who received the bribe in breach of duty must pay and account for the bribe to the person to who the duty is owed.** As soon as the bribe was received, it should have been transferred straight away to the person who suffered from the breach of duty. As soon as Reid received the money, he held it on constructive trust for the government of Hong Kong (as equity sees what is ought to be done as done).
    - As a decision of the Privy Council, this case is not binding in Australia or England. Thus, it does not overrule the decision in *Lister v Stubbs*

- ***Sinclair Investments v Versaille Trade Finance***
  - FACTS: Mr Kushney, a director of Versaille and another company called Trading Partners Ltd, made a profit of £28 million on the sale of his shares.
  - HELD: There was a breach of fiduciary duty. Held that the decision in *Attorney-General for Hong Kong v Reid* may be unsound. **There is a distinction between cases between where the fiduciary receives a bribe and cases where the fiduciary receives something that he had a duty to give to the beneficiary**. In cases where the fiduciary takes something for themself that they were supposed to take for the principal, that was an asset belonging to the principal. If the fiduciary takes a bribe that was not supposed to go to the principal, the bribe is not an asset of the beneficiary.

- ***Grimaldi v Chameleon Mining ML (No. 2)***
  - HELD: Described the reasoning in Sinclair as unconvincing. The approach in Australia is discretionary. It is not the case that a constructive trust arises at the moment that the fiduciary receives the money.

TOPIC 4B – DUTY OF CONFIDENCE

General

- The **equitable duty of confidence applies in situations where one party has imparted information to another party for a specific purpose**. Equity recognises that this information was imparted only for the specific purpose and thus, implies a duty of confidence.
- The duty of confidence is distinct to fiduciary duties
  - **There is no need for a fiduciary relationship to exist for the duty of confidence to arise**
  - Fiduciary duties are much broader than the duty of confidence (the duty of confidence only applies to the receipt of confidential information)
  - The duty of confidence and fiduciary duties may overlap (e.g. in the case of a company director, the company has entrusted the director with information. Equity imposes a duty of confidence on the director not to pursue their own interests)
- A duty of confidence may arise out of contract (this is distinct to the equitable duty of confidence)

Situations Where the Duty of Confidence Arises?

- **The nature of the information is confidential**
  - Most cases relate to commercial information (e.g. inventions); however, celebrity or government information may also be protected
  - To be confidential, the **information must be more than an idea**
    - Information must be **sufficiently detailed and developed so that it shows someone how something might be done** (i.e. provides a springboard for someone else to replicate what is being done) (*Ansell Rubber v Allied Rubber Industries*)
- **The circumstances of the communication indicates that the information was to be confidential**
  - Test: **Would the circumstances of the communication lead a reasonable person to believe that the information is to be kept confidential?** (*Seager v Copydex*)

Defences

- **Public Interest Defence**
  - Possible defence if **disclosure of the information is in the public interest**
  - A distinction is made between the type of information revealed
    - Government information:
      - This defence is more easily invoked in regards to government information
      - Onus of proof: **The plaintiff must show that it is in the public interest to treat the information as confidential** (*Attorney General (UK) v Heinemann Publishers Australian*)

- Commercial information:
  - Onus of proof: **The person who disclosed the information must prove that disclosure was in the best interest of the public.** (*Attorney General (UK) v Heinemann Publishers Australian*)
  - The public interest defence will be successful in relation to commercial information if the **information relates to a broader public interest** (*Lion Laboratories v Evans* – enforcement of the law)
- Must also consider what the best way to bring the information to the public light is (*Francombe v Mirror Newspaper* – not appropriate to print information of a crime in the newspaper)

Disclosure Requirements of the Trustees

- **Trustees must disclose to the beneficiaries the:**
  - **Trust instrument**
  - **Financial records of the trust property**
- Trustees do not have to disclose to beneficiaries:
  - Documents which the trustees created for themselves in assisting with the administration of the trust do not have to be disclosed (e.g. minutes, correspondence, etc) (*Re Londonderry's Settlement*)
  - Documents prepared by the settlor where it is indicated that the settlor wished to keep the documents confidential (*Hartigan Nominees v Rydge*)

Case Notes

- ***Ansell Rubber v Allied Rubber Industries***
  - FACTS: Ansell developed a machine to manufacture rubber gloves. Two employees left Ansell and started their own company that also manufactured rubber gloves. They used a similar machine.
  - HELD: Some of the information was publically available and could be obtained by observing it in operation. However, that information that was publically available was not sufficient to replicate the machine. The information that the two former employees had obtained went further that what was publically available. The information obtained was sufficiently detailed and thus, was of a confidential nature. The employees were held liable for breach of confidence.

- ***Seager v Copydex***
  - FACTS: Seager invented a carpet grip and entered into negotiations with Copydex for Copydex to market and sell the carpet grip. Seager disclosed information about the carpet grip in order to allow Copydex to make a decision. Copydex then manufactured their own carpet grip, which had some of the same features as Seager's carpet grip.
  - HELD: Copydex had breached their duty of confidence as the information was disclosed only for the purposes of the negotiations and Copydex could not use the information for another purpose.

- ***Attorney General (UK) v Heinemann Publishers Australian***
    - o FACTS: Heinemann was going to publish a spy catcher book. The UK government sought an injunction to restrain the publishing of the book in Australia. It was noted that there was no contractual duty of confidence in regards to what spies could disclose.
    - o HELD: In the first instance, the injunction was refused. The NSWCA upheld that refusal. There is a difference between information parted in private relationships and information parted in government. The government is required to act in the public interest. **In a private case, the person who disclosed the information must prove that disclosure was in the best interest of the public. In a government case, the plaintiff must show that it is in the public interest to treat the information as confidential.**

- ***Lion Laboratories v Evans***
    - o FACTS: The relevant information was commercial information. Lion Laboratories manufactured a breathalyser that had been approved for police use. Two former employees of Lion Laboratories disclosed information to the media which indicated that the breathalyser may not be reliable.
    - o HELD: **That the public interest defence was available as this commercial information relates to a broader public interest** (i.e. the proper enforcement of the law).

- ***Francombe v Mirror Newspaper***
    - o FACTS: The defendant, publishers of the Daily Mirror newspaper, had made recordings of an illegally taped phone conversations with a figure in the horse-racing field. These phone conversations showed that the person had breached jockey regulations as well as committed criminal offences. The publishers wanted to publish the material but the plaintiff sought an injunction.
    - o HELD: There was a public interest aspect to the information but **publishing the information in the newspaper was not the only, or best, way in which the public interest could be served**. The newspaper could give tapes to the police or the jockey club.

- ***Hartigan Nominees v Rydge***
    - **o** FACTS: This case concerned a discretionary trust. The trust instrument provided that the trustees had an absolute and uncontrolled discretion in the exercise of their powers. However, the settlor had provided the trustees with a second document entitled 'Memorandum of Wishes', which set out how he wished the trustees to exercise their discretion. There had been occasions on which the trustees had refused to make a distribution to a particular purpose as the memo did not provide for a distribution to this person. Some beneficiaries wanted access to the memo.
    - **o** HELD: Even if it was unclear whether the trustees had a legal duty to follow the memo, the memo had a practical effect of the administration of the trust. The memo did not fall within the two categories in *Re Londonderry's Settlement* (as it

was not the trust deed or financial documents and it was not created by the trustees). It was held that the beneficiaries were not entitled to the memo. The document does not become a trust document simply because it is prepared by the trustee for the administration of the trust. Those types of documents are part of the trustee's deliberative processes. While the memo was not prepared by the trustees, it was a document that the trustees would be entitled to and bound to keep confidential. **The fact that the settlor had placed his wishes in a separate document and not in the trust instrument suggested that he wanted his wishes to remain confidential**. He wanted the trustee to be able to decide to whom the trust property should be distributed without unnecessary abrasion from the beneficiaries.

TOPIC 4C – OBLIGATIONS OF LOYALTY AND CONFIDENCE (REMEDIES)

Remedies

- **It is not necessary that the principal suffers a loss for there to be a breach** of duties of loyalty and confidence
  - A principal can obtain a remedy even if they have suffered no loss or even if the principal has made a gain from the breach
- **Right of election the principal can choose to obtain a remedy of an account of profits or equitable compensation,** based on whatever is more favourable to them
  - *Warman International v Dwyer* – ordinarily a fiduciary will be ordered to award an account of profits. If the amount lost by the principal exceeds what is made by the fiduciary, the principal can elect to have compensation. This election can be made at any time up to the date of judgement.
- **Account of profits:**
  - This is the normal remedy
  - **The fiduciary has to disgorge (give up) any profits that he has made to the principal**
- **Constructive trust:**
  - May be available in some situations (*see above*)
- **Compensation:**
  - **No remoteness rules** the party in breach is responsible for all consequences of the breach
  - Aim: to put the plaintiff in the position that they would have been in had the transaction not gone ahead (*McKenzie v McDonald*)
  - **What if the principal would have gone ahead with the transaction anyway?**
    - It is irrelevant – **When a party holding a fiduciary relationship commits a breach of fiduciary duty by non-disclosure of material facts that his principal is entitled to know in connection with the transaction, he cannot maintain that the disclosure would not alter the decision to proceed with the transaction** (*Brikindon v Sailing Co*)
    - The fiduciary must make full disclosure of any conflict or profit (*MacGuire v Makaronis*)
- **Exemplary/punitive damages:**
  - Aim = to punish and deter offenders
  - **Should exemplary damages be available for breach of fiduciary duty?**
    - It depends on whether the case is analogous with tort (exemplary damages allowed) or with contract (exemplary damages not allowed) (*Harris v Digital Pulse*)

Third-Party Liability

- **Third-parties are not to be made constructive trustees unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees** (*Barnes v Addy*)

- Two limbs of this rule:
  - Knowing receipt
  - Knowing assistance
- The term 'constructive trustee' means that a third-party is made liable in equity as if the third-party was a trustee or a fiduciary (*Selangor Units Rubber Estates v Craddock*)
- Aim = a third-party who is knowingly involved in a breach of trust should be made liable
- Claims against third-parties are purely personal

- **Knowing Assistance**
  - There is no need for the third-party to have received trust property; just need to have knowingly assisted in a breach of trust
  - Requirements:
    - **1. Breach of trust or fiduciary duty**
    - **2. That breach must be dishonest or fraudulent**
      - This element is no longer required in England (*Royal Brunei Airlines v Tan*)
        - The HCA rejected this reasoning. Held that in Australia, any breach of trust or fiduciary duty must be dishonest or fraudulent (*Say-Dee v Farah Constructions*)
    - **3. Third-party must have assisted with that breach of trust or fiduciary duty**
      - **Assistance = any participation in the activity** (ranges from procuring the breach to performing acts to allow the trustee to commit the breach)
        - Being the managing director of the company that committed breach was sufficient assistance (*Royal Brunei Airlines v Tan*)
    - **4. Third-party must have assisted with the requisite degree of knowledge**
      - *Baden, Delveaux and Lecuit* - stated five categories of knowledge:
        - **Actual knowledge**
        - **Wilfully shutting one's eyes to the obvious**
        - **Wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make**
        - **Knowledge of circumstances which would indicate the facts to an honest and reasonable man**
        - **Knowledge of circumstances which would put an honest and reasonable man on inquiry**
      - *Consul Development v DPC Estates* - The court also considered whether Consul Developments (Mr Close) had knowingly assisted

in the breach of fiduciary duty. Did Mr Close have the requisite degree of knowledge? Held that actual knowledge was not required but constructive knowledge (i.e. the fifth category above) is not enough. Should Mr Close be suspicious of Mr Grey's actions? As Mr Grey knew of Walton's circumstances quite well, Mr Close had no reason to be suspicious of what Mr Grey had told him. Held that Mr Close did not have the requisite knowledge. In such a case where the elements are fulfilled, a third-party can be made liable.
    - Effect: **category 5 is not sufficient.**
  - English law does not use the test of knowledge anymore (Australia still does)

- **Knowing Receipt**
  - The third-party must have received trust property (or the traceable proceeds of the trust property)
  - The trust property (or traceable proceeds) does not still have to be in the third-parties hands at the time of claim
    - If the trust property is still in the third-parties hand, it is possible to bring a proprietary claim against the trustee. However, the 'knowing receipt' claim is a personal claim
  - Requirements:
    - **1. Disposal of assets by a trustee or fiduciary in breach of trust or fiduciary duty**
    - **2. Beneficial receipt by the third party of the assets or the traceable proceeds of the asset**
      - **Receipt = receiving any interest in the trust property**
      - There does not have to be receipt of physical possession or an absolute interest; rather, **the third-party must directly benefit from the breach** (*Doneley v Doneley*)
      - 3. The **third-party must receive the trust property for their benefit, and not as agent for someone else** (e.g. in the normal situation, a bank receiving money for a customer would just be an agent and would not have had receipt for the purposes of the knowing receipt rule)
    - **Requisite degree of knowledge on the part of the third party's**
      - Suggestions in the case law that the knowledge requirement for knowing receipt is less stringent that for knowing assistance
      - *Grimaldi v Chameleon Mining* - the FCA acknowledged that the past view in Australia was that there was a difference in the test of knowledge between knowing assistance and knowing receipt. **The orthodox view was that for knowing receipt, the fifth category would suffice. However, since the 1990's, the view had shifted towards viewing the knowledge requirements as**

the same (i.e. the fifth category did not suffice for knowing assistance or knowing receipt)

Case Notes

- ***Brikindon v Sailing Co***
  - o FACTS: Brikindon was a solicitor for both the lender and the borrower in the loan transaction. He had acted in breach of fiduciary duty as he had a personal interest in the transaction that he did not disclose (actually concealed it). He argued that the transaction would have gone ahead even if he had disclosed his personal interest.
  - o HELD: This argument was rejected. **When a party holding a fiduciary relationship commits a breach of fiduciary duty by non-disclosure of material facts that his principal is entitled to know in connection with the transaction, he cannot maintain that the disclosure would not alter the decision to proceed with the transaction.** Once the court has determined that the non-disclosed facts were material, speculation as to what course the principal would have taken is irrelevant.

- ***MacGuire v Makaronis***
  - o FACTS: A client, who was unsuccessful in obtaining a loan, asked his solicitor to arrange a loan for him. The solicitor arranged a loan with a finance company. The solicitor had a close relationship with the finance company but did not disclose this to the client. The client was ultimately unable to repay the loan and argued that the solicitor breached his fiduciary duty. The solicitor argued that even if he had disclosed the relevant fact to the client, the client would probably have taken the loan anyways.
  - o HELD: The solicitor's argument was rejected. It is the fiduciary's responsibility to protect the client's interest. **The fiduciary must make full disclosure of any conflict or profit.** The solicitor was liable even though the client may have gone ahead with the rule. Stated that the principle laid down in *Brikindon v Sailing Co* was not correct

- ***McKenzie v McDonald***
  - o FACTS: The plaintiff was a widow who owned a small farm that she wanted to sell. She engaged the defendant, a real estate agent, to sell the farm. She told the defendant the price she wanted (£4, 10s per acre). He suggested that she sell the farm to him for £4 per acre. The purchase price was £2300. She agreed to this. The defendant valued the property at £2000. Therefore, the defendant paid the plaintiff an additional £300 in cash. The defendant sold the farm to the third party for £4, 10s per acre. He made a profit. The evidence was that the true value of the property was £1550. The plaintiff brought a claim for breach of fiduciary duty.
  - o HELD: There was a fiduciary relationship as the defendant was an advisor. There was a breach. The full amount if compensation awarded was £595. **What would the plaintiff's position have been had the transaction not gone ahead**? If the plaintiff had attempted to sell the property, she would not be able to obtain a sale

for £4, 10s (only the defendant could get that price). If the plaintiff sold the property, she would only have been able to sell the property for £4, 5s per acre. Therefore, the total purchase price would have even £2445. From that sum, the value of what the plaintiff did receive (subtract £1850, which is what the plaintiff had received) was deducted from £2445.

- ***Warman International v Dwyer***
  - FACTS: Part of Warman's business was an agency for the distribution in Australia of gearboxes that were manufactured in Italy. Dwyer was the general manager of the Qld branch. Dwyer entered into an agreement with the Italian company where Dwyer would set up a new company that would assemble and sell the gearboxes. Dwyer made a significant profit under the new arrangement.
  - ISSUE: Was Dwyer liable to make to account for profits? Is it appropriate to make an allowance for their skills is a matter of discretion.
  - HELD: In regards to allowances, it is for the fiduciary to show that it would be inequitable to not provide an allowance. There is no hard and fast rule –it is a matter of discretion.

- ***Harris v Digital Pulse***
  - FACTS: An employee had secretly worked for the benefit of his own business in competition with his employer's business. It was an express term of the contract that the employer would not compete. When the employer found out that the clause was breached, the employer terminated the contract and sought punitive damages.
  - HELD: That **it was not necessary or desirable to decide that a exemplary, monetary award was never allowed in equity**. There is a distinction between how the fiduciary duty had arisen. Here we had a fiduciary duty that arisen because of a contractual relationship; thus, t**he relevant analogy was with the law of contract**. Another reason that exemplary damages should not be awarded in equity is that equity always granted relief from penalties in contract law. However, if the analogy is with torts, exemplary damages may be allowed.

- ***Royal Brunei Airlines v Tan***
  - FACTS: Borneo Leisure Travel, a travel agency, had an agreement with Royal Brunei airline where the travel agent would sell tickets for the airline. Any money from sales of tickets would be held on trust in a separate bank account. Mr Tan, the director of the travel agency used the trust money to pay salaries, overheads and other expenses. This was a breach of trust. However, at the time of claim, the travel agency was insolvent; thus, there was no point in bringing a claim against the company. The airline brought a claim against Mr Tan on the grounds that he had knowingly assisted in that breach of trust. Mr Tan argued that a third-party can only be liable for a breach of trust if that breach was dishonest or fraudulent (based on the words in _Barnes v Addy_).

- HELD: The Privy Council rejected this argument. The breach did not have to be dishonest or frauduelent; rather, there had to be some fault on the part of the third-party. Tan was the managing director of the company that had committed the breach and had undertaken the transactions with the trust money. This was sufficient assistance

- ***Doneley v Doneley***
  - FACTS: The bank obtained a mortgage over trust property. The bank sought to escspe liability by arguing that they had not knowingly received property; rather, that they only had a charge over the land (argued that physical possession or an absolute interest was required).
  - HELD: This argument was rejected. **The third-party does not have to receive physical possession or an absolute interest in the trust property (or traceable proceeds); rather, the key question is whether the third-party is a direct beneficiary of the breach?**

TOPIC 5A – DUTY OF CARE AND SKILL (CONTENT)

General
- Duty of care and skill = **equitable analogy of the common law tort of negligence**
- The key question is - **has the trustee exercised the requisite standard of care?**
  - Not a question about whether the trustee has done what they are required to do; rather, concerned with authorised transactions and whether they have performed that transaction with the required standard of care

Requisite Standard of Care
- **If the trustee is not a professional or expert the trustee must meet the standard of an ordinary, prudent business person** (*Speight v Gaunt*)
- **If the trustee is a professional or expert the trustee must meet the standards which they hold themselves out as having (higher standard)** (*Bartlett v Barclay's Bank Trust Co*)
- s22 Trusts Act modifies the standard of care that trustees have to meet in relation to investment decision
  - 22 (1) A trustee must, in exercising a power of investment-
    - (a) if the trustee's profession, business or employment is, or includes, acting as a trustee or investing money for other persons – **exercise the care, diligence and skill a prudent person engaged in that profession**, business or employment would exercise in managing the affairs of other persons; or
    - (b) if the trustee's profession, business or employment is not, or does not include, acting as a trustee or investing money for other persons – **exercise the care, diligence and skill a prudent person of business would exercise in managing the affairs of other persons**.
  - This section indicates that when managing the affairs of other people, you should be more careful than when managing your own affairs
    - *Australian Securities Commission v AS Nominees* – it might be reasonable to take risks with your own affairs that you might not take when administering other peoples affairs

Failure to Insure Trust Property
- **If there is a duty to insure the trust property and the trustee fails to insure the property, there will be a breach of the duty of care and skill**
  - Whether or not there is a duty to insure the trust property is dependent on the facts of the case (*Pateman v Heyen* – as the house was rented and a source of income, it should have been insured)

Case Notes

- ***Speight v Gaunt***
  - FACTS: Gaunt was the trustee and executor of Speight's estate. Gaunt discussed with some of the beneficiaries about investing some of the trust money. It was agreed that the trust money should be invested in shares. This was allowed under the terms of the trust. In order to buy shares in a public company, it was necessary to engage a stockbroker. Cook was engaged as the stockbroker because he had acted for Speight in the past and was a reliable stockbroker. Cook was instructed to invest £15,275 in shares of three companies. Gaunt drew up cheques in favour of Cook's firm. Cook gave Gaunt a document, which showed the companies in which the money was to be invested, the amount to be invested and acted as a receipt. Cook became bankrupt. Cook had not bought the shares but had appropriated the money for his own use. As Cook was bankrupt, there was no point in suing him. The beneficiaries brought a claim against Gaunt for breach of duty and care.
  - HELD: At first instance, Gaunt was found liable. This decision was overturned on appeal. The standard of care is **- a trustee has to conduct the business of the trust in the same manner that an ordinary, prudent man of business would conduct his own business (do not need to have expert knowledge).** Gaunt had to engage a stockbroker to carry out this transaction. In engaging Cook, Gaunt had acted as an ordinary, prudent man of business as there was no indication that Cook as anything other than reliable. Therefore, there was no failure of meeting the standard of care in engaging Cook in the first place. However, Gaunt still had a duty to supervise the transaction. It was considered whether anything happened that would put an ordinary, prudent man of business on enquiry. Cook had given Gaunt a document, which was later found to have irregularities. However, these irregularities would not be obvious to an ordinary, prudent business person (only to an expert). Thus, there was no notice that there was something suspicious about the transaction.

- ***Bartlett v Barclays Bank Trust Co***
  - FACTS: The defendant was a professional trustee company. The trust property was a majority shareholding in a company which was in the business of office management. The office management company made a decision to expand their business to include speculative real estate investment. This was much more riskier. Barclays Bank did not know of this expansion. One of the projects was a failure and the company lost a lot of money and became insolvent. The value of the trust estate decreased significantly.
  - HELD: Should Barclays Bank have known of the expansion? Yes. The trust had a majority shareholding; thus, could control the board of directors and the business decisions. **If a trustee holds themselves out as having a high level of expertise or skill, you are expected to exercise that degree of skill or expertise**. Barclays Bank should have known of the change in activities of the company and they were in a position to influence this change. They breached the duty of care and skill.

- ***Pateman v Heyen***
  - FACTS: The defendant was the trustee and executor of a deceased's estate. The plaintiff was the sole beneficiary. Part of the trust estate was a house that was rented out to tenants. The trustee had originally taken out insurance but had failed to renew the property. The house burnt down. The plaintiff sued the trustee for breach of the duty of care and skill by failing to insure the property.
  - HELD: The defendant was liable. Whether a trustee should insure depends on the facts of the case. As the house was timber and was rented (thus, was a source of income), it should have been insured.

TOPIC 5B – DUTY OF CARE AND SKILL (REMEDIES)

Remedies

- **Remedy = equitable compensation** (only if the trust estate has been made worse off)
- Does the principle of remoteness of damage (i.e. are unforeseeable damages outside of the scope of liability) apply?
  - This issue has not been decided in Australia
  - The approach taken in England and NZ is that **remoteness of damage applies → if an unforeseeable supervening event is the immediate cause of the loss, the trustee won't be liable to compensate the beneficiary** (mirrors the common law)
    - Obiter remarks in *Youyang* state that cannot assume that Australian courts will follow the British decision

Case Notes

- ***Bristol & West Building Society v Motthew***
  - FACTS: Bristol approved a loan to the borrower on a mortgage. The loan was given on the condition that the borrowers would provide the balance of the purchase price from their own funds and that no second mortgage would be given. Bristol gave instructions to their solicitors that they should inform them if they became aware of any proposal to create a second mortgage. It was a significant fact that even if there was a proposal to grant a second mortgage, Bristol would not necessarily have refused to grant a mortgage. The borrowers formed an intention to create a second mortgage and informed their solicitor, Motthew. Motthew failed to tell Bristol of this intention. Bristol transferred the loan. The borrowers defaulted. Bristol exercised the power of sale and could not recover total loan amount.
  - HELD: The defendant's liability was limited to the loss suffered that was directly due to failing to exercise the requisite standard of care. Bristol's failure to recover the total loan amount was not due to the breach. **There is no reason that the common law rules of causation and remoteness should not apply.** This is because the equitable duty of care and skill is the equitable analogy of the common law tort of negligence.
- ***Bank of New Zealand v NZ Guardian Trust***
  - FACTS: NZ Guardian Trust was the trustee of debenture loans. They failed to detect that the investment company had breached the terms of the deed and thus, failed to inform the bank of this. The bank was only able to recover a fifth of what was loaned due to a downturn in the property market.
  - HELD: At first instance, it was found that the trustee company had been negligent but were not liable for the banks losses. This was upheld on appeal. While the trustees negligence had caused the loans to be defaulted upon, the negligence was not the relevant cause for the banks loss. The immediate cause was the downturn in the property market. **The scope of the duty does not extend to protect losses that arise from an independent cause.**

TOPIC 6 – RIGHTS OF TRUSTEES

Variation of Powers

- **A trustee's powers can be varied by:**
  - **The trustee exercising an express power in the trust instrument**
    - Variation power = a power allowing the trustees to vary their powers
    - A power of variation is a power like any other power the trustee must remain within the power conferred (this power may be broad or narrow)
    - A court will be reluctant to impose limitations on a broad power
    - **The power of variation must be exercised:**
      - **Bona fide (in good faith)**
      - **For the benefit of the beneficiaries as a whole**
        - NOT for the benefit of the individual beneficiaries (as each beneficiary may have conflicting interests)
        - Consider – What was the benefit that the settlor intended to confer upon the beneficiaries?
        - *Kearns v Hill* –
          - FACTS: There was an attempt to vary the trust to add a new class of potential beneficiaries (the next generation of the family).
          - HELD: NSWCA held that this was permissible under the broad power of variation as it was consistent with the benefit of a discretionary trust that the settlor intended to occur. It was to replenish the classes of beneficiaries as new classes arose. Adding grandchildren to the class of beneficiaries that already contains children was permissible.
    - A power of variation may requires particular conditions to be satisfied before variation can occur
      - *Wilson v Metro Goldwyn Mayer* –
        - FACTS: There was a pension fund for the employees of Metro Goldwyn Mayer. The trustees proposed to change what would happen to surplus funds upon the winding up on the trust from distributing the surplus to the beneficiaries to distribution the surplus to the company. The variation provision stated that the trust could be varied in any respect which would, in the opinion of the company, not prejudice any benefit secured by contributions made on behalf of any member.
        - HELD: For an exercise of a power of variation such as this one to be proper, the person exercising the power must act on a correct interpretation of the constraints of the power. That person has to form an opinion about the right question. **If the person acted on the incorrect**

interpretation of the power, the exercise of the power of variation would be invalid. The phrase "any benefit" means any benefit one gets by reason of being a member of the fund, including receiving surplus funds. Thus, the variation prejudiced a benefit and was not allowed.

- **An order of the Supreme Court**
    - s94(1) TA – Where in the opinion of the court, a transaction is **expedient in the management or administration of property vested in a trustee**, or **would be in the best interests of the persons, or the majority of the persons, beneficially interested** under the trust, the court may confer upon the trustee, either generally or in any particular instance, the necessary power for the purpose.
    - Historically, the most common application of s94 TA is in the investment context (e.g. if a particular type of investment that is prohibited by a trust would be an expedient transaction in a particular situation, the trustee can get a s94 order to perform such an investment)

<u>Right to Directions</u>

- There is an inherent power of a court of equity to give directions to a trustee
- s96(1) TA – **Any trustee may apply upon a written statement of facts to the court for directions concerning any property subject to a trust**, or respecting the **management or administration of that property**, or respecting the exercise of any power or discretion vested in the trustee.
- s97(1) TA – Any trustee acting under any direction of the court shall be **deemed**, so far as regards the trustee's own responsibility, **to have discharged the trustee's duty** as trustee in the subject matter of the direction**, notwithstanding that the order giving the direction is subsequently invalidated**, overruled, set aside or otherwise rendered of no effect, or varied.
- s97(2) TA – This indemnity will not apply if the trustee has obtained the directions by fraud, wilful concealment or misrepresentation of the facts

<u>Right to Indemnity</u>

- Trustees will inevitably incur out-of-pocket expense in the occur of administration of the trust and may also incur debts → the trustee will be personally liable to pay those expenses/debts (as a trust is not a legal entity that can be made liable to pay debts)
    - The trustee has two options to recover expenses:
        - **Right of recoupment** → the trustee will satisfy the expenses from their own funds and then receive reimbursement from the trust property
        - **Right of exoneration** → the trustee will satisfy the expenses directly from trust funds
- **Right to indemnity from the trust property:**
    - This is the most common type of indemnity

- s72 TA – **A trustee may reimburse himself or herself for or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers.**
  - s72 TA is in Part 6 TA s65 TA states that the provisions of Part 6 apply whether or not a contrary intention is expressed in the trust instrument
  - The right under s72 is a right to indemnity against the trust property
    - It has been said that the trustee has a charge or lien over the trust assets, which may be exercised in priority over the proprietary interests of the beneficiaries (*Vacuum Oil v Wiltshire*)
  - Expenditure must be "reasonably incurred":
    - **The expenditure must not have occurred in breach of trust**
    - The expenditure must not be extravagant considering the needs and circumstances of the trust estate
    - If the trust estate includes a business, the expenses of operating the business are expenses that are reasonably incurred
      - Civil liabilities incurred by the business (such as for a motor vehicle accident) will be reasonably incurred if, overall, the business is being conducted in a reasonable way (*Vacuum Oil v Wiltshire*)
- The trustee's right to indemnity is a **property right**
  - If the trustee is sued by a third-party for a liability incurred in the administration of the trust estate, the third-party can execute a claim against the trust assets (way of subrogation)

- **Right to indemnity from the beneficiaries:**
  - The right arises in limited circumstances
    - It is accepted that **the trustee should exhaust its rights against the trust estate prior to claiming an indemnity from the beneficiaries**
  - There are two circumstances in which this right to indemnity arises: (*Hardoon v Belilios*)
    - **If the liability to meet the expense arises from the mere fact of ownership**, **the trustee does not have to show that the beneficiary requested him to incur the liability** (e.g. paying a call on a share, local authority rates on land, etc) **the beneficiary is liable to indemnify the trustee, so long as the beneficiary is 'sui juris'** (i.e. of full legal capacity).
    - **If the liability relates to something not necessarily within the scope of the trust** (i.e. an expense that did not have to be incurred) **the trustee will not have a right to be indemnified by the beneficiary, unless the beneficiary is 'sui juris' and has authorised or ratified the expenditure.**
      - If not all of the beneficiaries are 'sui juris', can the trustee claim against some of the beneficiaries? McGarvie J in *JW Broomhead (Vic) v JW Broomhead* said no (controversial)

- **A trustee is entitled to an indemnity only from beneficiaries who are absolutely entitled to property** (why? It is the beneficiary who receives the benefit of the expenditure)

TOPIC 7 – ADMINISTRATION OF DECEASED ESTATES

General

- The property of a deceased person in held on trust for the purpose of administration thus, all of the duties and rights which apply to trustees generally apply to those administrating deceased estates
- There are some specific duties that apply to executors (duties modified primarily by the *Succession Act 1981* (Qld))

Probate and Letters of Administration

- **Grant of probate = a certification by the Supreme Court that a particular person/s are authorised to carry out the administration of a deceased estate**
  - Relies upon the appointment of executors by a will
  - A grant probate tells third-parties that it is safe to deal with the executor in relation to satisfying debts of the estate, getting control of assets of the estate, etc
- **Is a grant of probate always necessary? No**
  - Sometimes, merely pointing to the clause in the will which appoints the person as executor is sufficient
  - Some parties (often banks or insurance companies) require a grant of probate
    - The executor or solicitor should ask the relevant parties what their requirements are in order to determine whether to apply for a grant of probate or not
- **The executor/s will apply to the Supreme Court for a grant of probate**
  - The applicant must **advertise their intention** to apply for a grant this gives an opportunity for people to object the grant (e.g. if the objector is aware of the existence of a more recent will, if there is a suggestion that the will that the applicant is relying on is invalid)
- **Letters of administration = where there is no will, no clause identifying executors or no surviving executors, a person willing to act as executor will apply to the Supreme Court for letters of administration**
  - Letters of administration are always required to administer an estate with no appointed executor
  - The applicant will often be the personal representative of the testator
    - If there is no obvious person to apply for letters of administration, **the public trustee will administer the estate**
      - The testator can appoint the public trustee as their executor in their will
- **Refusal of an application for a grant of probate:**
  - The court may refuse to grant probate to a person named executor in a will in some circumstances
  - <u>*Re Jensen*</u> –
    - FACTS: The testator's will appointed two of the testator's sons as executors. The Jensen family had been members of the exclusive Christian Bretheren. The testator and one of the sons named as executor

had left the exclusive Bretheren and joined the non-exclusive Bretheren. The members of the family that remained with the exclusive Bretheren did not talk to the testator and the son. The son that left the exclusive Bretheren applied to the court for a grant of probate. The other members objected to this grant. The objection was based upon their religious difference.

    - HELD: The court granted probate to the son that left alone (and not the other son). The objectors had not raised any concerns about the son's competence or trustworthiness. The testator relied heavily on the son as they had both left the exclusive Bretheren. **The key issue was the best interpretation of the testator's will.** One of the other sons said that the testator said that he wished for both sons to be executors if that was possible; however, if it was not possible, the testator intended for the son who left to act alone.

- **Removal of an executor:**
    - **The Supreme Court can remove an executor** (*Williams v Williams*)
    - The Supreme Court has an inherent power to remove trustees; thus, the Supreme Court has the power to remove an executor and appoint a replacement executor
- **s111 LTA – the person representative of the testator can apply to be registered as the registered owner of land** (this is functionally equivalent as a grant of probate or letters of administration in so far as dealing with land)
    - Once a person has been registered under s111 LTA, that person will have the same liabilities as if they had a grant of probate

Passing of Title

- **The property of the testator will vest in the executor upon the testator's death**
    - s45(1) SA – The property to which a deceased person was entitled for an interest not ceasing on his or her death … shall on his or her death and notwithstanding any testamentary disposition **devolve to and vest in his or her executor and if more than 1 as joint tenants, or, if there is no executor or no executor able and willing to act, the public trust**
- Once a grant of probate or letters of administration is issued, the property will vest in the applicant (the applicant may be someone other than the executor named in the will or a grant of probate may only be granted to some of the named executors)
    - s45(2) SA – **Upon the court granting probate** of the will or letters of administration of the estate of any deceased person the property vested in his or her executor or in the public trustee under the provisions of subsection (1) shall **devolve to and vest in the person to whom the grant is made and if more than 1 as joint tenants.**

Duties of Executors

- The general law relating to trustee's duties apply to executors
- s52(1) SA – The personal representative of a deceased person shall be under a duty to –
    - (a) **collect and get in the real and personal estate** of the deceased and **administer it according to law**; and

- This involves paying the debts of the estate (s57 SA states that where the estate is insolvent, the payment of funeral, testamentary and administration expenses have priority)
- (b) when required to do so by the court, exhibit on oath in the court a full inventory of the estate and when so required **render an account of the administration** of the estate to the court; and
- (c) when required to do so by the court, **deliver up the grant of probate** or letters of administration to the court; and
- (d) **distribute the estate of the deceased**, subject to the administration thereof, **as soon as may be**; and'
  - 'As soon as may be' depends upon the size and complexity of the estate
- (e) **pay interest upon any general legacy—**
  - (i) from the first anniversary of the death of the testator until payment of the legacy; or
  - (ii) in the case of a legacy that is, pursuant to a provision of the will, payable at a future date—from that date until payment of the legacy;

  at the rate of 8% per annum or at such other rate as the court may either generally or in a specific case determine, unless any contrary intention respecting the payment of the interest appears by the will.

<u>Legacies and Devises</u>

- **Types of legacies and devises:**
  - Legacy vs. Devise
    - **Legacy (bequest) = a gift of personalty**
    - **Devise = a gift of real property**
  - Two mutually exclusive categories:
    - **Specific disposition = the dispostion refers to a particular item** (e.g. my house, my car at the date of my death)
      - If the asset identified has ceased to exist at the time of the testator's death or is no longer in the testator's possession, there is nothing for the legacy or devise to operate on. The legacy or devise will be of no effect (see 'ademption')
    - **General disposition = the disposition does not refer to a particular item** (e.g. a car, 1000 shares in ABC Ltd)
      - Any property of this description will suffice; thus, there can be no ademption in relation to a general disposition
      - **If there is no such property at the date of the testator's death, the executor has an obligation to use the trust estate to purchase property to fulfil the disposition** (or give the beneficiary enough money to purchase the property)
  - Other types:
    - **Pecuniary legacy = a gift of money**

        - A devise cannot be pecuniary
        - A pecuniary legacy will often be general (e.g. I give $1000 to X) but can be specific (e.g. I give the money in the piggy bank on my bedside table to X)
    - **Demonstrative legacy = indicating that the legacy is to be satisfied by a particular asset** (e.g. $1000 from a specific bank account)
        - Half-way between a general and specific legacy if the asset does not exist, the legacy is not adeemed. The executor will still be obliged to fulfil the legacy.
    - **Residuary disposition = consists of property that is not specifically bequeathed or devised by the will** (e.g. I give the rest and reside to all of my children)
        - If the residuary disposition is invalid (e.g. fails because it is for a non-charitable purpose), the residue will be dealt with under the intestacy rules (as there is a partial intestacy) the residue will be distributed among the next of kin
        - The *Succession Act* includes provisions to reduce the chance of residuary dispositions failing
            - **s33O(1) SA - a disposition of all, or the residue, of the estate of a testator that refers only to the real estate of the testator, or only to the personal estate of the testator, must be interpreted as referring to both the real and personal estate of the testator**
                - s33O(2) SA - this provision will not apply if there is a contrary intention in the will
                - This section applies when the testator refers to their 'personal estate' without realising the distinction between personalty and real estate
- **Rights of beneficiaries to income:**
    - **Sometimes assets will earn income during the administration period (intermediate income -** e.g. dividends paid on shares, rent paid for leased real estate)
    - Whether the money goes to the residue or the beneficiary entitled to the asset depends on the type of legacy/devise:
        - **Specific disposition the beneficiary entitled to the asset will be entitled to any intermediate income** (*Re Rooke*)
        - **General disposition as no specific asset is identified, no income can be attached to the legacy/devise. The residue will get the intermediate income.**
            - s52(1)(e) SA - the executor has a duty to pay interest upon any general legacy from the first anniversary of the death of the

testator (rate of 8% per annum, unless the will provides another rate)
        - The rules are the same if the disposition is contingent upon a future event:
            - **s33H SA - a contingent, future or deferred disposition if property, whether specific or residuary, includes any intermediate income** of the property that has not been disposed of by the will

- **Failure of legacies and devises:**
    - **Ademption**
        - **Ademption occurs where there is a specific disposition and the asset referred to in the disposition has ceased to exist, is no longer owned by the testator at the testator's death or has substantially changed**
        - s33E(1) SA - a will takes effect, in relation to the property disposed of by the will, as if it had been executed immediately before the testator's death
            - s33E(2) SA - this provision will not apply if there is a contrary intention in the will (e.g. if the language of the will suggests that the disposition could only refer to the asset owned at the date of making the will)
            - **Effect = a will is always read as at the time of the testator's death** (not at the date of making the will); thus, property acquired after the date of making the will is included in the estate
            - *Will of Smith* – a disposition referred to 'my house and land in Urquhit St'. At the date of making the will, the testator owned no.44. Before he died, he sold no.44 and purchased no.46. The court read the will at the date of the death. The language was capable of referring to no.44 or no.46. Thus, the will referred to no.46.
        - Ademption does not depend on the intention of the testator it involves a comparison of the language of the gift with the property in the estate at the time of the testator's death (*McBride v Hudson*)
        - If property the subject of a gift is sold, ademption cannot be avoided by tracing the proceeds of the sale of the property (*Re Stokell*)
    - **Lapse**
        - **Lapse refers to the situation where the intended beneficiary does not survive the testator**
        - **s33B(1) SA – If a disposition of property is made to a person who dies within 30 days after the testator's death, the will takes effect as if the person had died immediately before the testator**

- s33B(2) SA – this provision will not apply if there is a contrary intention in the will (e.g. If X survives me for 15 days, they will get $1000)
- s33B(3) SA – a general requirement or condition that a beneficiary survives the testator is not a contrary intention
- Policy reason – aims to reduce the incidence of double administration within a short period of time

▪ **s33P(1) SA - If a part of a disposition in fractional parts of all, or the residue, of the testator's estate fails, that part that fails passes to the part the does not fail and, if there is more than 1 part that does not fail, to all those parts proportionately.**
- s33P(2) SA – this provision will not apply if there is a contrary intention in the will
- Only applies if the disposition is in fractional parts and the disposition is of all of the testator's estate or the residue of the estate
- E.g. A was to get 1/10, B was to get 3/10 and C was to get 6/10 of the testator's estate. C predeceases the testator. Total the proportion of A and B of the parts that do not fail. A has 1/4 and B has 3/4 of the parts that do not fail. Therefore, A gets 1/4 of C's share and B gets 3/4 of C's share.

▪ **s33N(2) SA – The issue of the original beneficiary (who does not survive the testator for 30 days) take the original beneficiary's share of the property in place of the original beneficiary as if the original beneficiary had died intestate leaving only issue surviving**
- s33N(1) – this section only applies if the disposition is in favour of **issue of the testator (descendants** of the testator) and the beneficiary does not survive the testator for 30 days
- **Effect = if a descendant of the testator dies within 30 days of the testator's death, that descendant's share of the testator's estate will go to the children of the descendant**
- Must refer to the intestacy rules (Part 2, Schedule 2 SA) to determine how the share will be distributed (note: must ignore the surviving spouse and only consider issue)

<u>Intestacy</u>

- If a person dies intestate (i.e. they do not have a valid will), their estate will be distributed according to the intestacy provisions in the *Succession Act*
- s35(1) SA – The person or persons entitled to take an interest in the residuary estate of an intestate, and the interest in that estate which that person is or those persons are entitled to take shall be ascertained by reference to schedule 2 according to the facts and circumstances existing in relation to the intestate
- **Schedule 2 – Distribution of Residuary Estate on Intestacy**

- **Part 1 – where the intestate is survived by a spouse** (spouse includes de facto spouses)
  - **If the intestate is not survived by issue:**
    - 1. If there is only 1 surviving spouse the spouse is entitled to the whole of the residuary estate
    - 2. If there is more than 1 surviving spouse they are entitled to the whole of the residuary estate in accordance with s36
  - **If the intestate is survived by issue:**
    - 1. If there is only 1 surviving spouse the spouse is entitled to (a) $150,000 and the household chattels; and (b) the following part of the residuary estate then remaining (i) if there is only one child of the intestate who survived, or who did not survive but left issue who survived, ½; (ii) otherwise 1/3.
    - 2. Same application as above in relation to more than 1 surviving spouse.
    - 3. The issue of the intestate are entitled to the balance of the residuary estate in accordance with s36A.
- **Part 2 – where the intestate is not survived by a spouse** (used under s33N SA)
  - 1. Where the intestate is survived by issue the issue are entitled to the whole of the residuary estate in accordance with s36A.
  - 2. Where the intestate is not survived by issue but is survived by a parent or both parents the parent is entitled to the whole of the residuary estate or, if both parents survive the intestate, the parents are entitled to the whole of the residuary estate in equal shares.
  - 3. Where the intestate is not survived by issue or by a parent but is survived by next of kin the next of kin are entitled to the residuary estate in accordance with s37
  - 4. Where the intestate is not survived by issue, a parent or next of kin the residuary estate shall be deemed to be bona vacantia and the Crown is entitled to it.

- s36A – Distribution of issue's entitlement
  - (3) If the intestate had only 1 child and the child survived, the child takes.
  - (4) **If the intestate had 2 or more children, all of whom survived, the children take in equal shares.**
  - (5) If the intestate had 2 or more children, of whom some survived and the remainder did not survive and did not leave surviving issue, the surviving children take in equal shares.
  - (6) If subsections (3) to (5) do not apply, the entitlement is divided into as many equal shares as the intestate had children who survived or who did not survive but left surviving issue.
  - (7) **The equal shares are then taken as follows—**

- **(a) the intestate's surviving children (if any) take 1 share each;**
- **(b) for each child of the intestate who did not survive but left surviving issue—1 share is taken by representation by the child's surviving issue**
  - E.g. Do not count the number of surviving issues - only divide the estate at first by the number of surviving children and children who have deceased but left issue of the intestate and then later divide the share of the deceased children between their issue)

<u>Family Provisions</u>

- Also known as '**Testator's Family Maintenance**'
- In Australia, testamentary freedom is the basic freedom (i.e. the testator can do what they want with their estate) → **testamentary freedom will prevail except to the extent that there are people who could reasonably expect to be provided for by the will**
- **Who may apply:**
  - s41(1) SA – **the spouse, child or dependent of the testator may apply for maintenance**
    - s40A(1) SA – a child includes a stepchild
    - s40 SA –
      - Child = any child, stepchild or adopted child of that person
      - **Dependant = any person who was being wholly or substantially maintained or supported** (otherwise than for full valuable consideration) **by that deceased person** at the time of the person's death being—
        - (a) a parent of that deceased person; or
        - (b) the parent of a surviving child under the age of 18 years of that deceased person; or
        - (c) a person under the age of 18 years.
      - <u>*Re Cobb*</u> – the flat mate of the testator succeeded in making a claim for family provision. This was unusual (most likely that they were in a de facto relationship, but that wasn't included in the definition of spouse at the time) and is now not allowed under s40 SA.
  - Maintenance is discretionary – the court will consider wether adequate provision been made → this will depend on the individual circumstances
- **Time limitation:**
  - s41(8) SA – **the application must be within 9 months after the testator's death** (the Court has a discretion to hear later applications, but there needs to be a good reason)
  - Policy reason → it is better to have the estate administered quickly