CHAPTER 11

ESSAY / DISCUSSION QUESTIONS

QUESTION 1

‘Tracing is not a remedy or a cause of action. It is a process that enables the proprietary rights of a beneficiary to be pursued when there is a breach of trust. Without the existence of a fiduciary relationship, tracing cannot be undertaken.’

Do you agree? Critically discuss this statement with respect to the role of fiduciary obligations and proprietary interests when tracing in equity is undertaken.

TIPS FOR QUESTION 1:

A careful analysis of the process of tracing needs to be undertaken. This should also be balanced with a discussion of the principles involved with fiduciary obligations – see Figure 5.1 in Chapter 5 Fiduciary Obligations and Confidential Information.

QUESTION 2

In *Barnes v Addy* (1874) LR 9 Ch App 244 the action brought by the beneficiaries was unsuccessful (see Chapter 9: Constructive Trusts).

When will a third party be held responsible as a constructive trustee? Does the process of tracing have a role in these circumstances?
TIPS FOR QUESTION 2:

This question is an extension of the principles identified in *Barnes v Addy* (1874) LR 9 Ch App 244. Note that it is important to distinguish this matter from the latter decisions in England and Australia with regard to the relevant principles.

PROBLEM QUESTIONS

QUESTION 1

John enters into an agreement with Susan. They have been talking for several years about joining forces in the fiercely competitive toy market. John has been importing high-quality toys from a number of international manufacturers and Susan has an extensive network of retail shops on the east coast of Australia.

The agreement enables them to pool their resources and share the profits. All monies are to go into a central bank account. As part of the agreement, they both acknowledge the importance of acting honestly and not benefiting individually at the expense of the other party.

After twelve months in business together, they are both surprised with how successful they have been. Unfortunately Susan has not been keeping John accurately informed regarding sales. Over the last six months Susan has been placing twenty-five per cent of all sales into a separate bank account that John does not know about. The account contained $50,000 but over the last few days, Susan has withdrawn $20,000 to buy shares in Brown Ltd.

Susan has always believed that aliens are visiting Earth. Six months ago she attended several meetings of ‘like-minded’ people. In an effort to assist these beliefs, Susan transfers $20,000 from her account to establish the ‘Aliens Are Visiting Earth’ trust. Susan considers this is a worthwhile and noble pursuit since the trust will educate others and improve society.

Susan also donates $10,000 to a local charity that cares for the elderly and infirm. The charitable organisation uses the money to refurbish and extend the nursing home they operate.

John has just discovered what Susan has been doing. He found out about the separate account when he was collating some papers in the office. Susan has recently been declared bankrupt and the company shares are her only asset. The shares are now valued at $25,000.

John seeks your advice.
TIPS FOR QUESTION 1:

This problem question involves the identification of fiduciary obligations and a discussion of their scope in the particular circumstances – see Figure 5.1 for further information. The process of tracing should then be considered. Other relevant matters include a purported trust for charitable purposes – see Figure 7.1

QUESTION 2

The problem questions in Chapter 5: Fiduciary Obligations and Confidential Information and Chapter 9: Constructive Trusts involve references to ABC Ltd and XYZ Ltd. Consider how the process of tracing might be used to provide an appropriate remedy in each of these matters individually.

TIPS FOR QUESTION 2:

Reflect upon your answers to the problem questions in Chapter 5 Fiduciary Obligations and Confidential and Chapter 9 Constructive Trusts. Note the requirements of tracing in Figure 11.1.