

CONTENTS

Answering a problem question	2
Identification of property interest	3
Real property, chose in possession, chose in action	3
Beneficial interest under a trust	4
Trust v debt / Trust v charge	4
Trust v agency / Trust v contract	5
Interest of a beneficiary in an unadministered deceased estate: <i>Livingstone</i> rights	6
Assignment and disposition of property interests	7
Unassignable choses: public pay, bare rights to litigate, contractual prohibitions, personal service	8
‘Assignment’ of future property	9
Transfer of legal interest in OS land	10
Transfer of legal interest in TT land	12
Transfer of possession of choses in possession: bailment	13
Transfer of ownership of choses in possession: <i>Sale of Goods Act</i>	14
Legal assignment of legal choses in action	16
Equitable assignment of legal interests (assignable at law)	16
Equitable assignment of legal interests (unassignable at law)	17
Equitable assignment of equitable interests	17
Priority disputes	20
Priority rules under the SGA	20
Priority rules under the general law	24
Security interests	27
General law security interests	27
Security interests under the PPSA	28

ANSWERING A PROBLEM QUESTION

1. What is the nature of the property?

Real property?
Chose in possession?
Chose in action?

2. What is the nature of X's interest in the property?

Legal?
Equitable?

3. What is X trying to do with it?

Assign it?
Declare a trust over it?
Leave it to someone in a will?
Surrender or abandon it?
Offer it as security?

4. Why are they doing that?

For value?
By way of gift?

5. Was it successful?

Did the interest pass? At law or in equity?

6. Is there a priority contest? Who prevails?

7. Does the PPSA apply?

1. IDENTIFICATION OF PROPRIETARY INTEREST

REAL PROPERTY

Limited number of recognised interests in real property:

- **Fee simple estate:** exclusive possession of land ‘forever’.
- **Life estate:** exclusive possession of land for duration of measuring life.
- **Easement:** right accommodating dominant land to use, or restrain use of, servient land in a manner not inconsistent with the servient owner’s continuing ownership.
- **Profit-à-prendre:** right to enter servient land and remove soil or natural produce.

If an interest does not fall within one of these categories, it is not a property right but a mere contractual right (ie. a personal obligation or licence) (*King v David Allen*).

King v David Allen & Sons Billposting

- K owned land; agreed to allow D to affix advertising on wall of theatre; K leased land to third party who refused to allow D to advertise; D sued K for breach of contract.
- Held that the contract did not create an interest in land (eg. a lease or easement) that was enforceable against the lessee; merely created a “personal obligation”, ie. a licence.

CHOSSES IN POSSESSION

(a) Ownership:

- An abstract relationship between a person and a thing, the content of which is the owner’s claim to dominion over the object owned.
- Can be lost through abandonment if this is the owner’s intention; title will only pass to a new owner through appropriation (ie. a manifest intention to exercise control over it and to exclude others) (*Re Jigrose*).

(b) Possession:

- A definite legal relation between a person and the thing possessed (cf. mere custody or physical possession) (*FCT v ANZ*).
- Two elements:
 - (1) Intention to possess; and
 - (2) Control, which may or may not be physical control, depending on the nature and context of the object; the key issue is the possessor’s capacity to exclude others (*The Tubantia*).

CHOSSES IN ACTION

(a) **Legal choses:** eg. debts, shares, intellectual property, rights in tort or contract.

(b) **Equitable choses:** eg. an equitable charge, the interest of a legatee under a will, the interest of a beneficiary under a trust (see over page).

BENEFICIAL INTEREST UNDER A TRUST

A declaration of trust requires the ‘three certainties’:

1. Certainty of intention

- Settlor must objectively intend to create a trust (*Byrnes v Kendle*); intention is to be inferred primarily from the language employed by the parties, as well as the nature of the transaction and the relevant circumstances attending the relationship (*Re Aust Elizabethan Theatre Trust*).
- No particular words are necessary (*Paul v Constance*: “the money is as much yours as mine” sufficient) but the intention must be expressed in imperative terms (*Re Adams*: “in full confidence that” insufficient).

Trust to be distinguished from:

(i) Debt:

- A debt is a legal chose in action involving an obligation to pay a creditor.
- An unsecured creditor does not have any rights over a debtor’s assets, so if the debtor goes into bankruptcy, the creditor ranks alongside other creditors in the insolvency (*Daly v Sydney Stock Exchange*).
- A beneficiary under a trust does have proprietary rights in the trust property, so if the trustee goes into bankruptcy, the trust property is preserved for the benefit of the beneficiary and does not form part of the trustee’s estate (*Quince v Varga*).
- To determine whether a debtor/creditor relationship also gives rise to a trust, look to the intention of the parties, especially the degree of separation between the debtor/trustee’s assets and the money advanced by the creditor/beneficiary; if money is kept in a separate account and/or labelled ‘trust’, this is a strong indication of an intention to create a trust (*Re Kayford*; cf. *Re Farepak*).

(ii) Charge:

- An equitable charge is a form of security interest giving the chargee certain rights over the chargor’s asset to secure the payment of a debt or the performance of an obligation (*Associated Alloys*).
- A declaration of trust, on the other hand, is a way of discharging a payment obligation, as it conveys a property interest in the underlying goods (*Associated Alloys*).

Associated Alloys

- A sold steel to X, on the following terms: “In the event that the purchaser uses the goods in some manufacturing process of its own or some third party, then the purchaser shall hold such part of the proceeds of such manufacturing process as relates to the goods in trust for the vendor. Such part shall be equal in dollar terms to the amount owing by the purchaser to the vendor at the time of the receipt of such proceeds”; X went into liquidation, having used the steel to manufacture products for sale to a third party; the question was whether a valid trust “of the proceeds of such manufacturing process as relates to the goods” was created for the benefit of A.