

TOPIC 2: PERSONAL PROPERTY: CHOSSES IN POSSESSION

POSSESSION VS ACTION

STEP 1. WHAT IS THE ITEM OF PROPERTY

CHOSE IN POSSESSION

Thing capable of being possessed - must be something that has a real existence as an object.

Ownership, control, or occupancy of any object, asset, or property by a person. It can be either actual (physical control) or constructive (legal control even without physical presence)

CHOSE IN ACTION

Things that are intangible - provides remedies for their breach/invasions of those particular interests

Millar v Taylor: Yates J "nothing can be the object of property which has not a corporeal existence"
However, now choses in action are considered personal right to property even though they are not corporeal.

- Only two titles to personal property; ownership and possession (at common law, these are indivisible)
- However, in equity there is division of title so it is possible for a person to have legal title and another person to have equitable title to the same asset.

Colonial Bank v Whinney (1885)

"An item will be a chose in action if there can be no occupation or enjoyment [from the item itself];" e.g. something intangible. While the item itself cannot be directly possessed or enjoyed, there may be fruits (benefits or proceeds) arising from it that can be enjoyed or possessed.

Example: A share in a company is 'a right to receive certain benefits from a corporation and to do certain acts as a member of that corporation and if those benefits be withheld or those acts be obstructed, the only remedy of the owner of the share is by action.'

Your Response Ltd v Datateam Business Media Ltd

A possessory lien, which is the right to retain possession of property until a debt is paid, requires the ability to physically possess the item in question. CIA are enforceable only through legal action, such as the right to sue for a debt or a legal claim. The electronic database was intangible, and the court found it could not be "possessed" in the traditional sense, meaning a possessory lien could not be applied to it.

CLASSIC TEST

The classic test from National Provincial Bank Ltd v Ainsworth [1965] sets four criteria: property must be definable, identifiable, assumable by third parties, and have some permanence.

LEGAL INTERESTS

STEP 2. IDENTIFY THE LEGAL INTEREST (OWNERSHIP VS POSSESSION)

POSSESSION

OWNERSHIP

Transfer of Ownership

(b) by gift

Likely won't be question on this but first look to see if there is a deed or declaration of trust:

A) Deed

A valid gift of a chose in possession can be effected by deed (*Nolan v Nolan*)

Deed: Instrument that has been signed, sealed, and delivered that passes an interest, right or property, creates a binding obligation, etc (*R v Morton*) → c.f. **CA s 38(1)** deed does not require delivery; sealed is signed and attested

B) Declaration of trust

A valid gift of a chose in possession can be effected by declaration of a trust (*Nolan v Nolan*)

- Did the donor intend to declare a trust?
 - o Look at the language: does it indicate the piece of property is being held for the benefit of another?
- If there is no intention to declare a trust on the available facts, then it is hard to argue a trust was declared.

Type of Gift

Inter vivos - *Nolan v Nolan* *P bears onus

Inter vivos = A gift inter vivos is a gift made during the donor's lifetime (without deed or trust), intended to take immediate and irrevocable effect.

Elements:

The essential elements of a valid gift of a chattel inter vivos, in the absence of a deed of gift or a declaration of trust, are

(a) an intention to make a gift, usually expressed by words of present gift;

- Usually use clear words to show their intent and specify what and how much they are giving.
- "Words of present gift"
- Words of present gift show "an intention to give over property to another, and not to retain it in the donor's hands for any purpose, fiduciary or otherwise"
- Words may not always be necessary however unusually circumstances where other functions can fulfil this certainty without words
 - o Document evidence may be admissible
- Delivery must occur while the donative intention subsists. At any stage until delivery occurs, the donor can validly retract the gift.

(b) intention on the part of the donee to accept the gift; and

Donatio Mortis Causa - *Public Trustee v Bussell*

Donatio Mortis Causa = a conditional gift made in anticipation of death, vesting property in the recipient upon the donor's death, but revocable until then.

Elements:

(a) Contemplation of Death:

- The donor must make the gift while facing imminent death from illness, injury, or another cause.

(b) There must be an actual delivery of the gift or a delivery of the essential indicia of title of the gift to the donee.

- Refers to documents or physical items that represent ownership of property, especially intangible property (like shares, debts, or other choses in action).
- The Public Trustee argued that a share certificate was only evidence of title and that a formally executed transfer was necessary.
- Delivering an essential document (such as a bank passbook or mortgage deed) could constitute a valid gift
- Satisfied where "there is not an immediate gift but a necessary means of obtaining the property has been delivered on a conditional basis" i.e. a bank passbook requiring a signed

Step 2.

STEP 1. DETERMINE WHAT THE POSSIBLE INTEREST IS?

There are different requirements depending on the interest you're trying to establish:

Freehold interests: Freehold title transfers/disputes and mortgage problem questions:

Non-freehold interests: Lease, licence, easement, chattels problem questions

STEP 2. CREATION OF THE INTEREST: FREEHOLD



2.1 Has a legal interest in the freehold estate been created?

s 23B(1): A deed is required to pass a legal interest in land

A deed is the most solemn act that can be done in respect to property (**Manton v Parabolic**)

- **Deed:** A deed is a special type of promise or commitment that indicates the most serious and or solemn indication that the executing party intends to do what they have promised - often used to transfer property
- **Manton v Parabolic**
 - A property deed is a written and signed legal instrument used to transfer ownership of the real property from the old owner (the grantor) to the new owner (the grantee)
 - At common law, prior to the enactment of the Conveyancing Act 1919 a deed was required for the conveyance of land.

OLD SYSTEM	TORRENS
Conveyancing Act 1919 (NSW) DEED s38(1): no particular form of words required, but must be: • signed by parties • attested by one witness (not a party to deed) • sealed (38(3) instrument signed and attested as above is deemed to be sealed) • s 38(1) deed does not need to be delivered, as at common law.	NOTE: RPA s36(11) upon registration, an instrument (including electronic) has the effect of a deed executed by the parties. Also CA s38(3) states that section 38 does NOT apply to land registered under the Real Property Act. S RPA 41: A transaction affecting land (such as a

- If the word 'deed' isn't used (e.g. if the interest is granted under statute), ask:

Has the person undertaken the most solemn act they could in accordance with the particular type of land concerned?
(*Manton v Parabolic*)

In *Manton v Parabolic*, Young JA considered that the lodgement of Form 125 under the Crown Lands Consolidation Act 1913 (NSW) was the "most solemn act that could be performed in divesting the vendor of title and hence the document is a deed"

Young JA at 373: "if it clearly appears on the face of the document that the parties must have been endeavouring to transfer an interest in property by the execution of a statutory form of transfer with a view to its subsequent lodgement and registration, then even though they do not use the word **"deed"** in the form, it clearly appears from the document itself that they are intending a deed and accordingly the document, even if executed by two individuals, would be one which was "expressed to be a deed" within the meaning of s 38(3)

- An executed deed allows the legal interest to pass under s **23B(1) Conveyancing Act** and the purchaser becomes the holder of the fee simple.
- Mortgage: An executed deed allows the mortgage interest to be created under s **23B(1)** and the mortgagee becomes the holder of the fee simple, while the mortgagor receives their entitlements under the agreement (usually money) and an equity of redemption
 - (*Figgins*): Under the Torrens system, the registered proprietor (*person on the land register*) retains the legal title, and the mortgage only creates a security interest (as opposed to a conveyance of the land), unlike the old system, where the legal title was transferred to the mortgagee and mortgagor has equitable redemption.

sale, mortgage, or lease) has no legal effect until it is registered. Once registered, the estate or interest in land passes according to the terms of the dealing.

- Registration allows the legal interest to be conferred under **RPA s 41(1)** and the purchaser becomes the registered proprietor
- Registration allows the mortgage interest to be created under **RPA s 41(1)** and the mortgagee (lender) receives a legal security interest in the form of a charge, while the mortgagor retains the legal title to the land (**RPA s 57(1)**) and Figgins - see explanation to the left

S 42 (1): proprietor's title is generally absolute, free from unregistered interests, except for specific exceptions - SEE FULL LEGISLATION FOR EXCEPTIONS

S 43 RPA provides that a purchaser from the registered proprietor is not affected by notice (either actual or constructive) of any unregistered interests or trusts, except in the case of fraud. NOTE; UNREGISTERED INTEREST MEANS A CLAIM OF LAND NOT REGISTERED (*Frazer and Walker Case for this section*)

- If A leaves her certificate of title with her solicitor S for safekeeping, and S forges A's signature to transfer land to B, B becomes the registered proprietor after the transfer is registered.
- Under immediate indefeasibility (supported by Section 43), B's title is protected, and A cannot reclaim the land, even though the transfer involved a forged signature, as long as B was innocent of any fraud.
- ***Under immediate indefeasibility, once a person becomes the registered proprietor, their title is immediately protected from future claims or challenge***



STEP 3. IS THERE ANY FRAUD?

OLD SYSTEM	TORRENS
Forgery: If the signature of the grantor has been forged, the instrument is void. It passes no rights in law or equity. Fraud: if the instrument was signed by the grantor, but its execution was induced by fraud, the instrument will pass a legal interest, but equity will allow the grantor to have the instrument set aside. RESULT: Fraud or forgery earlier in the chain of documents could result in title being void or challenged (nemo dat quod non habet – you cannot give what you don't have). CA 184(G) grants priority based on the order of registration rather than execution (signing vs land registry) , protecting bona fide purchasers for value. However, it does not cure defects caused by fraud or forgery. A fraudulent instrument cannot gain priority simply by being registered, and a forged document is void from the outset, making it unlikely to receive any priority advantage. Thus, while registration offers protection for valid instruments, it does not override fundamental defects in title. Under the Old System (pre-Torrens), registration does not validate a document. If a mortgage or deed was forged, the document would be void from the start NOTE: OLD SYSTEM - Registration is not mandatory, but it is strongly recommended to establish priority under s 184G of the Conveyancing Act 1919 (NSW). Without registration, a deed may still be legally valid between the parties, but it could lose priority to a	Once registered, the registered proprietor obtains indefeasible title immediately which can only be set aside in narrow circumstances, including actual fraud (not any other kind of fraud) • RPA S41(1): no dealing (such as a sale, lease, mortgage, or transfer) will be effective until it is registered in the official land registry • RPA S42(1): once a person's estate or interest in land is recorded in the land register, it generally takes priority over any unregistered interests, except in cases of fraud. ○ However exceptions include unrecorded easements, claiming the land of prior registration, error in description of land boundaries, also Tenancies where the tenant is in possession or entitled to possession, and the registered proprietor had notice of the tenancy before becoming the registered proprietor (subject to certain conditions like the tenancy term not exceeding three years). • (RPA s 43(1)). Actual fraud is required (see next page...) • RPA s 43 (2): direct or constructive notice is not sufficient Actual Notice – The purchaser personally knows about the unregistered interest. Constructive Notice – The purchaser should have known through reasonable inquiries, inspections, or a title search.

later registered interest. In comparison - Under s 42 of the Real Property Act 1900 (NSW), unregistered interests generally do not bind purchasers, reinforcing the need for registration.

Imputed Notice – The purchaser's **agent (e.g., solicitor)** knows of the interest, and this knowledge is attributed to the purchaser.

STEP 4. IS IT ACTUAL FRAUD?

Is there actual fraud?

*For the purposes of **RPA s 42(1)** and indefeasibility of Torrens Title*

Actual fraud requires actual acts and/or knowledge of dishonesty or fraud, as opposed to mere notice or constructive knowledge or suspicion of fraud. There is no clear line in the sand as to what constitutes actual fraud: it's a balancing exercise.

FRAUD CASE LIST

Frazer v Walker [1967]

- Mrs Frazer forged her husband's signature to secure a mortgage for a loan (Torrens). Then defaulted.
- The mortgagee (lender e.g.) bank, then exercised their power of sale, selling the property to Walker. Walker became the registered proprietor, seeking possession
- Frazer claimed mortgage of nullity due to forgery, seeking to cancel mortgage and restore possession → Walker had nothing to do with the fraud, no actual fraud
- **HELD:** Although there was fraud, the registration of Walker as the new proprietor under Torrens was considered conclusive, and his title was protected
- If the wife forged the mortgage under the Old System and did not register it, the forgery would render the mortgage void and it wouldn't have legal effect e.g. property remains with original owner
- Walker did not have actual knowledge and therefore no fraudulent intent on their part, registered effectively

Breskvar v Wall (1971) - Immediate indefeasibility

- [Breskvar] owned a property. They wanted a loan and had to execute a transfer of the property with the Second Respondent (Petrie).
- The transfer was not properly executed - the name of the transferee was blank during the time it was signed, which contravened legislation
- At a later date, the Second Respondent filled the name in the transfer as his grandson, the First Respondent [Wall].
- The First Respondent used the transfer document to register himself, and then tried to transfer it to the Third

Respondent [Alban], who was an innocent, bona fide purchaser for good consideration.

- Before the Third Respondent could complete registration, the Appellants lodged a caveat and thus the registration could not go through.
- **HELD:** Torrens system is 'not a system of registration of title but a system of title by registration' and thus it is the act of registering which attracts indefeasibility rather than the transfer.
- Upon registration, an innocent non-fraudulent party receives indefeasibility of their interest



IF A LEGAL INTEREST HAS BEEN CREATED (DEED) AND THERE IS NO ACTUAL FRAUD

- **Title transfer:** The freehold interest in the estate is passed at law and the purchaser becomes the legal titleholder. If it's Torrens land, the purchaser is the registered proprietor with indefeasible title.
- **Mortgage:** Legal interest is passed (see above for details of Old System and Torrens interests). Also:
 - The mortgagee will have a power of sale to sell the land if the mortgagor defaults. If that power is not expressly included in the mortgage agreement, it will be implied into the mortgage by CA s 109 – but only if the mortgage was made by deed.
 - Old System: Only one legal mortgage can be created, because the title is conveyed. Any subsequent mortgages are equitable (created from the equity of redemption).
 - Torrens: Multiple legal mortgages (in the form of charges) can be created, because the legal title is retained by the mortgagor.

STEP 5. IF THERE IS NO FRAUD, BUT NO LEGAL INTEREST, THERE MAY BE EQUITABLE INTEREST

An equitable interest in property arises when the legal owner of property is conscience-bound to recognize the claims of another person to that property, even though that person may not have legal title

- Equitable title to property only arises when there is a separation of ownership between the legal title (the person whose name is on the title of the property) and the equitable interest (the party who has a beneficial claim to the property) Not every piece of property has an equitable and legal interest. Something needs to happen to create the equitable interest and split the legal and equitable title. **DKLR Holdings Co (No 2) v Commissioner of Stamp Duties**

Equitable interests can be created either through:

1. **Writing: CA 23C(1)(a)** - outlines legal and equitable interests in land
2. **S 23E:** Part Performance exception
3. Deposit of title deeds with intention it is by way of security (**Theodore v Mistford**)
 - a. Security interest can arise even without a registered mortgage if there is clear evidence of an intention to create security. Here, Mrs. Theodore did not sign formal mortgage documents, but the deposit of her Certificate of Title (CT) created an equitable mortgage.

go to BELOW for consideration of equitable interests (after creation of leases)

ASSIGNMENTS OF EQUITABLE INTERESTS (IN EQUITY)

Types of Equitable Interests

Unregistered interest in the land (mortgage, lease, charge, purchase etc)

Personal Property

Choses in Action

- Interest of a beneficiary under a trust (i.e. subsisting equitable interest)
- Beneficiary's interest in an unadministered estate (Livingston right)
- Partnership interest
- Partial chose in action
- Future interests in choses in action (assign proceeds from chose in action)
- Mere equities (claim to have an equitable interest that can only be enforced by succeeding in court).
- Beneficial interest in a chose in possession held on trust is actually a chose in action

How are they created?

This can be done through:

Declaration of trust (creating an equitable interest),
 Agreement to declare a trust (promising to create one)
 Assignment (transferring an existing equitable interest to another (direct)

Declarations of Trust – Paul v Constance

Issue: Whether an informal arrangement can amount to a declaration of trust.

Held: Yes. A trust was declared because:

- There was intention to create a trust.
- The property (money) was identified.
- The beneficiary was identifiable (his partner).

Khoury v Khouri

Issue: Whether an oral agreement to hold property on trust can be enforced.

Held:

- Not enforceable unless it meets writing or part performance requirements under:
- CA s 23C(1)(b): must be manifested and proved in writing.
- CA s 54A: part performance can suffice if unequivocal acts are done.
- An oral agreement to declare a trust over land is unenforceable unless it satisfies statutory formalities or can be brought within the doctrine of part performance. Where there are no acts of part performance—such as taking possession, paying rates, making improvements, or receiving rents—the agreement will not be enforceable in equity.

Depending on what is is - the requirements for that particular form of assignment must be satisfied. Proving form with other requirements of another form will not save it (Second Limb from Milroy and Lord).

FIRST REQUIREMENT (REAL AND PERSONAL PROPERTY)

CONSIDER: AGREEMENTS TO ASSIGN E.G. FUTURE

Agreements to Assign (i.e., future assignments)

- **Distinction:** There's a difference between an *agreement to assign* (a contract to assign in the future) and an actual *assignment* (transfer now).
- **Real Property:** Agreements to assign equitable interests in land for value must also be in writing (due to broader requirements in land law and s 54A Conveyancing Act).
- **Personal Property:** The situation is more complex. Two interpretations exist:

(a) Constructive Trust Analysis:

- If the agreement to assign is specifically enforceable (e.g., because it involves unique personal property like shares in a private company), equity may treat the assignor as holding the equitable interest on constructive trust for the assignee.
- **Effect:** No writing is required under s 23C(1)(c) because s 23C(2) says it doesn't apply to constructive trusts.
- **Case Example:** *Oughtred v IRC* (dissenting view supported in later cases like *Neville v Wilson*): An oral agreement for specifically enforceable personal property (private shares) creates a constructive trust and therefore bypasses the writing requirement.

(b) Outright Disposition Analysis:

- Alternatively, if seen as an outright disposition of an existing equitable interest, then s 23C(1)(c) applies and **writing is required**.
- **Majority in Oughtred:** Adopted this view, resulting in tax liability, as the oral agreement was considered void and thus ineffective to transfer the equitable interest.

Type of Property	Direct Assignment	Agreement to Assign 
Equitable interest in land	Must be in writing (s 23C(1)(a)) – or void	Must be in writing (real property rule + s 54A)
Equitable interest in personal property	Must be in writing (s 23C(1)(c)) – or void	Possibly valid if specifically enforceable → constructive trust (no writing needed under s 23C(2))

The constructive trust approach (as in *Oughtred v Inland Revenue Commissioners* [1960] AC 206) creates a subtrust for the assignee by operation of law rather than an outright disposition of the equitable interest. This approach faces difficulties:

- It does not clearly explain how the assignor disposes of their equitable interest, instead treating the assignor as a subtrustee for the assignee (*Neville v Wilson* [1997] Ch 144).
- The assignor retains a “bare” equitable estate that is “nebulous” and cannot be enforced against the assignee (*Oughtred* per Lord Cohen).
- This may complicate compliance with formal writing requirements (similar to s 23C) and raises uncertainty about the assignor's continuing role.

DECLARATIONS OF SUBTRUSTS

ISSUE: Whether the owner of an equitable interest has validly declared a subtrust over that equitable interest, and if so, whether the declaration complies with the writing requirements under s 23C of the Conveyancing Act 1919 (NSW).

Definition: A declaration of subtrust occurs when the owner of an equitable interest declares that they will hold that interest on trust for another (the assignee), effectively creating a subtrust of that equitable interest.

Writing requirements for subtrust declarations:

For equitable interests in land:

1. Must be in writing to comply with s 23C(1)(a) (creation and disposition of interests in land) and s 23C(1)(b) (declarations of trust of land)
 - a. So it doesn't matter if declaration is creating an interest in the sub-beneficiary or as disposing of an assignor's subsisting interest in the land.
 - b. This section requires creation and disposition to be in writing.
2. Oral declarations of trust of land are unenforceable but not void unless proved by a written memorandum.
 - a. Declaration of the trust of land only requires manifested and proved by some writing
 - b. Effect is it is not void but unenforceable until proved.

For equitable interests in personal property:

1. As per s 23C(1)(c) declarations of trust in personal property need only to comply with writing requirements if they are seen as effecting a disposition of a subsisting equitable interest.
2. However, note there are some arguments against this including (NOT SETTLED)
 - a. When the person who originally held the equitable interest (the assignor) declares that they will now hold that interest for someone else, but they take on active duties to manage or administer the interest for that new beneficiary, they don't actually transfer away their equitable interest.
 - b. Because the assignor keeps an equitable interest, this is not a "disposition" (i.e., not a full transfer or assignment), but rather the creation of a new trust relationship (a subtrust).
 - c. Disposition of legal interests need not be in writing - ALL THAT IS NEEDED IS INTENTION

View 1: Declaration as a Disposition (writing required)

Grey v Inland Revenue Commissioners [1958] Ch 690 (Upjohn J at 715)

- Facts: Beneficiary directed trustees to hold shares for new beneficiaries.
- Held: Oral direction was a disposition of a subsisting equitable interest.
- Principle: A declaration of trust by the assignor over an existing equitable interest passes that interest and requires writing.
- The assignor drops out of the picture; the equitable interest moves directly to the new beneficiary.
- Writing is required under **s 23C(1)(c)** because the assignor **loses their equitable interest** entirely

View 2: Declaration as Creation of New Trust (no writing required)

- Beneficiary directed trustees to pay proceeds to others
- Held: This was not a disposition, but a declaration of trust.
- Principle: The assignor remained a beneficiary under the head trust but held their equitable interest on trust for the new beneficiary (a subtrust).
- No immediate transfer of the equitable interest.
- Therefore, no writing was required under s 23C(1)(c)

Therefore - will not be a disposition where:

1. When the transfer is of both legal and equitable title together
2. When the person does not hold an equitable interest
3. A beneficiary directed the trustee to hold property on trust for someone else but continued to control the trust - Sometimes this can be seen as creating a sub-trust
4. When the interest passes automatically by operation of law e.g. by death

Directions to Trustees to Transfer Equitable or Legal Interests

When a beneficiary who is absolutely entitled to a trust property (i.e. owns the full equitable interest) gives a direction to trustees to hold the trust property for someone else, the legal effect depends on whether:

1. The direction constitutes a **disposition** of an existing equitable interest, or
2. It amounts to a **declaration of a new trust** (i.e. the assignor becomes a subtrustee).

This matters because:

1. Dispositions of equitable interests must be in writing under s 23C(1)(a) or (c).
2. Declarations of trust generally don't need to be in writing for personal property.

RULE: A disposition of an equitable interest must involve an immediate transfer of that interest, and if it does, it must comply with formalities under s 23C(1)(c) (in writing). **Comptroller of Stamps (Vic)**

→ **Grey v IRC [1960] AC** 1: The settlor orally directed the trustees to hold shares on trust for grandchildren. The court held this passed the settlor's existing equitable interest. Therefore writing required.

→ **Comptroller of Stamp**: Did a residuary beneficiary's letter to trustees, directing payment to third parties, amount to a disposition of an equitable interest? The letter was interpreted as a revocable authority to act, not a binding direction. But here, the beneficiary did not intend to immediately assign his interest.

A direction will not be a disposition if:

1. It merely authorises or instructs the trustee to distribute to others later (revocable).
2. It expresses only a future intention without passing a present interest.
3. It amounts to a declaration of trust instead of transferring a subsisting interest.

OTHER CONSIDERATIONS

Directions to trustees by an equitable owner can effect a transfer of both legal and equitable interests, even if given orally, as long as the legal title is actually transferred by the trustee in accordance with the direction. This avoids need for compliance with writing under s23 (1) (c) (Vandervell)

Oral directions by an equitable owner may transfer their interest – where direct trustee to transfer legal title

Under s 23C(1)(c), a “disposition” of an existing equitable interest generally must be in writing.

However, if the **absolute equitable owner** orally **directs**

Example: Vandervell v IRC (No 1):

- Vandervell gave an oral direction to his trustee (the Bank) to transfer shares to the Royal College of Surgeons.
- Included Share certificates and blank signed transfers, passed through his solicitor to the College.
- The College became legal owner and received dividends - but note this was not in writing?
- when the legal title was transferred, that carried the equitable interest with it, because:

their bare trustee to transfer the **legal title** to a third party (assignee), **and the trustee complies**, then:

- The *equitable interest* passes *not because of the oral direction* (which would be invalid under s 23C(1)(c)),
- But because of the **trustee's act of transferring the legal title**—which can also pass the equitable interest, *if that was the assignor's intention*.

The equitable owner can direct the legal owner (trustee) to transfer this title because the trustee works for the benefit of the beneficiary—especially where the trustee holds the legal title on a bare trust (i.e., where the trustee must act on the beneficiary's instructions).

Legal title to personal property (e.g., shares, goods) can generally be **transferred without writing, unless a statute** requires otherwise (e.g., company law for shares).

- The majority view allows an **oral direction + trustee's legal transfer to pass the equitable interest, without violating s 23C(1)(c)**.
- This effectively avoids the need for:
 - A **written assignment** by the equitable owner, and
 - A **separate transfer** by the trustee.
- However, **this only works** when:
 - The assignor is the **absolute owner** of the equitable interest;
 - The trustee is a **bare trustee**;
 - The assignor **intends** the assignee to receive **both legal and equitable interests**;
 - The trustee **actually transfers** the legal title accordingly.

Releases of Equitable Interests

The holder of an absolute equitable interest in property (assignor) may release the legal owner (trustee) from their obligations to deal with the trust property for the benefit of the assignor - this leaves trustee free to deal with property as her/his own

Sarah is the beneficiary of a trust. The trustee, Tom, holds legal title to a parcel of land on trust for Sarah — meaning Tom must deal with the land for Sarah's benefit.

Sarah decides she no longer wants any interest in the land and tells Tom, "I release you from your obligations to hold this land for me. You can treat it as your own."

After this release, Tom is no longer bound by the trust and can now deal with the land as if he were the full legal and beneficial owner.

	ISSUE: Is a release of an absolute equitable interest in property a “disposition” of a “subsisting equitable interest” that must be in writing under s 23C(1)(a) (land) or s 23C(1)(c) (personal property)? RULE: Under s 23C(1)(a) and (c) of the Conveyancing Act 1919 (NSW), a disposition of a subsisting equitable interest in land or personal property must be in writing. There are two interpretations of a release: 1. It may constitute a disposition — the equitable interest passes to the trustee. 2. It may operate as an extinction — the equitable interest ceases to exist. <table border="1" data-bbox="414 541 1450 1087"> <tr> <td data-bbox="414 541 613 751">First View</td><td data-bbox="613 541 1450 751"> Where the equitable interest passes to the trustee (who is the legal owner), this is a disposition of a subsisting equitable interest, and thus must comply with writing requirements under s 23C(1)(a)/(c) • Supported by view that statutory definition of “disposition”, which includes “release.” </td></tr> <tr> <td data-bbox="414 751 613 1087">Second View</td><td data-bbox="613 751 1450 1087"> The equitable interest is extinguished, not passed — therefore, no disposition occurs, and no writing is needed. <i>Vandervell v IRC</i> [1967] 2 AC 291, where directing trustees to transfer property did not amount to a disposition of an equitable interest. As a matter of principle, however, if the effect of the release is to enlarge the interest of the assignee (trustee), it is difficult not to view it as a disposition requiring writing. </td></tr> </table> While there is judicial support for both views, the more principled and statutory approach is that a release which transfers or enlarges the interest of another (e.g., the trustee) should be treated as a disposition of a subsisting equitable interest, and thus must be in writing to comply with s 23C(1)(a) or (c).	First View	Where the equitable interest passes to the trustee (who is the legal owner), this is a disposition of a subsisting equitable interest, and thus must comply with writing requirements under s 23C(1)(a)/(c) • Supported by view that statutory definition of “disposition”, which includes “release.”	Second View	The equitable interest is extinguished, not passed — therefore, no disposition occurs, and no writing is needed. <i>Vandervell v IRC</i> [1967] 2 AC 291, where directing trustees to transfer property did not amount to a disposition of an equitable interest. As a matter of principle, however, if the effect of the release is to enlarge the interest of the assignee (trustee), it is difficult not to view it as a disposition requiring writing.
First View	Where the equitable interest passes to the trustee (who is the legal owner), this is a disposition of a subsisting equitable interest, and thus must comply with writing requirements under s 23C(1)(a)/(c) • Supported by view that statutory definition of “disposition”, which includes “release.”				
Second View	The equitable interest is extinguished, not passed — therefore, no disposition occurs, and no writing is needed. <i>Vandervell v IRC</i> [1967] 2 AC 291, where directing trustees to transfer property did not amount to a disposition of an equitable interest. As a matter of principle, however, if the effect of the release is to enlarge the interest of the assignee (trustee), it is difficult not to view it as a disposition requiring writing.				
Nomination Of Beneficiaries	Also not settled. The assignor (the person who holds an equitable interest in property) can nominate someone else (a beneficiary) to receive a benefit in that property after the assignor dies. This means instead of the property going to the assignor’s estate (i.e., passing under their will or by intestacy), the nominated beneficiary gets the benefit directly.				
Divestiture Of Equitable Interests Under Resulting Trusts	• Resulting trust means the property is held by someone (the trustee), but the benefit belongs to the person who gave the money or property (the beneficiary). • It “results” back to the person who provided the money or property because there’s a gap or “leftover” beneficial ownership that needs to be recognized. • This trust usually happens automatically by law, without needing a formal agreement ○ <i>You pay \$100,000 to your friend to buy a house.</i> ○ <i>The house is registered in your friend’s name.</i> ○ <i>But because you provided the money, the law says your friend holds the house on trust for you — meaning they hold the legal title, but you have the beneficial interest (the real ownership).</i>				

	ISSUE: Whether a beneficiary under a resulting trust who divests themselves of their equitable interest must comply with the writing requirements imposed by section 23C(1) of the relevant statute RULE: Section 23C(1) requires that any disposition of a subsisting equitable interest in property (whether real or personal) must be made in writing signed by the person disposing of the interest. • Exceptions under s 23C(2) only apply to the creation or operation of resulting, implied, or constructive trusts, not to their termination or the disposition of interests under them. • The <i>Re Vandervell's Trusts (No 2)</i> case addressed whether an oral disposition of an equitable interest under a resulting trust was effective without complying with s 23C(1). • Lord Denning MR and Lawton LJ in the Court of Appeal suggested that resulting trusts arise and cease without writing and relied on estoppel and practical considerations. • However, this reasoning conflicts with the statutory requirement in s 23C(1)(c) for dispositions of equitable interests in personal property to be in writing. ◦ Lord Denning argued that resulting trusts "born and die" without writing and that the oral declaration was sufficient; Lawton LJ relied on the principle that a trustee using trust funds holds property on trust. ◦ The statutory scheme in s 23C(1) does not exempt dispositions of equitable interests under resulting trusts from writing requirements; it only exempts their creation or operation. ◦ Therefore, the oral divestiture by Vandervell arguably should have been ineffective because it failed to comply with the writing requirement for a disposition of equitable interest under s 23C(1)(c) (for personal property). ◦ Note if resulting trust in land must have writing
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REQUIREMENT 2 (AFTER ALL THAT) - IF IT IS A EQUITABLE CHOSE IN ACTION

RULE	Section 12 Conveyancing Act 1919 (NSW): Requires absolute assignments of debts and legal choses in action to: 1. be in writing 2. be signed by the assignor, and 3. have written notice given to the debtor or trustee. The term "legal chose in action" has been interpreted by the High Court in <i>Federal Commissioner of Taxation v Everett</i> (1980) to mean "lawfully assignable" choses in action, including equitable choses in action <i>BUT UNSETTLED - LEGISLATIVE AMENDMENTS NEEDED FOR CLARITY</i> The effect of this interpretation is that the formalities for the assignment of equitable choses in action are more onerous than those for the assignment in equity of legal choses in action, because while a legal assignment that does not comply with the formalities in s 12 may be enforced in equity, if s 12 applies to equitable assignments, an equitable assignment that does not comply with the s 12 formalities will not be enforced. • Section 12 writing and notice requirements technically apply to equitable choses in action, but it is uncertain whether compliance is mandatory or merely a method for effective assignment. • In order to avoid these difficulties, s 12 should be seen as merely providing a method for the assignment of equitable choses in action, although not necessarily a mandatory method. • Notice to the debtor, though not essential to validity, is important for protecting the assignee's rights (AND priority from other interests)
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PT Ltd v Maradona Pty Ltd (No 2) (1992) 27 NSWLR 241	• EMFNV lent money to Maradona Pty Ltd, secured by a mortgage. • EMF International SA held the equitable interest in the mortgage. • PT Ltd became assignee of the debt through a transaction involving EMF Mortgage Investments BV. • The court had to decide whether the transfer of EMF SA's equitable interest was a "disposition" requiring writing under s 23C(1)(c) of the NSW Conveyancing Act 1919. ◦ EMF International SA gave up its equitable interest in the debt by allowing PT Ltd to become the new beneficial owner. ◦ This was either an assignment, disclaimer, or release—all of which fall under the broad meaning of "disposition" (following Grey v IRC). All dispositions of equitable interests in real or personal property must comply with s 23C(1)(c).
Grey v Inland Revenue Commissioners [1960] AC 1	• Mr Hunter was the beneficial owner of shares held by trustees. • He orally instructed trustees to hold the shares for his grandchildren instead of himself. • The oral instruction was later confirmed in writing. • The Inland Revenue assessed stamp duty on the oral direction, treating it as a disposition. • The oral instruction was a "disposition" under s 53(1)(c) of the UK Law of Property Act 1925. • Since it was not in writing when made, it was ineffective.
Vandervell v Inland Revenue Commissioners [1967] 2 AC 291	• Vandervell, the beneficial owner of shares, instructed trustees orally to transfer shares to the Royal College of Surgeons. • There was no written instrument transferring the equitable interest. Dividends were paid to the college, but the Inland Revenue argued Vandervell still retained beneficial ownership and owed tax. • The House of Lords held that s 53(1)(c) did not apply. • Because Vandervell directed the trustee to transfer both legal and equitable ownership, no separate disposition of the equitable interest occurred. • The section was interpreted as only applying where equitable and legal title are split. Where a beneficiary instructs a bare trustee to transfer both legal and equitable title, the instruction is not a disposition under s 53(1)(c).

TOPIC 4 CONTINUED: LEGAL PROPERTY THAT IS ONLY CAPABLE OF ASSIGNMENT IN EQUITY	
PARTIAL ASSIGNMENT	
ISSUE	Can parts (partial interests) of legal property (choses in action) be validly assigned in equity, even if they are not assignable at law?
RULE	Parts of legal choses in action, being incapable of assignment at law, may be assigned only in equity. For equitable assignment of a part, a clear expression of intention to make an immediate disposition by the assignor is required. • Norman v FCT Windeyer J (dissent) held: equity will enforce the assignment if there is 'sufficiently clear intention to assign the partial chose in action as a gift'

	○ Look for language or circumstances that demonstrate gift. ○ But normal formalities e.g. <i>Corin v Patton</i> do not need to be complied with ● Valuable consideration is not necessary for an equitable assignment of part of legal property (<i>Norman v Federal Commissioner of Taxation</i> (1963) 109 CLR 9). ● Refuses to allow assignor to act in a way inconsistent with the assignors actions. OUTCOME: If equity can enforce the assignment of a partial chose in action (either gift or consideration), the assignor will hold the interest on trust for the assignee and owes them obligations. The assignee will be able to compel the assignor to transfer the benefit of the partial chose in action when it is received EXAMPLE Imagine Sarah has a debt owed to her by John for \$100,000. Sarah decides to assign only \$30,000 of that debt to her friend Mike. ● Mike has an equitable interest in the \$30,000 portion of the debt owed by John. Because partial assignments of debts are not valid at law (they can't transfer legal title), Mike cannot sue John at law directly. ● Sarah retains the legal title to the entire debt (\$100,000). She can still enforce the full debt against John at law. ● Sarah must account to Mike for the \$30,000 she assigned to him. Mike can seek an equitable remedy (such as an injunction or an order for payment) against Sarah to enforce his interest. ● John doesn't have to know about = just needs to pay Sarah
FUTURE PROPERTY	
ISSUE	Can future property (property not yet in existence) be validly assigned in equity, and under what conditions?