Equitable Choses in Action

Interests under Trusts

(a) Creation of Express Trusts

Express Trusts: Trusts which are created intentionally (cf legal trusts such as established by ***Lysaght v Edwards*** etc)

Creation of Express Trusts: The Three Certainties

For an express trust to be validly created, the settlor must ensure certainty of intention, subject-matter, and objects.

1. Certainty of Intention

The settlor must have a clear intention to create a trust.

- **Objective Test:** Intention is determined by an objective assessment of what the parties said and did in the circumstances, not by their secret subjective thoughts (***Byrnes v Kendle***).
- **No Formal Words Required:** You do not need to use the word "trust." Informal language that indicates property is being held for another is sufficient (***Paul v Constance; Re Kayford Ltd***). Only need to establish an intention.
- **Imperative vs. Precatory Words:** The words used must impose a mandatory obligation on the trustee. Words of "hope," "wish," or "confidence" (precatory words) are generally insufficient to create a trust (***Re Adams and the Kensington Vestry***).
- **Inferred Intention:** In commercial dealings, courts may look to the nature of the transaction and the relationship between the parties to infer intention (***Re Australian Elizabethan Theatre Trust***; ***Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd***).

2. Certainty of Subject-Matter

It must be clear exactly what property is subject to the trust.

- **Identification of Property:** The trust fails if the subject-matter is vague. For example, a trust over "the bulk of my estate" is too uncertain (***Palmer v Simmonds***).
  - This applies to words such as "some of" or "most of" the property → too uncertain to be a valid trust
- **Identifiability in Commercial Contexts:** In scenarios involving mixed goods or proceeds, the specific property belonging to the trust must be identifiable. A trust fails if the claimant cannot prove which specific items (e.g., steel products) were made from their materials (***Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd***).

3. Certainty of Objects

The beneficiaries (the "objects") of the trust must be reasonably certain.

- **Class Certainty:** Beneficiaries can be defined as a class (e.g., "my children"). The criterion for membership in that class must be clear enough for a court to understand and enforce (***Foreman v Hazard***).
- **Trusts for Purposes:** While private trusts must have human beneficiaries, charitable trusts are an exception as they are for purposes rather than specific persons.

<u>And</u>, trust property must reach trustee in order for the trust to exist (***Oughtred v Inland Revenue Commissioners [1960] AC 206***)

- ***Example:*** *A promises to transfer a house to B so B can hold it on trust for C (made orally). This oral promise to transfer real property is not binding / enforceable. If A changes their mind, they are not obliged to transfer their house to B and B has no rights in respect of that property. Therefore, there is no trust on behalf of C.*

◦ *BUT this changes where there is a binding contract (Walsh v Lonsdale; Lysaght v Edwards) → trust for C would have been constituted by B receiving that equitable property when the binding contract is formed (**Oughtred v Inland Revenue Commissioners*** is an example of this) • No trust is constituted until the property has reached the trustee – if the trustee has not received any property, the trust is not constituted

Byrnes v Kendle (2011) 243 CLR 253 – certainty of intention to create a trust is determined objectively by the words used in the instrument (subjective intent irrelevant)	
Facts	• In 1997, a husband (**Kendle**, the respondent) and wife (**Byrnes**, the appellant) executed a formal document titled **"acknowledgment of trust"**. • In this document, Kendle declared that he held an undivided **half interest in a house**—to which he held the legal title—as a tenant-in-common on **trust for Byrnes**. • This 1997 document replaced a similar acknowledgment made in 1989 regarding a previous property the couple had owned. • Following the breakdown of their relationship, **Kendle claimed that he never actually intended to create a trust**, despite having signed the formal instrument. • The litigation was further complicated because Kendle had allowed his own son to live in the property rent-free, prompting Byrnes' son (who had been assigned her interest) to sue Kendle for **breach of trust** for failing to collect rent.
Issue(s)	• Whether Kendle had validly **created an express trust** over the property. • Whether the **certainty of intention** required to create a trust should be determined by an **objective assessment** of the words used or a **subjective inquiry** into the settlor's actual state of mind. • Whether **extrinsic evidence** of a settlor's secret, subjective intention is admissible to contradict the plain language of a written trust instrument.
Principle(s)	• **Objective Test for Intention:** The intention to create a trust is determined by an **objective assessment** of what the parties said and did, rather than their secret subjective thoughts. • **Certainty of Intention:** In the context of the "three certainties," the "intention" referred to is that which is **extracted from the words used**, not a subjective intent that cannot be found within those words. • **Inadmissibility of Extrinsic Evidence:** Where a trust is created by an unambiguous written instrument, evidence of a contrary **subjective intention is generally inadmissible**. • **Exceptions for Vitiating Factors:** Subjective intention is only relevant if the transaction is challenged based on factors such as **mistake, misrepresentation, undue influence, duress, or a "sham"**.
Judgement / Reasoning	The High Court unanimously allowed the appeal, finding that a valid trust existed and that Kendle was in breach of his duties. • **Heydon and Crennan JJ:** ◦ Search for "intention" is a search for the **intention revealed by the language employed** by the parties. ◦ The question is **what the settlor did**, not what they intended to do. ◦ Explicitly rejected the majority view in ***Commissioner of Stamp Duties (Qld) v Jolliffe*** (1920) and adopted **Isaacs J's "powerful dissent"** from that case: an open declaration of trust is final and cannot be denied by secret intent.

	Gummow and Hayne JJ: - The fundamental rule of interpretation is: **"What is the meaning of what the parties have said?"** rather than "What did the parties mean to say?". - Adopted Lord Millett's reasoning in ***Twinsectra***: if a settlor enters arrangements that have the effect of creating a trust, it is sufficient that they **intended to enter the arrangement**; they do not need to appreciate the legal consequences. - Ruled that ***Jolliffe*** is no longer authority for the proposition that a "real intention" can override manifest words. **French CJ:** - Agreed that intention is determined by an objective assessment of words and actions. - Noted that Isaacs J's dissent in ***Jolliffe*** is the preferred statement of law: a formal deed of trust cannot be open to evidence of a "personal secret intention" not to do what the document purports to effect.

(c) Distinguishing trusts from other legal relationships

***** Need to be able to recognise whether a legal relationship is a trust; and the differences between the different types of legal arrangements***

a. Trusts and Debt

Trust vs Debt

The distinction between **trust** and **debt** is a fundamental concept in commercial law, particularly regarding how assets are treated in the event of insolvency. While both involve personal property rights that are enforced by legal action (**choses in action**), they differ significantly in nature, obligations, and proprietary consequences.

1. Conceptual Definitions

- **Debt:** A relationship where a sum of money is due from one person (the **debtor**) to another (the **creditor**). The creditor has a **personal right** against the debtor but no right to any of the debtor's specific assets.
- **Trust:** A relationship where a **trustee** holds legal title to property for the benefit of **beneficiaries**. The beneficiary generally holds a **proprietary equitable interest** in the trust property itself (***Baker v Archer-Shee***).

2. Key Distinguishing Factors

Courts look to several indicators to determine whether a relationship is a trust or a debt:

- **Intention (The Primary Test):** The separation of debt from trust is determined by the **objective intention** of the parties. Did the parties intend for the recipient to be a trustee or a mere borrower?
- **The "Free Disposal" Test:**
  - In a **debt**, the money is at the **free disposal of the recipient**, who can mix it with their own funds and use it for their own purposes as long as they eventually repay the sum.
  - In a **trust**, the money is **not at the free disposal** of the trustee; they must use it specifically for the trust's purposes.
- **Segregation of Funds:**
  - **Trustees** are generally expected to keep trust property **separate** from their own assets.
  - **Debtors** are entitled to **mix** the funds with their own money.
  - *Note:* While keeping funds in a separate account is a strong indicator of a trust (***Re Kayford***), it is not an absolute requirement.
- **Fiduciary Duties:** Trusts involve **onerous fiduciary duties** (the duty to act exclusively for the beneficiary), whereas debt relationships ordinarily do not.

3. The Practical Importance: Insolvency

This distinction is most critical when the recipient of the funds becomes insolvent:

- **In Debt:** The creditor is an **unsecured creditor**. They have no claim to specific assets and must share proportionately in the remaining "pot" of the debtor's assets after secured and preferred creditors are paid.
- **In Trust:** The trust property is **not divisible** among the trustee's general creditors. It is held separately for the beneficiaries and does not form part of the bankrupt estate.

4. Key Case Comparisons

Case	Relationship	Reason for Decision
Daly v Sydney Stock Exchange	**Debt**	A loan of money repayable on demand does not create a trust; the money was received by the stockbrokers on their own account.

Logical Consequences and Legal Implications

The classification leads to drastically different legal outcomes, especially in **insolvency**:

Feature	Debt (***Daly***)	Trust (***Quince***)
Ownership	Title passes to the borrower; the lender has a **personal right** only.	Beneficial ownership remains with the settlor; the beneficiary has a **proprietary interest**.
Insolvency	The creditor is **unsecured** and ranks proportionately with others; they often get nothing.	Trust assets are **not divisible** among the trustee's general creditors; the beneficiary gets the assets back.
Third-Party Claims	No rights against third parties who receive the money from the debtor.	Beneficiaries can assert rights against third parties (e.g., "donees") to recover trust property.
Upside/Downside	The creditor only gets the fixed debt amount, regardless of how the debtor's assets grow.	The beneficiary gets the benefit of any **increase in value** of the trust assets.

Trust vs Debt – What to Look for on the Facts

To determine whether a relationship is a **trust** or a **debt**, you should look for the following indicators in a fact pattern:

- **The "Free Disposal" Test:**
  - **Debt:** In ***Daly***, the money was at the **free disposal** of the stockbrokers. They received it on their own account and were free to use it to run their business, provided they eventually repaid the sum plus interest.
  - **Trust:** In ***Quince***, the money was **not at the free disposal** of the recipient. McLauchlan was restricted to using the funds for **specific, designated investments** on Ms. Quince's behalf.
- **Obligation to Segregate:**
  - **Trust:** An express requirement to keep funds in a **separate account** is a hallmark of a trust relationship (***Re Kayford***).
  - **Debt:** A permission to **mix funds** with the recipient's general operating money suggests a debtor-creditor relationship (***Walker v Corboy***).
- **Nature of the Payout:**
  - **Debt:** If the recipient must simply return an **equivalent sum** (plus interest), it is likely a debt.
  - **Trust:** If the recipient must account for the **actual property or the specific proceeds** of that property, it is likely a trust (***Cohen v Cohen***).

Re Kayford Ltd (in liq) [1975] 1 WLR 279 – A debtor can unilaterally create an express trust over funds received from creditors by **manifesting a clear intention to keep those funds separate** from their own, thereby protecting those funds in the event of insolvency	
Facts	• **Company in Distress:** Kayford Ltd, a mail-order business, was facing financial difficulties and feared insolvency. • **Protective Action:** On professional advice, the company decided to protect customer deposits for goods not yet delivered. • **Segregation of Funds:** The company used an existing dormant bank account and renamed it the **"Customers Trust Deposit Account"**.

Assignment Of Legal Interests

Legal assignment of real property and choses in possession

Methods of Transfer at Law for Land and Choses in Possession

[Topics 1-2 Review]

Legal Assignment of Real Property (Land)

Land System	Method of Transfer	Statutory Authority	Formalities & Key Authority
Old System	Execution of a **Deed**	***CA* s 23B(1)**	Must be on paper/parchment, **signed, sealed, and delivered** (***Manton v Parabolic***).
Torrens Title	**Registration** of a dealing	***RPA* ss 41, 42**	Title is independent and passes by the act of registration, not the instrument (***Breskvar v Wall***; ***Frazer v Walker***).
Short-Term Leases	**Oral** (Parol) grant	***CA* s 23D(2)**	Legal interest created without deed/registration if term 3 yrs, at **best rent**, and taking effect in **possession** (***RPA* s 42(1)(d)** for Torrens).

Legal Transfer of Choses in Possession

Method of Transfer	Key Rule & Requirements	Authority (Case/Statute)
Execution of a Deed	Transfers legal title immediately upon delivery of the signed and sealed document; physical delivery of the item is unnecessary.	***Cochrane v Moore***; ***Nolan v Nolan***
Inter Vivos Gift (Delivery)	Requires temporal coincidence of: (1) **Physical Fact** (transfer of possession) and (2) **Mental Fact** (objective manifestation of *present* intention to make the recipient owner).	***Nolan v Nolan***; ***Cochrane v Moore***
Modes of Delivery	**Actual** (handover); **Symbolic** (keys/means of control for bulky items); **Constructive/Attornment** (acknowledgment by a third-party holder).	***Re Wasserberg***; ***Askrigg***
Sale (SOGA) - Specific Goods	**Master Rule**: Property passes when parties **intend** (s 22). **Default**: Passes when the contract is made, regardless of payment/delivery (s 23 R 1).	***Sale of Goods Act 1923* (NSW) ss 22, 23**
Sale (Unascertained Goods)	No property passes until **ascertained** (s 21). Accomplished via **unconditional appropriation** (s 23 R 5) or **exhaustion**.	***SOGA* s 21**; ***Carlos Federspiel***; ***Re Goldcorp***
Donatio Mortis Causa (DMC)	(1) Contemplation of death, (2) Delivery of **indicia of title** (e.g., share scrip/keys), (3) Conditional on death. Delivery is **evidential**, not constitutive.	***Public Trustee v Bussell***

Legal (Statutory) Assignment of Choses in Action

- **Historical Policy (*Lampet's Case*):** Choses in action were unassignable at law to prevent "multiplying of contentions and suits" (protecting the debtor).
- **Modern Policy (*Re BCCI*):** Debt is now a "saleable commodity" essential for credit and financing (commercial efficiency).
- **The Mechanism: Section 12 *Conveyancing Act*** provides the statutory method to achieve this "diagonal" assignment, provided it is **absolute**, in **signed writing**, and **written notice** is given to the debtor.

Assignments of debts and choses in action – Conveyancing Act 1919 (NSW), s 12

> *Any **absolute** assignment **by writing** under the **hand of the assignor** (not purporting to be by way of charge only) **of any debt or other legal chose in action**, of which express **notice** in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor…*

1. "Any Absolute Assignment"

The assignment must be total and unconditional to fall under **Section 12**.

- **Not Partial:** You cannot assign part of a debt (e.g., 50%) under this statute. Assigning part of a debt would "multiply the legal relations" of the debtor, which the law seeks to prevent. While a partial assignment is valid in **equity**, it does not transfer the legal right under **Section 12**.
- **Not Conditional:** The assignment cannot be subject to a condition. In ***Durham Bros v Robertson***, an assignment of a debt "until" a loan was repaid was held to be conditional. Because it was not absolute, the assignee could not sue the debtor in their own name at law.

2. "By Writing Under the Hand of the Assignor"

- **Signed Writing:** This phrase means the assignment must be in **writing** and **signed** by the person giving the interest away.
- **Electronic Writing:** While **Section 12** does not explicitly mention electronic forms (unlike **sections 23C or 54A**), the lecturer notes that the ***Interpretation Act*** likely includes electronic writing and signatures.

3. "Any Debt or Other Legal Chose in Action"

- **Legal Chose in Action:** This generally refers to contractual rights, such as the right to receive royalties or interest on a loan.
- **Equitable Interests:** While the statute refers to "legal" choses, the High Court in ***Everett v Commissioner of Taxation*** suggested in ***obiter*** that **Section 12** can also be used to assign equitable choses in action (like a partner's interest in a partnership) because the statute mentions giving notice to a "trustee".

4. "Express Notice in Writing Given to the Debtor"

- **The Date of Transfer:** Legal title to the debt does not pass when the assignor signs the document; it only passes from the **date of the notice** to the debtor.
- **Who Gives Notice:** The statute is written in the passive voice ("notice has been given"), meaning either the **assignor or the assignee** can provide the written notice.

	because the recipient is the full owner and does not need the statute's protection against the trustee.

Comparison: *Grey* vs. *Vandervell*

Feature	*Grey v IRC*	*Vandervell v IRC*
Legal Title	Stays with the **same Trustee**.	Moves from Trustee to the **Recipient**.
Trust Status	**Continues** with new beneficiaries.	**Collapses** via merger of interests.
Movement	Only one "arm": Equitable interest moves sideways.	Two "arms": Legal moves sideways; Equitable moves diagonally [Previous conversation].
s 23C(1)(c)	**Engaged:** Oral direction is void; **signed writing required**.	**Not engaged:** Oral direction is valid (the "***Vandervell*** Exception").
Rationale	Protecting the trustee from uncertainty regarding beneficiaries.	No trustee to protect once the recipient is the full legal owner.

Key Exam Takeaway: Use the ***Grey*** diagram when a beneficiary (B1) tries to swap themselves for someone else (B2) while keeping the same trustee. Use the ***Vandervell*** diagram when the goal is to end the trust by giving the recipient both legal and beneficial ownership.

Parker & Parker v Ledsham [1988] WAR 32 – if a direction to a trustee is construed as a **mere mandate or authority** (rather than an immediate, irrevocable assignment), it is **automatically revoked upon the death** of the person who gave the direction

Facts	• **The Parties:** A testatrix (the person who made the will) was entitled to income from her deceased husband's estate. • **The Document:** Before she died, she gave a **written direction** to the trustees of the estate to pay specific sums of money from that income to various named individuals. • **The Timing:** The woman **died before the trustees had actually carried out the instructions** and paid the money to the recipients.
Issue(s)	• Whether the written direction constituted an **immediate, irrevocable disposition** of her equitable interest (which would persist after death) or a **revocable mandate/authority**. • Whether the trustees were still authorized to pay the named individuals after the testatrix's death.
Principle(s)	• **Revocability of Mandates:** A mere permission, authority, or mandate given by a beneficiary to a trustee is **revocable** at any time until it is actually acted upon. • **Revocation by Death:** Such an authority or mandate is **automatically revoked by the death** of the person who issued it. • **Vesting in Executors:** Upon death, a person's authority to command an agent or trustee ceases, and their property rights pass to their **executors** for the benefit of the estate.
Judgement / Reasoning	• **Direction was a Mandate:** Rowland J held that the testatrix's written instructions were properly conceived as a **mandate or authority** rather than an immediate assignment of her interest. • **Authority Revoked:** Because she died before the money was paid, her authority was **revoked by law** the moment she passed away.

	• **Result:** The trustees could no longer pay the named individuals; the money instead had to be paid to the testatrix's **estate**. • **Note:** This contrasts with the obiter in ***Vandervell v IRC***, where Lord Wilberforce suggested that if a direction had been an effective gift where the donor had "done everything within his power," it might still be valid after death.

Rule in *Grey* and the Two Primary Exceptions

The rule in ***Grey v IRC*** is that an oral direction by a beneficiary (B1) to a trustee (T) to hold their subsisting equitable interest for new beneficiaries (B2) is a "disposition" under **Section 23C(1)(c)** and is void without signed writing.

The two primary exceptions discussed in the lectures are ***Vandervell v IRC*** and ***Comptroller of Stamps (Vic) v Howard-Smith***:

1. The *Vandervell* Exception: Collapsing the Trust
In ***Vandervell v IRC***, the court established that writing is **not required** if the beneficiary (B1) directs the trustee (T) to transfer the **full legal title** to a third party (B2) so that the trust relationship ends.

- **The Movement:** Instead of just moving the equitable interest (as in ***Grey***), B1 directs T to move the legal title sideways to B2 while B1's equitable interest moves diagonally to meet it in B2's hands.
- **Reasoning:** Because the legal and equitable interests merge in the hands of the new owner, the recipient becomes the **Full Legal Owner (FLO)**.
- **The Exception:** The House of Lords held that the statutory writing requirement is intended to protect trustees by ensuring they know who their beneficiaries are; this rationale does not apply when the trust is collapsed and the recipient "does not need protection from itself".

2. The Howard-Smith Exception: Mere Authority vs. Direction
In ***Comptroller of Stamps (Vic) v Howard-Smith***, the court distinguished between an immediate **direction** (which moves value) and a **mere authority or mandate** (which does not).

- **The Movement:** The beneficiary wrote a letter "requesting" (not "directing") the trustees to pay certain people.
- **Reasoning:** The court construed the letter as a **revocable authorization** that permitted the trustees to act, rather than an immediate, irrevocable transfer of the interest.
- **The Exception:** Because the letter was a mere authority, no value moved at the moment the letter was written; the "disposition" only occurred later when the trustees actually made the payments. Therefore, the letter itself was not a disposition and did not need to satisfy the writing requirements of the statute.
- **Warning:** As noted in ***Parker & Parker v Ledsham***, a "mere authority" is automatically **revoked upon the death** of the beneficiary if the payment hasn't been made yet.

Sub-trusts – How they work

A **sub-trust** occurs when a beneficiary (**B1**) of an existing trust declares that they now hold their equitable interest on trust for a new beneficiary (**B2**). While there can only be one legal owner (the Trustee), there can be multiple "layers" of beneficiaries on the equitable plane.

The primary legal issue is whether this is the **creation of a new trust** (no writing required for personalty) or a **disposition of a subsisting interest** (requires signed writing under **s 23C(1)(c)**).

Distinguish these based on **active duties**:

- **Active Duty Sub-trust (B1 stays in the picture):** If B1 retains active duties or powers (e.g., deciding which sub-beneficiaries receive funds), it is viewed as the **creation of a new interest**. This does **not require writing**.
- **Bare Sub-trust (B1 disappears):** If B1 declares a trust of their *entire* interest and retains no duties, they effectively "disappear in a puff of smoke". Because B1 no longer serves a purpose, equity may view this as a **disposition** of their interest to B2, meaning it **must be in signed writing** to be valid.

The "Arrow" View: Instead of B1 telling the Trustee to hold for B2 (Direction), B1 tells B2, **"I now hold my interest on trust for you"**.

ISPT Nominees Pty Ltd v Commr of State Revenue [2003] NSWSC 697; (2003) 53 ATR 527, 585-593 – a **bare sub-trust** (where the intermediate beneficiary retains no active duties) can be characterised as a **disposition of a subsisting equitable interest** under **Section 23C(1)(c)** ➔ This means that if a beneficiary (B1) declares they hold their entire interest on trust for another (B2) and has nothing left to do, they "disappear," and the transaction must be in signed writing to be valid	
Facts	• The case involves a dealing with an existing equitable interest through the mechanism of a **sub-trust** • A beneficiary (**B1**) of an existing trust declared a trust over their entire equitable interest for a new beneficiary (**B2**) • The declaration was a "**bare**" sub-trust, meaning B1 retained no active duties, powers of management, or discretion regarding the interest; they simply stood between the head trustee and the new sub-beneficiary
Issue(s)	• Whether the declaration of a bare sub-trust over an entire equitable interest constitutes a **creation** of a new interest (which requires no writing for personalty) or a **disposition** of a subsisting interest under **Section 23C(1)(c)** (which requires signed writing) • Whether B1 "disappears" from the relationship, effectively making the transaction a direct movement of the interest from B1 to B2
Principle(s)	• **Active Duties Test:** The requirement for writing depends on whether B1 retains **active duties**. If B1 has duties to perform (e.g., exercising discretion on who receives funds), it is the creation of a new interest and does not need writing,. • **The "Disappearing" Beneficiary:** If B1 declares a bare trust of their entire interest, they no longer serve a purpose in equity. In such cases, B1 "drops out of the picture" or "disappears in a puff of smoke," and the head trustee deals directly with B2 • **Broad Construction of "Disposition":** Because the effect of a bare sub-trust is to divest B1 of their interest and move it to B2, it falls under the "ordinary sense" of a disposition
Judgement / Reasoning	• **Writing Required:** Justice Barrett suggested that where B1 declares a bare sub-trust, they effectively drop out, and the head trustee can deal directly with B2. • **Functional Disposition:** Because B1 has no equity left to raise and no duties to perform, the court views the substance of the transaction as a disposition of B1's subsisting interest to B2,. • **Policy Against Gaps:** The court noted that if bare sub-trusts did not require writing, parties could easily avoid the formalities of s 23C(1)(c)