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Real property	**Personal property**	
	Choses in possession	**Choses in action**
- Ownership of the fee simple - Mortgages - Easements - Leases - Profits a prendre	- Vehicles - Bank notes - Computers - Artwork - Other tangible items	- Shares - Debts/money transferred - Intellectual property - A beneficiary's interest under fixed trust - Some contractual rights

Legal property rights	**Equitable property rights**	**Mere equities**
- A registered interest in land - Legal title to personal	- (most) unregistered interests in land	- Claim for rectification - Claim to set aside a

property - The trustee's title to trust property - Legal security rights	- Assignee of an equitable assignment of property - A beneficiary's interest under a fixed trust - Equitable security right - Partner's interest in a partnership	transfer for fraud - Claim to set aside an improperly exercised power of sale - Claim to rescind

Breach of Express Trust

First necessary to identify:

1. **Trustee** - the proprietor of trust property (legal title), but is bound by personal obligation(s) to the beneficiary. In NSW, must be over 18 years old (CA s 10(1)(b))
2. **Beneficiary** - has a right to performance of the trust
3. **Third party**

The overall issue is whether a valid private express trust can be recognised between [TRUSTEE] and [BENEFICIARY].

Step one: Creation of express trust

The first issue is whether a trust has been created. Here, a trust appears to have been created by ___ [**declaration/transfer/will**].

Trust by declaration	[**SETTLOR**] declared himself/herself trustee of his/her own property for [**BENEFICIARY**], as evidenced when he/she ____ [**describe declaration**]. - …Since this inter vivos trust involves personal property, there are no formalities that must be complied with. This means that the declaration can be made orally. - …since the inter vivos trust involves land, the declaration must comply with the *Conveyancing Act s23C(1)(b)*, which requires the declaration to be manifested and proved by writing and signed by the person able to declare the trust. This ___ (did/did not) occur when ___. - …even though [SETTLOR] orally declared that a trust had been created over land, the trust will be valid because it was later reduced to writing when ___ (i.e. [SETTLOR] wrote in his diary that a trust had been created).
Trust by transfer	There are two main requirements. - [**SETTLOR**] must first declare that he/she is transferring property to [**TRUSTEE**] to act as a trustee on behalf of [**BENEFICIARY**]. This occurred when he/she ___ [**describe declaration of transfer**]. - Second, there must also have been a valid assignment of trust property to the trustee. → *go to assignment rules + formalities* Unconditional transfer It is likely that the transaction was merely an unconditional transfer/assignment (i.e. gift to charity) (*Elizabethan Theatre Trust*). Since there were no conditions attached to the transfer, this is the antithesis of a trust.
Trust by will	A testamentary trust appears to have been created unilaterally by [**SETTLOR/TESTATOR**] in his/her

(testamentary trust)	will. A number of special rules apply to trusts which are intended to take effect on the death of the creator: - The will must be in **writing** - **Signed** by the testator or another in the testator's presence and by the testator's discretion - Location of signature in a **special position** on the material bearing the writing - Signature **witnessed** by two or more people, who are **present together** at the time of signature and who also sign as **witnesses** - Testator must have **legal capacity** to make the will - Testator must have an **unimpaired intention** to create the will

QUISTCLOSE TRUST → trust property for specific purpose
In terms of creation of trust, it appears that [**SETTLOR**] has created a Quistclose trust. [**LENDER/SETTLOR**] lent money to [**BORROWER**] for the specific purpose of ___ (describe purpose) (*Barclays Bank; Rolls Razor*). This demonstrates that [**LENDER**] did not intend for [**BORROWER**] to use the money at his/her free disposal (*Twinsectra v Yardley*). Effectively, this means that ___ (apply facts).

Quistclose Investments v Rolls Razor; Barclays Bank v Quistclose Investments	Money was lent to [**BORROWER**] for a **specific purpose** under contract (cf. lent in the absence of special terms) - [**BORROWER**] does NOT get full beneficial title → he CANNOT use the money as he wishes → rather, he receives money as a [**TRUSTEE**] to apply it solely for the purpose specified by [**LENDER**]. - If the money CANNOT be used for that purpose/misapplied, there is an express or implied term that obliges [**BORROWER/TRUSTEE**] to repay the lender ([**LENDER**] gets a higher priority than creditors) Since a Quistclose trust appears to have been created, analogous to *Elizabethan theatre*, the same rules for an express trust apply. ***Note: Settlor must have **intended** to create the trust, but objectively did NOT intend to confer a beneficial title to the funds on borrower.* Since the Quistclose trust failed, an automatic resulting trust will likely arise in favour of [**LENDER**] (*Twinsectra*). (*apply resulting trust*)

Step two: Certainties

The issue is whether the three certainty requirements have been satisfied for a valid trust to arise.

1) Certainty of intention

[Settlor/may also be TRUSTEE in self-declared trust] must have intended to create the trust. An objective intention must be shown - that in all the circumstances, [**SETTLOR**] intended to create a trust (*Byrnes v Kendle*) (cf a mere assignment).

Here, there was an intention to impose an obligation on [**TRUSTEE**], the trustee, to hold property for the benefit of [**BENEFICIARY**], the identified beneficiary, as evidenced in ___ (described exact words, conduct - apply table).

- …[**SETTLOR**] must have intended for the trust to take effect **immediately**, which will be satisfied in this close because ___ (*Harpur v Levy*).

- …Even though [**BENEFICIARY's**] enjoyment of property under the trust is deferred (i.e. children will only get the remainder of property once [**SETTLOR**] dies), the trust can still take effect immediately because ___ (apply facts).

- …Analogous to *Harpur v Levy*, [**SETTLOR**] created a deed of trust which would take effect in the future. This is not expressing a clear intention to create an immediate operative trust.
    - …Even though [**SETTLOR**] intended to create a trust in the future, which meant that this was NOT an immediate and operative trust, valuable consideration was provided. Hence, it will be specifically enforceable by [**INTENDED TRUSTEE**], unless a bar to specific performance applies.

Harpur v Levy	Deed of trust executed in August 1997 and expressed to take effect on the 'commencement day' of October 1997 - NO trust had been created → settlor had NOT expressed a **clear intention** to create an **immediately operative trust**

- The trust in this case was created for the purpose of avoiding liability and with the intention of deceiving third parties. It is thus a sham and should be held void (*Midland Bank v Wyatt*).

Authority	**Situation**
Byrnes v Kendle	Trust created by express words - signed a **deed of acknowledgement** which stated he held property on trust → sufficiently manifested intention
Re Armstrong	It is irrelevant that [**SETTLOR**] did not use the word 'trust
Paul v Constance	Although ambiguous words were used, a trust is the most appropriate legal mechanism for giving effect to [**SETTLOR'S**] wishes - 'This is as much as yours as mine' - Being in mind the 'unsophisticated character of the deceased and his relationship with the plaintiff', intention construed to create a trust
Re Williams	'I give you absolutely' is a form of assignment such that rights as hers freely and absolutely.
Associated Alloys	'Held in trust for the seller' → demonstrates an objective intention
Williams v Williams	**Precatory words** (i.e. 'hoping that…', 'in full confidence that…') will be **insufficient** for a court to recognise an intention to create a trust.

If the parties meant to have said something but didn't or had reservations

- …even though [Settlor] had mental reservations and did not intend to ___ (i.e. transfer property) (subjective intention), this is unimportant because one must look to what the parties have said (objective intention) (*Byrnes v Kendle*).

2) Certainty of subject matter

The subject matter of the trust property must be specified.

(A) Legally recognised property

First, the trust must constitute legally recognised property.

- …[**SETTLOR**] transferred ___ (property), which is a form of ***presently existing*** **___** [legal/equitable property].
- …Analogous to *Re Rules' Settlement,* ___ (property) which is simply a mere expectancy (i.e. expectation of receiving property under a will of someone who has NOT yet died).
- …The property in this case may be characterised as 'future' property because ___ [**APPLY**].
    - …Although such property cannot be the subject matter of a voluntary trust, this is not an issue as there was consideration when ___ (**describe consideration**) → Note: *if no consideration, no trust*

(B) Quantum defined

Second, the *quantum or amount of property* to be held on trust must be clearly defined (*Re Goldcorp Exchange Ltd, Palmer v Simmonds*).

- …[**SETTLOR**] stated that ___, which makes it clear the property to be held on trust.

Authority	**Situation**
Palmer v Simmonds	'Leaving the bulk of my estate' → **not sufficiently certain**
Hunter v Moss	**Percentages/fractions of property** → **sufficiently certain** - However, this is qualified by the fact that the subject matter must be fungible property (identical property which is interchangeable with property of the same description (coins, shares of the same class)
Re Golay's Will Trusts	Objective term, such as 'reasonable' is applied → **sufficiently certain**

3) Certainty of object

The beneficiaries of the trust must be identifiable.

a. Fixed vs discretionary trust

It is first necessary to determine whether [**SETTLOR/TRUSTEE**] has created a fixed or discretionary trust.

- …It appears that [**SETTLOR**] has created a **fixed trust** because the **beneficiaries are defined** and trust property must be distributed amongst this class: *Beneficiaries have a proprietary equitable interest in the trust property*

- …It appears that [**SETTLOR**] has created a **discretionary trust** because the **trustee/3P has a trust power (discretion) to distribute the share**.

b. Exhaustive vs non-exhaustive

Second, the issue is whether [**TRUSTEE**] has an exhaustive or non-exhaustive power.

- …It is likely that [**TRUSTEE/3P**] has an **exhaustive trust power**. He/she is under an obligation to distribute all the property to [**BENEFICIARY**], as evidenced in ___ (apply facts).
    - …but also has a power to choose to whom/how much (*as long as the property is distributed in the end*).

- …It is likely that [**TRUSTEE/3P**] has a **non-exhaustive and mere (bare) power**. He/she is under NO obligation to distribute the trust property, as evidenced in ___ (apply facts - i.e. can choose whether to distribute and to whom).
    - …the fact that there is a gift-over term, which specifies what should happen when trust property is left over. This suggests that [**TRUSTEE**] has a mere power and the members of this class are mere objects.