

ASSIGNMENTS

Answer structure

Legal chose in action or equitable chose in action?

(1) Legal chose in action

(a) Effected at Law? (i.e. assignable under statute)

- Must be an absolute assignment – i.e. not part only of a chose in action or assigned for a limited term
- Look to relevant statute requirements: **Corps Act, s 199 PLA**
- Formalities:
 - In writing
 - Signed by assignor
 - Express written notice to the obligor (debtor etc)
 - Express written notice must be direct and definite statement of the fact, rather than supplying materials from which the existence of the fact has to be inferred (**Showa Shoji v Ocean Life**)
 - Assigned absolutely and not by way of a 'charge'
 - Has to be the whole right, not partial, and can't be for a limited use/can't be conditional
- Consequences of valid assignment **s 199(1) PLA** – assigned chose in action is effective at law.

(2) If statute applies, but is not complied with:

(a) Has it been effected in equity?

- (i) Formalities not complied with (2)(a)
 - Clear intention to assign; AND
 - Consideration has passed (**Holroyd v Marshall**), or by way of gift?
 - If gift (voluntary): equity will not complete the gift unless donor has done everything they alone can do to put it beyond their recall (**s 200 PLA**; **Corin v Patton** – two step test clarifies rule in **Milroy v Lord**)
 - (1) whether donor has done all that is necessary to place vesting of legal title within control of donee
 - (2) and beyond the recall and intervention of the donor
 - I.e. for choses in action assignable under **s 199** – must be in writing and signed, but notice not required to bind assignor (**Norman v FCT**).
 - Note: obligor still legally bound to A, rights assigned are binding between A and B, B can enforce rights by obtaining benefit from A or could sue O jointly with A

(b) Legal chose in action not assignable under statute

- Consideration, or by way of gift?
 - If gift: need a clear intention to assign – to make immediate and irrevocable transfer of present property of the chose in action
- Requirements
 - Not required to be in writing
 - Notice not necessary but prudent

(3) Equitable chose in action

I.e. beneficiary's interest under trust; interest of equitable mortgagee; partner's interest in partnership assets; legatee's right under un-administered estate to have will administered (**Schulz**).

Either:

- (1) Clear intention to assign- make an immediate and irrevocable transfer and compliance with **S 11(1)(c) PLA** formality requirement
 - No requirement to give notice to obligor – however notice is prudent (advantage is first to give notice to obligor has priority over other competing interests – **Dearle v Hall**), and informs other party as to who is to pay
- Or
- (2) **S 199 PLA** – if you substantially comply with requirements the assignment will be effected in equity

(4) Future property

- Not assignable under statute or in equity since it is not a present entitlement
- Has consideration passed?
 - If yes, equity binds conscience
 - Assignment takes effect as an agreement to assign property when it vests in the assignor (**Palette Shoes Pty Ltd v Krohn; Norman v FCT**).
 - If no, equity does not assist the volunteer – purported transaction fails

Introduction

Assignment: an **immediate** transfer of **existing** property/proprietary right, vested or contingent, from the assignor to the assignee (**Norman v FCT**).

Chose in action: all personal rights of property, which can only be claimed or enforced by action (legal action), and not by taking physical possession (**Torkington v Magee**). Can be legal or equitable.

- Shares
- Money sums due and owing (debts)
- Rights/benefits under a contract
- Mortgagor's equity of redemption
- Beneficiary's rights and interests under a trust
- Legatee's rights under un-administered will/estate (**Schultz**)

Choses not assignable at law or in equity

- (1.) Purely personal rights (e.g. right to rescind K by purchaser)
- (2.) Obligations – generally (unless parties mutually agree to transfer – novation)
- (3.) Public pay by holder of public office (under most circumstances)
- (4.) Bare rights of action
 - Includes rights to sue in tort, sue for unliquidated damages for breach of K, sue in equity
 - Not assignable for public policy considerations – assignment amounts to maintenance of champerty – incentive to maintain legal actions by a third person with no interest in the COA, just receives a part of any verdict upon completion of action

Glegg v Bromley: Mrs G was suing Mr B in tort – tried to assign to husband 'all that the interest sum of money or premises to which she is or may become entitled under or by virtue of . . . any verdict compromise or agreement which she may obtain or to which she may become a party in or consequent upon the said action [for slander against Bromley]'. **Held:** rights

to sue in tort not assignable, but principle in this case does not preclude assignment of the verdict (future property), i.e. the 'fruits' of the action – an assignment does not give the assignee any right to interfere in the proceedings of an action or insist that the action be carried on.

(1) Assignments of legal choses in action at law

Legislation requires assignment to be absolute – that is not in part only, subject to condition, in writing, signed by assignor and with express not the debtor.

s 199 Property Law Act

(1.) 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 thing in action, of which **express notice in writing** has been **given to the debtor** or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice—

- the legal right to such debt or thing in action; 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.

(2.) If the debtor, trustee or other person liable in respect of such debt or thing in action has notice—

- that the assignment is disputed by the assignor or any person claiming under the assignor; or
- of any other opposing or conflicting claims to such debt or thing in action;

the debtor may, if the debtor thinks fit, either call upon the persons making claim to the debt or other thing in action to interplead concerning the same or pay the debt or other thing in action into court under and in conformity with the provisions of the Acts relating to relief of trustees.

Carob Industries v Simto: when its (legislative) requirements are fulfilled the statutory assignment effects a divesting of legal title correlative to the transfer of the right, so that if notice has been duly given, the debt or chose in action no longer belongs to the assignor and he cannot take proceedings to recover it.

Showa Shoji Australia v Oceanic Life: no special form of notice is necessary, and the notice need only convey the fact that the obligation has been transferred to an assignee. But the notice must do so expressly by direct and definite statement of the fact rather than by supplying material from which the existence of the fact is to be inferred; and because the notice must be in writing the room for incorporation of surrounding events, even direct oral notice, is limited.

Sale of shares: Corps Act

- **S 1071A:** subdivision applies to shares in company, debentures and interests in a registered scheme
- **S 1070C** – share certificate must state name of company, class of shares and amount unpaid on shares.
- **S 1071B(2):** instrument of transfer, a company must only register instrument of transfer of securities if a proper instrument of transfer has been delivered to the company, despite anything in its constitution or anything in the deed relating to debentures
- Note – if share certificate exists this must be lodged
- **S 1072F: (1)** a person transferring shares remains the holder until the transfer is registered and the name of the person they are being

transferred to is entered into the register of members in respect of the shares.

- (2) the directors not required to register transfer unless the transfer and any share certificate have been lodged at the registered office; (ii) any fee payable on registration of transfer has been paid; and (iii) the directors have been given any future information they reasonable require to establish the right of the person transferring the shares to make the transfer.
- (3) may refuse to register a transfer if the share are not fully-paid, or the company has a lien on the shares.

(2) Assignment of legal choses in action in equity

Assignment of a legal chose in action not assignable except by aid of equity – i.e. statutory requirements not met.

S 200 PLA: efficacy in equity of voluntary assignments

(Clarifies rule in *Milroy v Lord*).

(1) A voluntary assignment of property shall in equity be effective and complete when, as as soon as, the assignor has done everything to be done by the assignor that is necessary in order to transfer the property to the assignee

- (a) even though anything remains to be done in order to transfer to the assignee complete and perfect title to the property; and
- (b) provided that anything so remaining to be done is such as may afterwards be done without intervention of or assistance from the assignor

(2) This section is without prejudice to any other mode of disposing of property, but applies subject to the provisions of this and of any other Act

(3) Assignment of equitable choses in action

Requirements

- Intention to assign and some act of assignment *Smith v Perpetual Trustee Co Ltd*, reflecting the maxim 'equity looks to intent rather than form'
- Consideration not required for assignment of equitable choses in action

Formality requirements

S 11(1)(c) in the PLA: instruments required to be in writing

(1)(c) Subject to this Act with respect to creation of interests in land by parol – a disposition of an equitable interest or trust subsisting at the time of the disposition, must be **manifested and proved by some writing signed** by the person disposing of the same, or by the person's agent lawfully authorised in writing, or by will.

Note:

- 'manifested and proved by some writing' – can be proved by a combination of documents, can have an oral assignment that is subsequently proved by documents
- Oral assignments – take place at date of oral assignment not later documentation.
- Note – the word 'deed' in exam means you can assume it is signed.

Case examples

Controller of Stamps (Vic) v Howard-Smith: a voluntary disposition of an equitable interest may take one of at least three forms: (i) expression or indication of intention on part of donor that he hold the equitable interest vested in him on trust for other persons (ii) expression of immediate intention to make over to persons intended to benefit the equitable interest vested in the donor, or some less interest carved out of it. In that case communication to the trustee or person in whom legal title is vested is not required in order to

assign the equitable property. Notice to the trustee may be important to bind him to respect the assignment and in order to preserve priorities, but it is not a condition precedent to the operation of the expression of intention as an assignment. (iii) intending donor for whom property is held on trust may give his trustee a direction requiring him to hold property upon trust for the intended donee.

Norman v FCT (summary of rules)

Taxpayer purported to assign his wife, his right, title and interest in the following: (a) interest payable on a loan he had made to a partnership which was repayable at will; and (b) dividends payable from shares he was to receive from the distribution of two estates. Sought to assign this in 1956 by way of gift under a deed for the years 1957 and 1958 – in order to minimise his tax by reducing personal income. **Issue:** was he assigning current property or future property?

Held: In equity, a would-be-present assignment of something to be acquired in the future is, when made for value, construed as an agreement to assign the thing when it is acquired. A court of equity will ensure that the would-be assignor performs this agreement, his conscience being bound by the consideration. In equity, there is a valid gift of property transferrable at law if the donor, intending to make, then and there, a complete disposition and transfer to the donee, does all that on his part is necessary to give effect to his intentions and arms the donee with the means of completing the gift according to the requirements of law. If a man meaning to make an immediate gift of a chose in action that is his, executes an instrument that meets the requirements of the statute and delivers it to the donee, actually or constructively, he has put it out of his power to recall his gift. Notice can be given by the donee.

Held majority 3-2: – assignment of the loan was future property not assignable by way of gift since no consideration had been given by wife – loan was repayable at will and therefore not a definite right that would exist for the 2 years he attempted to assign. Interest was a mere expectancy – assigned ineffectively for lack of consideration.

Held 5-0: no assignment of dividends payable, there is no right to receive dividends from a company (no chose in action), there is only a future possibility that the company may declare dividends, one the dividend is declared then there is an obligation which is due and payable – no consideration given so assignment failed.

Shepherd v Commissioner of Taxation: taxpayer assigned to his wife by way of gift his right, title and interest to an amount equal to 90% of the income from royalties, had a contract with a company that for every castor they made he would receive royalties as the patent owner. **Held:** valid assignment of chose in action – right to receive royalties was assignable. The tree, though not the fruit, existed at the date of the assignment as a proprietary right.

Justice Kitto: distinction is between a tree and fruit from the tree, can assign the tree but cannot assign fruit immediately (not until you have harvested fruit and it becomes present property), if you assign tree the owner is entitled to any fruit.

Therefore question in Shephard is one of intention – question of language and semantics, whether upon a true construction of the deed it purports to assign a part of a right to the royalties or a percentage of the royalties as after acquired property.

Corin v Patton: (clarified rule in *Milroy v Lord*) Mrs and Mr P owned property as joint tenants, Mrs O wanted her share to go to her children, wanted to

sever JT by assigning interest – executed 3 docs: memo of transfer to brother subject to mortgage of bank which held CT; trust deed declaring brother held interest on trust; and a will leaving her estate to her children equal shares. At time of death her transfer to her brother had not been registered nor had any steps been taken to have bank produce CT. **Hel** legal assignment since transfer not registered, no equitable assignment no efforts had been made to produce CT. **Two-step test:** (1) has donor all that is necessary to place vesting of legal title within control of donee (2) beyond the recall and intervention of the donor. Once that stage is reached the gift is effective in equity – donor is bound in conscience to the property as trustee for the donee pending the vesting of legal title. 'Everything necessary to be done' means everything that the assignor must have done to put it beyond their recall.

Milroy v Lord: Medley signed a deed saying he wished to transfer 50 shares in company to Lord to be held on trust for M's niece Milroy, M died. No instrument of transfer signed before death so assignment not complete although L had share certificates. Note – if M had already signed instrument of transfer the transfer could have been completed by L registering the documents.

(1) Assignor must do all that is necessary to be done to transfer the property (2) assignor must do all that is necessary to be done to render the assignment binding upon the assignor.

Dearle v Halle: notice is useful for priority, first to give notice is first to get priority. Property was left on trust to pay half of income to Brown, who mortgaged his interest in the fund to Dearle and another (S). Later he sold his interest in the fund to Hall who purchased without notice of the prior mortgages. Hall gave notice of his sale to the trustees. Several months later D and S gave notice of their mortgages to trustees. **Held:** Hall took interest free of D and S's interest as he had given notice first.

Hazard Systems v Car-tech Services: clause that assignor 'will assign invalid, must use language of immediacy rather than language of contract'

(4) Future property

A promise to make a gift in the future is not binding without consideration. A promise to transfer something in the future with consideration is binding under contract law, whether or not you own the property at the time of the agreement.

Consideration:

- Must be real or valuable
- Deal has to be a commercial reality – but doesn't have to be of great value to the chose in action being transferred
- Not nominal or token

Palette Shoes v Krohn: once consideration has passed equity binds the conscience of assignor. Future property is held on constructive trust on behalf of the assignee-equitable interest instantly arises once property vests in assignor since the assignor's conscience is bound in respect of property once consideration has passed. Equity fastens on the property and makes the assignor a trustee of the legal rights or ownership for the assignee. Where subject to be made over doesn't exist, matter primarily in contract, but the prospective right in property w/ the assignee obtains higher right than the right to have specific performance of the K, and may survive the assignor's bankruptcy.

FCT v Everett: partner in law firm sought to assign deed by 6/13 of his share in partnership to his wife including right to receive an appropriate share of the profits for valuable consideration. **Held:** effective assignment,

assignment the right to receive income under the partnership agreement, which included a right to receive appropriate share of profits.

Kelly v Commissioner of Inland Revenue: two partners attempted to alienate their rights to partnership income to relatives of the other partner.

Held: invalid assignment, since assignment of future income of a partnership cannot exist independently of specified share in the partnership.

Williams v IRC: partner in law firm sought to assign his first 500 pounds of income he received as a partner in future years. **Held:** invalid, assigning the fruit (future property) – not assignable immediately.

Gleg v Bromley: assignment of the interest sum of money or things she may become entitled to by virtue of action against Bromley in tort. Was assigning the fruit but husband gave consideration; therefore it was a valid assignment. Note – couldn't have assigned the tree since the right to sue in tort is a bare right, which is not assignable.

EXPRESS TRUSTS

Characteristics

- Trustee is in a fiduciary relationship with beneficiary – duty to manage trust property for the exclusive benefit of beneficiary/ies (who has standing to enforce in a court)
- Person can be a trustee and beneficiary, but cannot be sole trustee AND sole beneficiary of the same trust property, because then the legal and equitable title would merge meaning the arrangement no longer satisfied definition of a trust (*Re Heberley (decd)*)
- Two types: fixed (beneficiary holds a fixed entitlement to trust property – i.e. to all my children in equal shares) discretionary (beneficiary has mere expectancy that trustee will exercise discretion and make a distribution of trust property).
- Settlor = person setting up the trust
- Must satisfy three certainties

Commissioner of ACT Revenue v Perpetual Trustee: merger of legal and beneficial interests will not occur where the trustee is merely one of a number of beneficiaries, or where trustee hold the beneficial interest in a different capacity from capacity in w/ the legal interest is held.

Three certainties:

- Certainty of intention
- Certainty of subject matter
- Certainty of objects

*Also consider formalities (for land) and illegality.

1. Certainty of intention

Case law indicates don't need specific words but the words used must be imperative or mandatory rather than precatory (hope, wish, belief, confidence etc.). Note - looking at the intention of the settlor.

Re Armstrong: man with a number of children, wanted to invest 1500 pounds for each of his sons, but wanted to invest it in a term deposit, continue to receive interest payments on this itself and then upon maturity of deposit and on his death two children would be entitled to profits. Went to bank – on one slip said in regards to William, other said in regards to Bernard. He died – who was entitled to money. Hadn't used words 'I declare myself trustee' so court looked to discussions with bank manager where he had explained what he was trying to do, and the existence of two separate slips – had indicated they were for his sons. **Held:** must have words or expressions that evidence intention to create a trust, must be equivalent to/have same meaning as 'I declare myself trustee'. In this case there was a trust – actions

of going to bank and speaking to bank manager about how he wanted the trust set up effectively declared himself trustee.

Paul v Constance: de facto couple had account in husband's name, he deposited 950 pounds, died without a will so wife became executor of will. Competition between his actual wife and de facto partner. **Held:** had referred to money saying 'this is as much yours as it is mine', this was sufficient to declare himself trustee over money 50/50.

Jones v Lock: father came home from business trip and was scolded for not bringing anything home for the baby, so took a cheque put it in the baby's hands, hadn't signed/endorsed the cheque. **Held:** couldn't infer from words or conduct that he was declaring himself trustee, where a particular method of divesting property is intended and fails, the court will not imply a trust. I.e. if you intended to make a gift or assignment and this fails, equity will not perfect and imperfect gift by inferring an express trust.

Milroy v Lord: where there are two methods of disposing of property court won't fix or imply the alternative method if the first is not done properly.

Deane v Cole: highlights importance of wording. Testator died – in will left all real and personal estate to wife, **trusting** to her she would divide in fair just and equal shares to his children all such part and portion of my estate as she may be in the use and enjoyment of. **Held:** 'trusting' not sufficient since it is precatory (i.e. hoping, wishing) – no trust established, in another part of the will he had left the wife property including all property subject to this particular disposition and left it to her absolutely, this was inconsistent with direction to distribute to children. Need to look at all the provisions in the will and the surrounding circumstances.

Hayes v National Heart Foundation of Australia: father died, left daughter the balance of his estate **on the understanding that** she write into her will the shares were to be sold and profits divided into equal parts to three named charities upon her death. Did she receive shares subject to enforceable condition or a moral condition? **Held:** received the shares on trust in favour of the three named charities, wording was sufficient and clear enough to establish a trust, 'on the understanding that' means that she is to understand she is subject to an obligation to dispose of the capital in the manner directed. She took the shares on trust to dispose of them by her will as directed. Intention that at no point was she to enjoy the shares as if they were her own (didn't intend for her to be the absolute owner). Quoted *Re Williams* – if property left to a person in confidence that they will dispose of it in a particular way to which there is no ambiguity, such words are sufficient to impose an obligation.

Re Australian Elizabethan Theatre Trust: the relevant intention is to be inferred from the language used by the parties in question and to that end the court may also look to the nature of the transaction and the relevant circumstances attending the relationship between them.

Walsh Bay Developments v FCT: use of the words 'on trust for' do not necessarily create a trust since surrounding circumstances may displace inference that a trust was intended.

Intention to create trust v create other legal relationships

Loans and debts

Re Kayford Ltd (in liq): mail order company had financial difficulties, decided to establish a separate customer trust deposit account; customer ordering would send money to be put into separate account (was just an old account that was laying dormant). Company went into liquidation. If trust had been set up – customers yet to receive goods would have priority as creditors. **Held:** trust created in favour of customers. Generally, sending money in

exchange for goods is a creditor/debtor relationship. Here, because sep bank account been used specifically for this purpose it showed intention create the trust for the customers.

Henry v Hammond: if a person receives money and is bound to keep it separate...and to hand that money so kept as a separate fund to the person entitled to keep it, then he is a trustee of that money...If on the other hand is not bound to keep it separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money then he is a mere debtor.

Quistclose trusts

Barclays Bank v Quistclose Investments: Rolls Razor wanted to declare dividend but didn't have enough money, approached Q to borrow money lent on proviso that it was for the purpose of paying the dividend and the money was to be paid into separate account. Before they could pay the dividend company went bankrupt. Other bank holding the account tried off amounts owed by RR against money in account. **Held:** need to look **mutual intention** of the two parties (not just the settlor), since here there a contractual relationship and from use of words 'only' and 'exclusively' could be inferred mutual intention was that the sum advanced should not become part of the assets of RR but should be used to pay dividends.

Result: two trusts established

- Primary express trust established where RR was trustee and beneficiary were the shareholders; and (if primary trust not fulfilled)
- Second trust arises for benefit of Q (i.e. in favour of settlor) – then Q both settlor and beneficiary of secondary trust.

Re Australian Elizabethan Theatre Trust: number of gifts made to AET but were expressed to be unconditional gifts (for tax implications) but settlor they would have a preference for AETT to pass on the gift to a nominated arts organisation. Donations deposited into AETT's general operating account, AETT went into liquidation. **Held:** interpreted Quistclose situation a different way – one express trust created with a mandate (condition attached), if condition is fulfilled you go back to a debtor/creditor relationship if not fulfilled then money is simply returned to the settlor. Ultimately no trust created here – in all circumstances of the transaction words such as 'unconditionally', 'it would be appreciated' these were just precatory words. **Twinsectra v Yardley:** subjective intention of the settlor is irrelevant – as long as they enter into arrangement, which has effect of creating a trust is all that is necessary – that they intended to enter into the transaction. Mr Leach was a solicitor acting for Mr Y who wanted to purchase land, L needed to borrow 1 million but lender (T) didn't want to lend money unless was a personal undertaking by L – didn't want to do this. Mr Y approached second law firm who agreed to give undertaking so T released money to first firm who released it to Mr L on instructions of Mr Y. Y asked L to use money for a number of things, not just purchase of land. T not happy – sued both firms, 2nd firm for breach of trust and L for being accessory to breach. **Held:** contrast to Quistclose, this was a purpose trust – and wasn't charitable. Lender paid money to borrower as a loan but didn't part with entire beneficial interest in the money – parts with it on terms that don't exhaust beneficial interest, means a resulting trust arises for lender from outset which the lender is the beneficiary.

Stephens Travel Service International v Qantas Airways: money on separate account isn't fatal – just one factor in ascertaining whether the trust. STS had a K with Q – all money collected shall be property of Q unless accounted for. STS received money from clients for travel tickets purch:

and kept in account, would pay Q amounts on a regular fortnightly basis.

Trust established – even though not in separate account, were able to account for how much money in account belonged to Q.

Bailment

Similar to trust relationship – one party taking care of property for another. Difference – bailment usually refers to chattel, whereas trust can deal with choses in action. Trustee has legal title in trust property whereas bailor retains legal title at all times in bailment cases.

Associated Alloys Ltd: attempt to combine retention of title clause with a trust. Contract where one party giving steel/aluminium to another company to be used in production of goods. Clause in K 'in event purchaser uses goods in manufacturing or construction process then purchaser shall hold proceeds as related to the product on trust for the vendor'. **Held:** no trust created, while the proceeds sub-clause operated as an intention to create a trust it was over future property.

2. Certainty of subject matter

Must be certainty of the property to be subject to the trust. Trustees must be able to clearly identify the trust property, and, in the case of a fixed trust, must be able to identify the precise entitlement of the beneficiaries.

Re Golay (Decd): trust created where wording referred to 'reasonable income'. **Held:** sufficiently clear – court is in the business of looking at what is objectively 'reasonable', it is something the court has done previously, and can arguably be determined with reference to some sort of objective criteria (e.g. median wage), in these cases the words used are capable of being interpreted with certainty by the court. Made reference to case of **Palmer v Simmons** – where 'the bulk of my estate' was not clear enough.

Hunter v Moss: defendant was beneficial owner of 950 shares in company that had issued 1000 shares, plaintiff argued defendant had promised to give him 5% shares (i.e. 50 shares) as a condition of his employment. Argued he had made himself trustee over 50 of the shares by making that promise. **Held:** trust existed, shares were all the same class of share in the same company – each share was identical in its properties so it was sufficiently certain.

White v Shortall: dissolution of relationship, husband stated in letter that he held 220,000 shares on behalf of wife (owned 1.5 million shares in company).

Held: trust existed, husband held shares as trustee for himself and his wife, held in proportion of 220,000 for wife and remainder for himself. The law assumes that the trustee will protect the beneficiary as much as possible – as long as there is more than 220,000 shares left can sell other shares and deal with them as you like as long as 220,000 remain intact.

3. Certainty of objects

Every trust must have a definite object, there must be somebody in whose favour the court can decree performance (**Morice v Bishop of Durham**). Requirement of certainty of objects differs according to whether it is (i) a fixed trust; or a (ii) discretionary trust.

(i) Fixed trust

List certainty test: a list of all the beneficiaries (possible objects) must be compiled or it must be possible to compile such a list (**Inland Revenue Commissioners v Broadway Cottages Trust**).

Modification of list certainty test in **West v Weston** – but not certain whether this is applicable in Qld.

West v Weston: NSW case. Settlor said to divide balance remaining equally among such of the issue leaving at my death of my four grandparents as attain the age of 21 years old. Difficulties – was practically impossible to make a complete list of these persons at the time of the testator's death.

Question what was included in 'the issue of my four grandparents' – means children/descendants of four grandparents, but did it include children born out of wedlock? Children changing their names? **Held:** list certainty test is satisfied if, within a reasonable time after the gift comes into effect, the court can be satisfied on the balance of probabilities that a **substantial majority** of the beneficiaries have been ascertained and that no reasonable inquiries could be made that would improve the situation.

Prosper v Wojtowicz: left open whether *West v Weston* is good law in Qld. List certainty test is satisfied as long as at the date of death of the testator, a list could, in theory, have been made (not whether a list was actually made), in relation to a disposition in equal shares to all those who attended the deceased's funeral other than members of his family. **Held** – list capable of compilation.

(ii) Discretionary trust/trust with powers

Linguistic certainty/Semantic/Criterion certainty test: trustee to be in a position where they can say, with certainty that a claimant fits within the class of beneficiaries as directed by the testator.

Two types of discretionary trust:

(1) Trust with mere/bare powers – trustee has two choices, (i) do they want to distribute the property; and (ii) If yes, to whom will the distribution be made. (Indicated by trustee 'may'...). Trustee may or may not choose to act – a mere power is facultative. A gift in default of appointment is indicative of a mere power.

(2) Trust with trust powers – trustee only has one choice to make/discretion: who will receive a distribution? Trustee must act – it is imperative. (Indicated by trustee shall/will/must etc.)

Re Gulbenkian's Settlements: it is a matter of construction whether the power is a mere power or trust power and the use of inappropriate language is not decisive. It is a mere power to distribute with a gift over in default; in the second case it is a trust to distribute among the class defined by the donor with merely a power of selection within that class. In the first case, even if the class of appointee among whom the donees of the power may appoint is clear and ascertained and they are of full age and sui juris. Nevertheless they cannot compel the donees of the power to exercise it in their collective favour. If, however, it is a trust power, then those entitled are entitled to compel the trustees to pay the fund over to them unless the fund is income and trustees have power to accumulate for the future.

Discretionary trust with trust powers – extra requirement

Extra requirement on top of linguistic certainty test – that the trust be administratively workable.

Re Gulbenkian's Settlement: disposition to 'my old friends'. Trust failed – can't objectively ascertain who fits into the class of 'friend'. Unless there is some admissible evidence that the donor has given some special meaning to the phrase which allows the trustee to determine who fits into the class, it will be too uncertain.

Lempens v Reid: clause – remaining half of my estate to such of my friends who resided with me from overseas. Court found to be too uncertain: problem with who is a friend and who is an acquaintance, and how long someone had 'resided' overseas a day/month/year? If a gift fulfils requirement for linguistic or semantic certainty the gift will not be invalid due to difficulties in ascertaining the whereabouts or continued existence of some of the relevant persons. That is merely evidentiary uncertainty.

Re Barlow's will trusts: option given to friends and family of deceased purchase the testatrix's pictures. Valid trust – all that was being conferred was an option to her friends/each person coming forward to exercise the option had to prove they were friend – which is different from having privity which must be distributed among members of the class, which then you would have to establish the class.

McPhail v Doulton: disposition to any officers or employees, or ex officio employees, and any relatives or dependents of any such persons. **Held** class of beneficiaries must be **administratively workable** for trust power for mere powers it is not a problem since trustee can choose not to distribute at all. There may be cases where the meaning of the words used is clear the definition of beneficiaries is so hopelessly wide as not to form 'anything like a class' so that the trust is administratively unworkable/one that cannot be executed. Example – residents of greater London, trustee would have to consider the boundaries of the class before deciding who the distribution would be made to, residents of greater London would be too large – trust would have great difficulty in having to consider everyone in the class.

Nature of a beneficiary's interest under a discretionary trust

Beneficiaries under a fixed trust have a fixed entitlement in the trust income and/or capital determined pursuant to the trust. They may, as a result, enforce the distribution of the property of the trust according to those terms. Beneficiaries of a discretionary trust have no claim to the trust property the trustees elect to exercise the discretion in their favour – their interest is mere expectancy, a right to be considered. Beneficiaries are entitled to approach a court to ensure the trust is properly administered.

Gartside v Inland Revenue Commissioners: interest does not extend to the whole or part of the income or capital of the trust fund. The nature of interest is the right to be considered as a potential recipient of benefit by trustee, right to have the trustee exercise their discretion fairly, reasonably properly. It is an expectancy but is more than a mere hope – requires some objective consideration by the trustee.

Karger v Paul: testator left entire estate to husband during his lifetime and power to trustees in absolute discretion and upon request by husband to or transfer whole or half of estate to husband for his use absolutely, and husband's death the residue of estate to her cousin. Husband was also one of the trustees. **Held:** as long as discretion is exercised in good faith upon real and genuine consideration and in accordance with purposes for which the discretion was conferred, the requirement that the discretion be exercised reasonably or fairly will be satisfied. If trustee discloses reasons for the decision the court can look to this, if not the court will look for absence of ulterior motive.

Kennon v Spry: Doctor S created a trust and designated himself as trustee assumed power to appoint further trustees – power to modify trust was restricted to prevent him from acquiring future powers. Was beneficiary with his wife and children, later removed himself as beneficiary. As sole trustee he had legal title. Question – was discretionary trust subject to matrimonial settlement – would be if husband held property. **Held:** although settlor is taken to transfer property to trustee in respect of which he created trust, there may be retained a right to take a benefit under it. Because he had legal title and discretion to give all legal title to his wife, this property became an asset of the marriage and therefore subject to settlement.