INTRODUCTION to EQUITY

What is Equity?

Relationship between equity and the common law and what is meant by equity.

Equity meaning fairness...comes from the **Latin aequitas (fairness)**.
Oxford dictionary defines equity as fairness, equal, impartial.
**Equity is the application of the general principles of justice to correct or supplement the law.**
**Equity is the distinctive name of a system of law that exists side by side with common and statute law.**

Dictionary definition: fair, equal, impartial, even-handed – comes from Latin *aequitas* (fairness)
Legal definition (narrower): equity is the application of **general principles of justice to correct/supplement the law.**

In a technical sense, we mean a body of law existing side by side but separate & **distinct** from **statute law**
(legislation) + **common law** (judges), Equity arises mostly from decisions of judges but has evolved as a
separate and distinct system from the common law.

Law in NZ is broadly made up of **legislation, the common law + equity.**

Famous definition by, famous writer of equity - **Maitland:**
“We are driven to say that equity is that body of rules administered by our Courts of Justice which, were it not
for the operation of the Judicature Acts, would be administered only by those courts which would be known as
courts of equity.” Maitland himself acknowledges that it's not a good definition but the best he could come up
with!

**Meagher, Gummow, Lehane (Book on Australian Equity “Doctrines and Remedies”):**
“Equity can be described but is impossible to define.” Agree with what Maitland said, that equity is the body of
law developed by Court of Chancery before 1873 (when the Judicature Acts were passed - major structural
court reform, changed way equity administered in England). But equity didn’t stop developing - it's been
developing ever since. Its a much larger topic now, than it was in C19th.

**Meagher et al. go on to say that Equity’s justification was that it corrected, supplemented and amended the common law,** it softened & modified many injustices of the common law & provided remedies which at
common law were either inadequate or non-existent. So it's seen as a **gloss/ modification/interpretation/addition to common law.**

**Maitland:** “one shouldn’t think of common law & equity as two rival systems – equity **not self-sufficient, at every point it presupposed the existence of the common law.** Common law was a self sufficient system. If
the legislature passed a short act saying equity is abolished, we might have got on fairly well - in some respects
our law would have be barbarous, unjust & absurd, but still the great elementary rights (e.g. immunity from
violence, one’s good name, ownership, possession etc.) would have been decently protected by common law,
and contracts would have been enforced. Conversely, if legislature said common law is abolished & this obeyed
this would have meant anarchy. At every point, equity presupposes the existence of the common law.

Equitable maxims - mottos or sayings. Not rules of law, they just capture an essential point.
Equity: principles, vast body of precedent, maxims (mottos capturing essential points/not rules of law)

**Historical Introduction - (need to find a few good old cases during the course)**

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Law schools in NZ, AUS and UK - the study of equity always starts with historical development. Evolved in a fragmentary way so must look at the history. In UK, time of Edward 1, the common law courts fairly well established, They were the kings courts. And called common law courts because they administered the same law over the whole country. They took the place of the administration of the law. Which had previously been controlled by local barons or great landowners.

End 13th C (Edward I), King’s/common law courts well established in England – administered same law all over country, taking place of administration of the law previously controlled by hundreds of individuals (barons, landowners etc) – need for uniformity, consistency & certainty in the law. To do this - the common law courts developed by the 14th C strict rules of procedure and a strong adherence to the letter of the law. To develop consistency, to make sure cases with similar facts dealt with the same all over England they followed precedent closely. By the 13th C law reports allowed for this so you could look up people’s cases and follow them. So to start off in a common law court you had to apply for a writ and it had to be the right sort of writ for your case – became very rigid, necessary to use correct writ, words/terminology, very easy to go wrong, time sensitive. The aim wasn’t simply bureaucracy and legalism, but to produce certainty. But to produce certainty, it might mean in a certain case your result wasn’t fair. Common law judges and lawyers thought it was more important to have certainty than individual fairness. Legislation written to try and cover all possibilities and again applying statutes can lead to injustice. So equity evolved to mitigate the harshness. Injustice/unfairness because people often didn’t get desired results – equity evolved to mitigate harshness.

● The Court of Chancery Jurisdiction

Equity was centred around the office of the Lord Chancellor (Head of Chancery, great Department of State, described as like King’s PM – extremely powerful, traditionally always someone well-versed in church/canon law).

The King was the fountain of all justice, and so litigants discontented because of rigidities in common law would petition to King seeking relief. These were presented in the form of petitions. At the beginning this was fine because not many people living in UK especially not many people who could do a petition (literacy).

Over time these petitions became addressed not to the King but directly to the Lord Chancellor. Petitions would suggest shortcomings with the law & ask for some relief. The LC did not follow precedent or the common law. In his office there were no precedents to follow, none in his office to be followed (first reports produced 1557). Lord Chancellor to use his power to summons (writ of subpoena) person whose conduct was the source of grievance before him in the Chancery, simply heard both sides & made a decision based on what he, as a religious man, thought was right, what accorded with good conscience. The LC’s decisions were discretionary. So under the common law, the court was obliged to give a remedy but not so for the LC - he was not obliged to give a remedy, even if he found petitioner had made out his case.

These proceedings weren’t originally thought of as “courts” - that came only with time, as their jurisdiction evolved – court of conscience based on conscience, fairness, equity.

So common law courts - strict common law basis was the custom of England which came together as a common law. Conversely the court of chancery - a court of conscience, basis of conscience, fairness and equity. Tension between the two proceeding of remedy and by C17th the tension had become explicitly.

John Seldon (scholar, 1584-1684): thought common law better system – said “equity in law same as spirit in religion - what anyone chooses to make of it. Sometimes according to conscience, sometimes according to law, sometimes according to the rule of court. Equity is a rogueish thing. For common law there is a measure, know what to trust to. Equity is according to the conscience of him, that is Chancellor and as that is larger or narrower, so ie equity. Tis all one as if they should make the standard for the measure a Chancellor’s foot, what an uncertain measure would this be? One C has a long foot, another a short foot, a third an indifferent foort. Tis the same thing in the C’s conscience.”
So equity criticised because it all depended on the attitude of the Chancellor.

1616 Earl of Oxford’s Case
This conflict between equity and common law all came to a head in the Earl of Oxford’s case. An action had been brought in Court of King’s Bench (a common law court). Judgment given for plaintiff by the Lord Chief Justice, the head of common law. The Defendant claimed judgment obtained by fraud, so brought petition to the Court of Chancery, who agreed with him and issued an injunction to stop plaintiff taking action in common law courts to enforce judgment he had obtained in the common law court.

LC said in this case, explained why the equitable jurisdiction had evolved. “the office of the Chancellor is to correct mens’ consciences for frauds, breaches of trusts, wrongs & oppressions, & to soften & modify the extremities of the law.”

Common law lawyers saw this as dangerous intermingling by Court of Chancery with common law matters – direct conflict between common law & equity

Matter taken to King who pronounced in favour of Lord Chancellor & equity – so if a conflict, equity is to prevail. When judgment obtained by oppression, wrong or bad conscience, Chancellor may frustrate & set it aside, not because common law judges made an error, but because it would be contrary to good conscience to allow it to stand.

1529: common law lawyer (not a religious person - Sir Thomas Moore) appointed as Head of Chancery – from that point a period of very powerful Lord Chancellors. Over next few centuries complaints about equity being dependent on length of Chancellor’s foot left in the past.

Gee v Pritchard (1818) 36 ER 670
Lord Eldon (conservative) said “nothing would could inflict on me greater pain than that I had done anything to justice the reproach that the Equity of this Court varies like the Chancellor’s foot” He said it was better that the law be certain, than that every judge speculate on improvement – wanted everything certain.

In middle of C19th great changes to equity courts.

Court of Chancery jurisdiction (from time of Henry 8th)
Three matters equity dealt with said the LC at the time;
1. Fraud: Had a different meaning in equity than at common law. At common law it meant deliberate deceit (no remedy if fraud came about by innocent misrepresentation e.g. mistake over boundary of land), but under equity fraud did cover innocent misrepresentation as well as covered many matters including undue influence (unacceptable pressure on someone to do something), concealing relevant facts, neglect of fiduciary duty (relationship of trust arising where person required to act not for himself but for another)
2. Accidents: equity would not allow enforcement of any legal right gained by mischance.
3. Confidence: the enforcement of uses (the basis of the modern day trust).

Trusts started because there wasn’t many job opportunities in the C12th. Many people went into church life, but you had to go in with poverty so had to make sure your wealth was being looked after. But the main reason was because of the Crusades (religious wars).

“Feoffor to use” - is the person who's going to get shot of his or her property.
“Feoffee to use” - the trusted friend who is going to get the property

The Feoffee to use has the legal title to everything which you’re holding, not for yourself but in trust for B (family and sons) called the “Cestui que use”. Over centuries this term turned into Cestui que trust. In modern terms we talk about the Settlor (giving all your property away to A) giving away things to the Trustee who is holding it for the beneficiary or beneficiaries. The consequences of this is that the trustee becomes the legal owner of the property. But the beneficiaries are the equitable owners and that is recognised by equity. Early trusts – Crusades eg: X (in castle about to set off to Crusades, feoffer to use, settlor) conveys property to A (trusted friend, feoffee, trustee – legal owner) to hold on trust for B (wife & family, cestui(s) que use, beneficiary/ies – equitable owner, recognised by equity). X falls out of equation unless becomes trustee or beneficiary
King losing much revenue – death duties avoided under trust arrangement

As a side effect, trusts had a certain amount of loss of revenue to the Crown because no death duties payable. So in 1535 the statute of uses was past.

**Statute of Uses 1535** - the effect was to make B the legal owner and cut out A altogether.

**Statute of Uses made B (beneficiaries) legal owner, ignoring A – defeated purpose of arrangement**

So system began called use upon a use: Here X conveyed castle/property to Y who conveys to A who conveys to B – **Chancellor enforces second use, X & Y dropout, back to A (legal owner) & B (equitable owner)** - basis of modern trusts today.

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**Remedies**

The common law gave just damages (money) but equity developed it's own set of remedies. It's rare for damages to be given in equity but they are from time to time. Two main equitable remedies;

- **Specific Performance**
  Specific performance: an order of the court directing a party to contract to perform its obligations according to terms of contract. Arises where a contract calls for a party to execute some instrument to complete the transaction. eg. contract to sell land – order to sign transfer. Fundamental requirement – applicant must be ready & willing to perform their side of bargain/contract. Useful because you want that particular piece of land, not money, but that piece of land.

- **Injunctions**
  Injunctions: an order of the courts, restraining a person to whom it is directed from performing some act. Several varieties e.g. requiring other party to refrain from doing something (prohibitory injunction – most common) or given by courts in meantime until matters can be heard fully (interim injunction – aimed at preserving status quo until matters sorted out). An injunction requiring someone to do something is called a mandatory injunction.

Earl of Oxford’s case is an example of an injunction.

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**19th C reforms**

By early 19th C equity itself became bogged down in jurisdictional & procedural tangles.

Difficulty – if common law point arose in court of equity, P had to start again in common law courts

Succession of reforms mid 19th C:

**Common Law Procedure Act 1954**: gave CL courts some limited power to give equitable remedies. Helpful because if you set off in the wrong court you had to start all over again in the other court.

**Chancery Amendment Act 1858 (Lord Cairn’s Act)**: gave Chancery courts power to award certain common law remedies, in particular damages instead of/as well as specific performance.

Most importantly were the **Judicature Acts 1873, 1875**: they abolished all the old courts in England and set up one system of courts, all judges empowered to deal with all matters. This was reproduced in NZ in **Judicature Act 1908**, since repealed but rule continues in other legislation. Remains that if conflict between common law & equity, equity to prevail.

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**Fusion of Law and Equity**

**Fusion of law + equity**

Debate as to whether these reforms simply jurisdictional (procedural) or whether they had brought fusion of common law & equity – different views expressed.
Contention about whether there has been a fusion between law and equity. Some think the two streams are intermingled and others say the Judicature Act only made a jurisdictional change and they are two systems going side by side.

Ashburner (academic) - two streams; common law and equity and although run in the same channel, they run side by side and do not muddy their waters.

United Scientific Holdings Ltd v Burnley BC [1978] (UK)
Lord Diplock: if you had 2 streams, they would eventually meet up & mingle

Aquaculture Corp v NZ Green Mussel Co Ltd [1990] 3 NZLR 299 (NZ position on the fusion):
AC developing drug from Green Lipped mussels in hope of finding cure for arthritis, gave confidential info to defendants who used it wrongly. AC claimed business prospects suffered through breach of confidence – this is an equitable matter. HC: actual loss claimed & assessed at $1.5 mill, High court Judge decided could not award compensatory damages for such a cause of action because of rules governing remedies in equity – could only award Exemplary Damages for $100,000. CA allowed AC’s appeal: applied idea common law & equity are fused, for breach of confidence full range of remedies should be available no matter whether they originate in common law, equity or statute.

“For me, equity and common law are like the individual strands of a two-stranded rope. The rope as a whole is the corpus of judge-made law. Each strand, while an essential part of the whole rope, is still recognisable for what it is – a discrete strand having a separate existence. The two strands work together to do the task required of the whole rope. To achieve this they are intertwined. Each depends on the other, and without each the whole rope would not exist. The development of each strand may be influenced by its partner. Thus, if a single word is to be used to describe the modern relationship between law and equity, I would use the word ‘intertwined’ … we do not have fusion of law and equity, rather we have intertwining.”


Meagher, Gummow, Lehane/Aust HC Judge Heydon criticism of Aquaculture CA decision: “remedies do not exist in vacuum, rather they are linked to causes of action from which they arise – to change remedies may undermine those causes of action in subtle but crucial ways.”
The case was also criticised because it ignores some CA precedents and cites some precedents incorrectly. Was not challenged further by the losing party as well.
TRUSTS

Readings Nevill Chapter 1 and Chapter 2. Note that Nevill in footnote 1 at the beginning of each chapter cites the relevant chapter or chapters in the other leading texts in New Zealand, Australia and England.

At the end of these lectures you should be able to demonstrate that you can explain;
(i) the distinction between legal and equitable title to property;
(ii) the consequences that flow from property being recognised as trust property; and
(iii) the distinction between express trusts, resulting trusts and constructive trusts.

Definition
A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) either for the benefit of persons (who are called beneficiaries or cestuis que trust) of whom he may himself be one, and any one of whom may enforce the obligation, or for a charitable purpose, which may be enforced at the instance of the Attorney-General, or for some other purpose permitted by law although unenforceable.


Terminology (See also the Glossary in Nevill’s Trusts, Wills and Administration)
- Will - the legal declaration of a person's intentions which he or she wants to be performed after their death. Up until the last 15 years lots of trusts were found in wills. For a long time covered by the Wills Act 1837, passed in England and was one of the few acts that continued to apply in NZ. In 2007, a new Wills Act was passed in NZ and that will be the act we are concerned with. 2012 saw an amendment to the act - important.

- Will maker - the person who actually makes the will. The old terms were testator (male) and testatrix (women) but the 2007 Act doesn't use those terms but look out for them in cases and judgements.

- executor - the person appointed in the will, by the willmaker, to carry out the terms of the will. The executor whose duty it is to see that all the property are gathered in and distribute it to those to whom it has been left. Frequently the will will simply leave property to ppl as gifts, the executor has to the duty to see that those people get those gifts. Wills also very frequently set up trusts, particularly for those who are minors. Or to provide for people beyond the present generation. Sometimes for people not yet born. If a trust is set up under the will. The executor must transfer the property to the trustees. Often the executor will be a trustee as well. The female equivalent is executrix - in the old days it was very strictly used, but nowadays we can just use executor all the time.

- probate - used to describe the formality by which a court recognises that a will is genuine and that the formalities required for a proper will have been followed. Probate comes from the latin for ‘proved’ and just means the court says that the will has been authenticated. The expression used is called a grant of probate. The executor will apply for a grant of probate which is the means by which they are formally recognised as the executor. A grant of probate comes in two forms; 1) common form - this is where there are no questions about the propriety
of the will. The executor swears an oath that everything is above board and the courts after reading the will accepts it. This is a routine matter conducted by a restigar of the HC. 2) solemn form - when there is some doubt about whether the will is in fact correct and requires a hearing in court before a judge. Much rarer.

- **codicil** - an addition to a will that must be executed (i.e signed) and witnessed in exactly the same way as a will is. A codicil can add something to a will or it could revoke something, it could confirm or explain something in the will. Codicils were very common prior to computers, the Wills Act 2007 only mentions codicils once. Nicky thinks you're much better to do a new will than to do codicils.

- If a person dies without making a will they are said to have died **in testate**. The section 77 of the Administration act applies and sets out what will happen to your property when you have not made a will. s77 is printed in full in Nevill's Textbook. Instead of an executor, the person responsible for disposing of the property by way of s77 is called an **administrator** or a **administratrix** (female). Executors and administrators are sometimes referred to collectively as **personal representatives**.

- Gifts under wills are known by certain names. A **bequest** covers everything that is not land, all personal property or personality. A bequest also includes residual gifts (leftover gifts after particular things have been given to particular people). After the particular things have been made the will will generally end by saying the residual estate goes to such and such. A **device** is a gift of land, of real estate and a **legacy** is a little narrower than a bequest. Like a bequest it covers personal property, not land, but it covers only particular gifts, not the residual stuff.

- When trust is set up by a person still alive they are known as the **settlor**. Sometimes they are called **grantors** which is not to be confused with a guarantor. A **trustee** is the person who has the legal ownership of the property, of the trust. This is the person that the settlor has trusted to have ownership of the property and to deal with it for the benefit of the beneficiaries that the settlor has nominated.

- **trust property and trust estate** are expressions used to describe the property, the assets of the trust. Trust property is used when dealing with an **inter vivos** trust (a trust made by somebody who is alive to take effect now) and trust estate is used when dealing with a trust set up under a will. A trust is set up for the benefit of some person or persons who are called the **beneficiary (cestui que trust)** or **beneficiaries** and these people can enforce the trust. The same person may be the settlor, the trustee and one of the beneficiary. But the settlor can not be the sole beneficiary.

**Essential elements of a trust**

Some trusts it's hard to find all the elements but for the common type of trusts, these are essential.

**Settlor/grantor**: If a person can dispose of property, so sell it or mortgage it, then he or she can create a trust of it. A trust must have a trustee but it won’t fail if you don’t have one. Trustees have duties. The trust must also have trust property, this property must be of a kind capable of being put in trust. It includes all legal and equitable property that one could make a gift of (inter vivos). The legal interest is the one recognised by the common law and the equitable interest is recognised by equity. The property to be made the subject matter of the trust, must be in existence at the time the trust is set up. It's not possible to make a trust of future property.
Williams v CIR [1964] NZLR 395 (NZ): property must be existence when trust is set up – property of alleged trust first was to be the first £500 profit from the farm. But that $500 had not yet been made. Court held it was not possible to make trust over property not in existence, so trust invalid.

Beneficiaries most important people to consider in a trust. Generally must have human beneficiaries who can enforce the trust. Together the beneficiaries are the equitable owners of the property. It may include people who are not yet born. If they own the entire equitable interest, they can apply to have the trust wound up. And that is known as the rule in Saunders and Vautier. Saunders v Vautier (1841) 4 Beav 115; (1841) Cr&Ph 240; 49 ER 282 (UK): if beneficiaries own entire equitable interest, are of full age & in agreement, they can force the trustees to transfer the legal interest to themselves.

Last element of a trust is an equitable obligation an obligation on the trustee attaching to trust property, to hold and deal with it for the benefit of the beneficiaries. So you start with the settlor (owns the property) goes down to the trustees (the legal owners) and the trust property (the assets) and underneath is the beneficiaries who will benefit (equitable owners).

Distinction Between Legal and Equitable Title

Common law recognises various interests people have in property and what the interests are depends on what the property is (i.e. real, or personal, tangible or intangible). These interests are known as legal interests when it's used in this sense it's used to differentiate it from equitable interests. Equitable interests or equitable title are recognised by the courts of chancery (originally.). These arise when the legal owner is obliged to hold the property to the benefit of someone else. The legal owner still have the legal interest, but there are restrictions on what they can do. These restrictions are governed by the rights of the equitable owner. So if you have a trust of land, the trustee has the legal title to that land. The trustee has the legal right to enter into possession, to mortgage the land, stop trespassers etc. But they can’t treat it as if it were his own, has to treat it according to the terms of the trust and for the benefit of the beneficiaries. They must take care of it (can’t make it go to waste), must protect it's value and they can’t sell it. What the trust document says is the rule, if that doesn’t declare then look at the Trust Act, (may be able to sell for the benefit of the beneficiaries).

The trustee holds the legal title to the trust property whilst the beneficiaries hold the equitable title.

“... although the equitable estate is an interest in property, its essential character still bears the stamp which its origin placed upon it. Where the trustee is owner of the legal fee simple, the right of the beneficiary, although annexed to the land, is a right to compel the legal owner to hold and use the rights which the law gives him in accordance with the obligations which equity has imposed him. The trustee, in such a case, has at law all the rights of the absolute owner of fee simple, but he is not free to use those rights for his own benefit in the way he could if no trust existed. Equitable obligations require him to use them in some particular way for the benefit of other persons:” DKLR Holding Co (No 2) v Commissioner of Stamp Duties [1980] 1 NSWLR 510, 519 per Hope JA.

Settlor: Live person who sets up trust, transfers or settles assets on trust
Inter vivos: trust made while person still alive (cf testamentary)
Trust deed: sets out rules of trust
Trustee: person who has legal ownership of the property
Trust property: subject/assets of trust – term used where trust created where settlor still alive
Trust estate: subject/assets of trust – term used where trust created under will
Beneficiary/cestui que trust: persons for whom the trust is created, equitable ownership – same person may be settlor, trustee & beneficiary BUT not sole beneficiary
"Commissioner of Stamp Duties [1980] (Aust): “The trustee has at law all the rights of the absolute owner of fee simple, but he is not free to use those rights for his own benefit in the way he could if no trust existed. Equitable obligations require him to use them in some particular way for the benefit of other persons”

Consequences of property being recognised as trust property

- Personal creditors of trustees have no recourse against trust property; the property is not the trustee’s to benefit from.
- Trust property does not form part of trustee’s estate upon bankruptcy; i.e. not available to creditors
- Trust property does not form part of trustee’s matrimonial property or part of trustee’s estate on death; there are some provisions in the relationship properties act that do allow a court to look into a trust, if there is evidence that the trust was established in order to evade provisions of the act.
- Beneficiary can recover trust property that a trustee mingles with his/her own property or disposes of it in breach of his/her obligations; e.g. if a trustee takes $100,000 out of the trust account for a sports car, you can trace to the car and can have the sports car sold for the money. But if the property is disposed of to a bona fide purchaser who has no notice of the trust (and both of those provisos are important), then the beneficiary has to seek other remedies. i.e property comes into hand of bf purchaser for full value who acquires the legal interest without notice of beneficiary’s equitable interest

Classification of Trusts

(i) According to Intention

Express Trusts ↔ Trusts which arise by (declared trusts) by operation of Law
Can be fixed or discretionary
Charitable Trusts
Constructive Trusts
Presumed ) Trusts
Resulting )

The Classification of Implied Trusts

Williams v CIR [1964] NZLR 395

Classifying Trusts

Judges and writers have attempted to Classify Trusts; one way is to classify them according to intention.

1. The express trust - sometimes called declared trusts. These can be set up while settlor is alive (inter vivos) or the will maker to come into force when the die, that’s called a testamentary trust.

   e.g. X by will gives shares to T upon trust to pay the dividends to A for life and on A’s death to sell the shares and divide the proceeds equally amongst A’s children. So it says it's upon trust (so we know it's a trust situation). So here, X is the will maker (not settlor because not inter vivos), and T is the trustee and he has got no discretion, he must do exactly what X wants. A and his children are the beneficiaries. So that’s called a fixed trust. We would describe that as a fixed, testamentary, express trust.

   e.g. same example but X is alive, it's not a will so he’s the settlor. This is a fixed, inter vivos express trust.

   e.g. X (will maker) gives shares to T (trustee) upon trust, to pay the dividends to A for life and on A’s death to divide the proceeds amongst A’s children (beneficiaries). So now T can divide them to A’s children however he wants. So he has a discretion. Because it's by will it's testamentary. So a testamentary, discretionary, express trust. The advantage of setting up a fixed trust is the will maker, gets exactly what they want. But in NZ discretionary trusts are much more common. Advantage is that things change so allows some flexible. Can deal with changing circumstances.

2. Resulting Trusts - trusts can arise by operation of law, rather than by the intention of human beings and the most common of these is resulting trusts and constructing trusts. With resulting trusts, they are sometimes
called presumed or implied trusts. Nicky likes resulting trusts terminology. This kind of trusts arises when the intention of the settlor, to set up a trust, is inferred or deduced from his or her words or actions. Many resulting trusts, arise from an express trust. The law presumes an intention on the part of the settlor or will maker to create a trust. It’s presumed from the facts. One way in which they commonly arise, is when an express trust that has been set up, fails to dispose of all the trust property. Because the trust has property it doesn’t know what to do with, the property results back to the settlor or the estate of the will maker. Comes from the latin - to jump back.

e.g. In Re Stanford, University of Cambridge v AG [1924] 1 Ch 73 - In his will Mr Stanford, bequeathed (gifted) money to the university of Cambridge to complete and publish a dictionary he had begun work on. So Stanford is the will maker. Once project had been completed according to Stanford’s directions, there was some money left over. So that money could go back to Mr Stanford’s estate - so you would see if there was a residual will in the clause, what’s left over and where it goes if there is money or things left over. Or the money could go to the University of Cambridge, that it only be used in connection with the dictionary or give an outright gift. The courts decided to give it to the estate. If there had been no residuary clause, there would have been an impartial intestacy (?), which means s77 of the Administration Act applies, and there was a Mrs Stanford so she would have got the money. Only if he had no relations at all would it go to the Crown as bona fide cantica(?) which means good that belong to no one.

Trusts can fail for a number of reasons ; they might be certain when they are set up, or they might be for a specific purpose which law doesn’t find acceptable.

e.g Re The Trusts of the Abbott Fund [1900] 2 Ch 326 - money had been collected for the maintenance of two elderly ladies who were death and couldn’t speak. When the latter of them died, there was money left over. Where does the money go? The trustees asked the court. Number of options; the court decided he that the intention of the donor’s was to benefit the old ladies and nothing more, so the excess money went back to the donors. Assisted by the fact that the donor’s were easy to be found.

Also automatic resulting trusts; a group of trusts where people buy property and put it in the name of someone else, there is a presumption that the person whose name the property is in, is holding it on a resulting trust for the person who provided the money. But that is a rebuttable presumption.

3. Constructive trusts - also arise by operation of law - they arise because it is felt it would be inequitable for the benefit to lie where it falls. They arise independently and sometimes contrary to the intention of the parties. Many varieties of constructive trusts; the categories simply encompasses all those trusts that don’t fit in anywhere else.

Brown v Litton (1711) 1 P Wms 140 24 ER 329 - the master of a ship died at sea, no way of contacting england. The first mate took over command of the ship and used the master’s funds to trade and he made a profit. The ship finally got back to England and the question arose as to who was entitled to the funds and more importantly the profits that had been made with those funds. The master who had died had left a wife and children in england. Possibilities here; funds could return to wife and children, profits could go to the first mate or to the wife. Courts decided it would be unfair to give the fund to the first mate, so funds went to the wife as did the first mate. So the first mate just held the money on a constructive trust for the wife and the children. To make that profit, the first mate had exercised some skill and the courts will make allowances for that, so they can keep some of it.

Keech v Sandford (1726) Sel Cas 61 (famous equity case) - It's a rule that the trustee must never benefit from the trust. But in this case, the trustee held a lease for a person who was underage, a minor. The landlord refused to renew the lease to minor but did give it to trustee. It was held that this amounted to a breach of trust by the trustee and although he had done nothing wrong, he was the one person in the whole world who could not take the lease. His duty as a trustee disentitled him from it, even if the landlord refused to renew it to the minor. So court imposed a constructive trust which meant he was holding the lease for the benefit of the beneficiary.

But you can also classify trusts according to form;
1. Executed Trusts - ones where the settlor or will maker has defined with precision the exact interest to be taken by each beneficiary. So the trustee’s function is purely administrative. It's another way of describing a fixed, express trust.
2. Executory Trusts - where the trust maker has made his general intentions known. And that is like a discretionarry, express trust.
Can also classify trusts according to objects.
1. Trusts for the benefit of private individuals.
2. Charitable trusts - which benefit a public purpose.

If in a will you leave money for a scholarship, that is setting up a trust for a purpose and that would be recognised by the law as a charitable. But generally a trust must be for a person. Either corporate or human. Normally it is unacceptable to set up a trust for a person, because you must have a person who can enforce the trust. An exception is made for charitable trusts as these are enforced by the AG.

Charitable trusts aim to achieve a purpose which at law is regarded as beneficial to society. 4 main groups;
1. Trusts that advance religion
2. Trusts for the relief of poverty
3. Trusts that advance education
4. Trusts that have other beneficial public purposes, that don’t come under the first three heads.

e.g. Re Stanford case - dictionary published. That was a trust with a purpose, saved from invalidity with the fact it was educational and therefore charitable.

A case where a trust was intended to be set up for some named children for holiday treats, is that a trust for individual or for a purpose? It isn’t always easy to work it out. - EXAM Question example!

Classifying trusts according to duties - usually arise under wills.
1. Simple Trusts - one where the trustee has no active duties other than to transfer property to the beneficiary. The trustee in these cases is often cause a ‘bear’ or passive trustee. e.g. in textbook - Blackacre (a term used to describe any form of gift usually land). Must know what this means.
2. Special Trusts - imposes an active duty on the trustee, e.g. a willmaker leaves a $1000 to a trustee to invest it for a beneficiary who is a minor and to pay it to them with the accumulated income when they reach the age of 20. Here there is an active duty to invest the money wisely, and then when the minor is 20, transfer the property.

Trust Powers and Mere Powers

Mere powers are sometimes called bare powers, or powers collateral. Trust powers are sometimes called powers in the nature of a trust, or powers coupled with a duty. Nicky thinks best to use Trust power and Mere Power.

A power is an authority given by person (donor) to second person (donee) that allows second person to deal with property that does not belong to that second person - many types of powers in law. In equity in the law of trusts, there is the power to appoint people of beneficial interests.

In equity the difference between mere powers and trust powers, is that trusts are imperative and mere powers are discretionary.

Holders of trust powers (trustees) must perform duties imposed by trust. If they fail to do so, court can intervene, dismiss trustees & appoint new ones.

Eg A gives car to B to hold on trust until C is 16 & can drive, then have to give car to C - trust power, power given but B must act, must give car to C when 16. It's a trust power so it must be exercised.

If professional appointed, more likely to be trust power.

e.g. a fixed trust where I leave $1000 to Tom on trust for my children A, B, C, in equal shares - quite clearly a trust power. Tom must divide the money between the three children.

Donee of a mere power not required to act. They can choose whether or not to exercise power, court cannot intervene if they don’t exercise the power.

e.g. I leave $100,000 to my wife for life and after she has died, appoint to the children or if she doesn’t then to my best friend mary. There the wife has the mere power to carry out those directions.
e.g. I give my sister $100,000 use this money for our parents should they need it and if they don’t need it you keep it for yourself. That final sentence is a default clause. Because it tells you what to do if the first thing fails. That is a mere power, up to judgment of B whether or not to give C money, default clause

If default clause included &/or family member appointed, more likely to be mere power.

Problems with discretionary trusts
Where trustees have discretion to choose between beneficiaries – often no choice whether to act or not, simply choice between beneficiaries - does have to choose but which she choses is discretion. Evident but difficult distinction.

So difference between a mere power and a discretionary trust is difficult. Rests on the language.

e.g. $1000 to Terry on trust to my children and in such amounts as Terry as he absolute discretion shall think fit - trust power because it says On Trust. But thats not a hard and fast rule.

Consider language:
Mandatory words like “shall”, “must” indicate trust power where as words like “may” more likely to be trust power.

McPhail v Doulton [1971] AC 424 (HL): a fund was established to benefit the employees of a company, as well as their relatives & dependents as well. Trust document which said; “the trustees shall apply the net income of the fund in making at their absolute discretion grants in such amounts as they think fit” – not required to make grants in any particular year, could accumulate interest on the fund if they wanted to. In other clause it was clear that all the benefits were at the discretion of the trustees and clear no person to have any interest in fund otherwise than pursuant to exercise of trustee’s discretion. Conflict between mandatory words “trust”, “shall” & clear discretion

CA majority said this was a mere power but the HL unanimously decided it was a trust power – they said it was discretionary BUT there were duties imposed on trustees that they were required to perform, particularly that they had to consider from time to time whether to exercise their discretion.

A beneficiary is often called the object of a power, and the interests of people who have mere powers or trust powers, from the beneficiaries point of view is huge. They are the equitable owners. If all of the beneficiaries are of full age & agreement, can compel trustee to observe terms, wind up trust (Saunders v Vautier).

If it's a discretionary trust, the beneficiaries can require the trustee’s to consider the exercise of their discretion. If you have a fixed trust, then obviously you can make the trustee give you your share.

If trustee does not or acts wrongly in any way – will be removed & replaced by court, protection for beneficiaries under Trustee Act 1956.

NB fixed (can compel trustee to carry out trust document) vs discretionary (can compel trustee to consider exercise of discretion).

On the other hand the object of a mere power, can not force the holder of power to do anything – can only have hope (or have what is called a spes) donor will exercise power in his/her favor. They have no interest in property, own nothing until donee exercises power in their favour. They own nothing until the power is exercised in their favour.

At the end of year - don’t commit yourself; say the court could go either way and give reasons for both.

Common reasons for creating express trust – very popular in NZ
- Asset protection - In 1990s there was an increased tendency to sue professionals, all those with assets. If you have put your property into a trust, then those assets can not be attacked by your creditors. Traditionally used to save property from death duties, but we don’t have them in NZ at the moment. Divesting property to trust can protect family assets.
- Minimisation of taxation. See Penny v CIR [2012] 1 NZLR 433. Trusts pay less tax than individuals. Chapter 5 for more cases. Though one should never set up a trust to avoid the IRD.
- **Countering state encroachment** - e.g. If you are elderly and having to go into a retirement home you are asset tested and you have to contribute for your keep. Some people go into trusts to try and avoid doing this.

- **Investment purposes** – Vehicles for investment. **Unit trusts** – run by professional trustees who make a broad range of investments, this enables small investors to buy units to invest in wide range of investments thus spread their risk at a reasonable cost in a way that would not otherwise be cheaply available. Also gives varying degrees of risks. Many banks offer them – can choose between high/low/middle risk trusts

- **Protection of those unable to look out for themselves** - e.g. minors. Also protective trusts under **Trustee Act 1956, s 42** – means of protecting person from him or herself or e.g. grandchildren from spendthrift son or daughter.

- **Provision for causes (charitable objects) or non-human objects (animals).**

- **Privacy** - secret trusts, you can provide for someone you don’t want your family to know about. e.g. mistress.

- **Enabling property to be held by unincorporated associations.**

- **Carrying on a business** - trading trusts

- **Matrimonial purposes** - protection of property in the event of a marriage break up.

The disadvantages is once your property has gone into the trust, you can’t have it back. You can’t change your mind. You can make yourself a trustee and keep some control that way and give yourself more powers than the other trustees. Sham “trusts” you either have a trust or you haven’t. A sham transaction is when you set up what looks like a trust but it's for dodgy dealings - Chapter 5 of the textbook. e.g. set up a trust to defeat your creditors. *OA v Wilson* [2008] NZCA 122. - man is bankrupt, sets up trust again to bet his creditors.

*(Not in mid sessional).*

**Mini Test**

a) I give my farm to my brother - bequeath and beneficiary, outright gift so we have a donor, and donee.

b) I give my farm to my brother on trust for my children - I am the settlor, brother is trustee, and children are the beneficiaries and it's a trust.

c) I give my brother $1000 and say use this money for parents if they need it and if they don’t use it yourself - I am a donor, my brother is the donee and it's a mere power. With a default clause.

In exam it could just be an outright gift! The exam won’t be all trust.
CREATION OF AN EXPRESS TRUST

Readings Nevill Chapter 2

Learning Outcomes:
(i) if a settlor or will maker has created a valid express trust, and
(ii) if not, what effect his or her actions have over what would otherwise have been trust property.

“The Three Certainties”

1. Certainty of intention
It must be shown that the creator of trust (settlor/will maker) intended to create a trust.
Difficulties where word “trust” or something similar used without one being intended OR where trust intended but such a word not used. e.g. I leave property to X trusting that they will... - hard to tell if a real trust or not. No particular form of words necessary - it's not necessary to use the word trust if the intention is clear enough. A gift, or a mere power or a gift might have been intended.
It doesn’t matter if the creator doesn’t know what a trust is. All that is required is language the law recognises as indicating an intention to create a trust.
It doesn’t have to be written down unless involving property. Can be all word of mouth.
Mandatory words generally present eg “shall”, “will”, require people act as instructed, give orders (contrast with precatory words: words of hope or wish, generally not sufficient for creating a trust.)
Discernible reluctance to find intention in absence of clearest indication
Re Adams & Kensington Vestry (1884) (UKCA) – modern test one of overall intention.
Looking at the document or declaration as a whole, can it be proved that a trust was intended?
Will maker left everything to wife “in full confidence she would do what was right as to the disposable of thereof between the children, either in her lifetime or by will” - Did the willmaker intend a gift to the wife or a trust for the children? There were no mandatory words, merely words that expressed of hope, no trust intended, only moral obligation to follow wishes. Lord Cotton said the test was overall intention- and that to be determined by looking at the words the will maker had used. On the facts, the UK COA said no trust had been intended. So wife became full owner of the property.

Page v Page, 2001 (NZ)
Matrimonial property dispute over inherited paintings - precatory words gave rise to no more than moral obligation husband would pass paintings on to children, no trust intended
NB authority for the fact burden lies on person alleging trust

Re Williams (1897) (UKCA)
A man left his residuary estate to wife “in the fullest trust and confidence that she would carry out his wishes.” Court said several possibilities of what he had intended. Could have meant an outright gift and the words were merely wishful, could have been a mere power, gift with a condition or a trust. In old cases they use the term precatory trust and that is in fact a contradiction in terms. If they words are precatory (expressing only a hope) there is no trust. In Re Williams, Lord Justice Lindley said as such - “If a trust was found to have been intended it added nothing to call it a precatory trust. On the other hand if there was no intention to create a trust, then precatory words would not be sufficient to make it one.” Court concluded that this was an absolute gift, moral obligation only, no trust intended. Lindley - “A trust is really nothing, except a confidence preposed by one person in another, and enforceable in a court of equity.”

Until the mid C19th the executor kept any property not effectively disposed of by the will. This could lead to the executor getting an unexpected windfall. Equity doesn’t like accidents and accidental windfalls to an undeserving party is something equity hates. To avoid these windfalls, a court would find a trust existed, rather than let it fail and fall into the hands of an executor.

Re Singh (Deceased) [1995] (NZ) – followed Re Williams
Clause in will referred to “the wish of the willmaker” that something would occur, later “without however creating a trust in that regard” - clear expression wishes not to be binding.

**Jones v Lock (1865) (UK) - Awesome case! Must read.**

Mr Jones was an ironmonger in south wales and had gone away to do some business, when he came home, got in trouble for not bringing gift for baby. He had a £900 cheque made out to himself, pressed it into baby’s hand, said “Look you here, I give this to the boy, it is for himself”. His wife took it out of the baby’s hand and made him take it in a safe place. A few days later saw his solicitor & told him he intended to add another £100 then alter his will to provide for his son. But he died later that day without altering his will. Was there an outright gift of the $900 or was there a valid trust in that regard - clear expression wishes not to be binding.

**If no certainty of intention, what happens to the property?**

Important to say what happens to the property if the gift fails. So if you have no certainty of intention, have you got an absolute gift? – *Re Williams* or is there an imperfect gift? – *Jones v Lock*.

- If settlor/donor alive – property remains with him/her
- If willmaker has died – property into his/her estate
- If valid will with residuary clause, goes there; if not, there is a partial intestacy which means AA, s 77 applies.

**Overall intention may be inferred from conduct**

Question whether in substance sufficient intention to create trust manifested

*Belton v CIR* [1959] (NZ): argument with IRD over ownership of income. The trust was an inter vivos one - set up while the person was alive. And the farmer could show by conduct showed intention to set up trusts in favour of his children. The overall intention test can be difficult in practice, because usually the person is dead and we’re dealing with a will situation. Judges look at all the circumstances and decide what would be most just and work back from there.

*Re Kayford* [1975] (UK): (in a lot of the textbooks) - mail order company in financial difficulty. Customers paid a deposit for their purchases or paid in full for their delivery. Despite difficulties, kept trading and accepting customer’s money, but put customers’ money into separate “customer trust deposit account” to use for refunds if unable to supply goods. The company’s position didn’t improve and it eventually went into liquidation. This occurs when a company can’t pay their creditors. So it gets wound up and it's assets sold (liquidated) and if they're lucky their debt is met in the proceeds. The liquidator has all access to the funds. Court asked whether the funds in the separate account, should go into the general creditors pool or whether they were held in trust for the individual customer who had paid for them. If went into general pool, good chance they wouldn’t get any back. J McGarry said there was a trust, not merely name of account but also the conduct of the company in setting up payment into separate account strong (not conclusive) indication of intention to create trust. Well settled he said that a trust can be created without using the word trust. The question is whether in substance, sufficient intention to create a trust has been manifested ???

*Paul v Constance* [1977] (UK): Cs separated, husband then lived with Mrs P, compensation for accident, money put into bank in his name only (on suggestion of bank manager). Money not used very much look upon as a nest egg, although it was under his name Mr C referred on a number of occasions to the money belonging to both of them, him and Mrs P. They won some money at bingo, which also went into account. Mr C died without leaving will, Mrs C took out letters of administration (if you haven’t got a will you...
haven’t got an executor so you apply for a administrator, and she wanted it go to her like the AA says), Mrs 
P protested this saying the money in the account was held in trust and at least half of it belonged to her. 
Successfully claimed half money in account on trust for her – **although word trust never used.** Judge said 
there was a trust and half should go to Mrs P. But Mr C had said in front of witnesses that money as much 
**hers** **as mine enough to create trust.** So it was inferred by conduct that there was a trust.

**Thexton v Thexton [2001] (NZ):** Judge described *Kayford; Constance* cases as exceptional – where no 
words exhibiting necessary intent, in exceptional circumstances may infer intention from conduct

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**Often difficult to establish overall intention where will maker dead**

Sometimes judges consider all circumstances & ascribe most just outcome

**Bayley v PT [1908] (NZ):** The will maker said words “desire”, “request” - **no trust.** Judge said the words 
did not operate as a command, couldn’t be construed as imperative and imposing a trust, they were words in 
treaty only.

**Re Steele’s Will Trusts [1948] (UK):** The word in issue was “I request” - held it was a **trust.**

**Re Taylor [1927] (NZ):** Willmaker left all belonging to his dear wife, made her to sole trustee and left it to 
her “to do as she thought best,”.... went on to say “wished to trust she would do certain things (e.g. children 
cared for)” - **gift. Moral obligation not a trust.**

So in practice try to make your language as plain as possible. But *Re Singh* shows that won’t always help. 
In an exam - unless the answer is obvious, don’t come to a conclusion, explain the principles, argue both 
sides with examples and leave it with that.


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Also the settlor does not need to know what is technically a trust that he or she is creating, they have 
intended the legal consequences that will be apparent to a lawyer. and the burden of establishing intention is 
on the person who alleges that a trust has been created.

**Page v Page** Unreported Family Court, Wellington, FP 085 541 96 3 December 2001 Judge Inglis Q.C. (The 
appeal decision (2002) 22 FRNZ 266 is discussed in the context of secret trusts later in the course).

Son and daughter in law of well known NZ artist, Page. Mr and Mrs page had acquired a lot of paintings in 
their lifetimes and mr page died leaving collection to his wife. When she died she left her collection to her 
son and her daughter. It looked clearly like an outright gift. When the son separated from his wife an 
argument developed over the paintings which had become quite valuable at this point in time. The general 
rule in matrimonial property is you get have each. That would have required the son to give half of his 
paintings that he’d inherited to his wife. He didn’t want to, so he argued there was a trust. he argued he held 
them on trust for his children. And same goes for the sister and her children. That would have meant that 
the ex-wife would get no paintings. The matter become confused when the son said if there was no express 
trust then there was a secret trust. The matter when from the family court to the COA and both cases there 
was no possibility of there being a trust. So you must intend the trust, any language will do and conduct will 
be considered. If a trust is too uncertain it might be an outright gift or an imperfect gift. If it's an imperfect 
gift nothing happens, if it's a perfect gift the person who would have been the trustee becomes the donee of 
the gift. In an exam make sure you say what happens to the property.

If you’re going to have a valid trust you must make it clear what the trust property will be. The trustees must be 
able to discern clearly what they are dealing with. If not defined clearly then no trust. Generally trust property 
can consist of any property, or interest in any property, which a person may at law or equity, transfer, assign or
dispose of. There can be a trust of a chattel, a chose in possession (a thing in possession). Can also be a trust of land, cash and shares and collections of things like paintings.

It’s all summed up in *Don King Productions v Warren* [1998] 2 All ER 608 at 630; affirmed [1999] 2 All ER 218 (CA) - where judge said there can be a trust of a chattel or a chose in action (something you can only enforce by a court action) or a right or obligation under a ordinary legal contract, just as much as a trust of land. Chose in possession comes from the word thing - so a tangible item, capable of being actually possessed and enjoyed. Chose in action - is a right, a right to recover a debt, an interest in shares etc. that can be enforced by legal action.

2. Certainty of subject matter
You must be able to say with precise certainty what property is the subject of the trust. Trustees must be able to discern clearly what they are dealing with, otherwise they cannot act.

*Westdeutsche Landesbank* [1996] (UK): “a trust can only arise where there is defined trust property, it is therefore not consistent with trust principles to say that a person is a trustee of property which can not be defined.” (L Browne Wilkinson).

Trust property = any interest in property which a person may at law or in equity transfer, assign, dispose of – chose in possession, chose in action (*Don King Productions* [1998] (UK))

**If no certainty of subject matter, what happens to the property?**
- If settlor still alive – resulting trust in their favour
- If not – if valid residuary clause, property goes to residuary beneficiaries
- If not – *Administration Act 1956, s 77* applies – next of kin or Crown as *bona vacantia*

**Certainty of subject matter can arise in 2 situations;**

1. Uncertainty as to the whole trust property
Often arises when it comes to disposal of a residuary estate. Will maker wishes to leave something to a beneficiary but fails to define with sufficient certainty what it is. So then the trust for the beneficiary will fail. In *palmer v Simmonds*, the will make said that the bulk of my residuary estate should be left to a certain named person. with no further guidance it's not possible for the trustee to discern what they meant by the bulk of the residue. Will maker fails to define with sufficient certainty what property is left to a beneficiary - trust fails
- Often arises over residuary estate
  - *Palmer v Simmonds* (1854) (UK): “bulk of my residuary estate” = “bulk” too uncertain
  - *White v White* [1909] (NZ): “a small part of what is left” = too uncertain. White v White (NZ) - the will said Mary is to have a small part of what is left, again without anything further it's not possible to say with certainty what mary’s proportion would be. so trust was void.
  - *Jubber v Jubber* (1839) (UK): “handsome for tuity” = too uncertain. Jubber v Jubber - will maker said he wished to leave a handsome gratuity, court said that handsome was just too vague.
  - *Re London Wine Co* [1986] (UK): stocks of wine in various warehouses, when particular bottles bought, identified & stored at customers’ expense. In fact incorrectly identified = trust failed, while intention to create trust, not possible to ascertain the subject matter
    - Eg farmer declares himself trustee of 2 sheep without identifying them – no 2 sheep identical, would be different if sheep (& wine) were exactly the same.
  - Re London Wine - *Good case to read* - the company had stocks of wine in various warehouses that they sold to various customers. the idea was that when you bought wine your particular purchase was identified and stored for you at your expense. but the identification of particular bottles was not done. The company went bust and the customers having paid for the wine were trying to keep the wine from going into the general pool of assets available to all creditors. Claimed it was being held in trust for them. The court held that while there had been an intention to create a trust, it failed because it was not possible to ascertain the subject matter. Each customers’ wine had no infact been identified. Oliver J said I appreciate the point taken that the subject matter is part of a homogenous mass so that the specific identity is of little importance as it is for instance in the case
of money,” so why was the wine different from money? because each one was unique. He gives a good example - eg how a farmer could declared himself a trustee of two sheep without identifying them could be said to have created a perfect and complete trust.

**Hunter v Moss [1994]** (UK): settlor held 950 shares in company, declared 50 held on trust for another. Later wished to back out of arrangement = trust upheld, held to be **certainty of subject matter because all shares identical** (whichever 50 were chosen). Unclear whether this still applies in NZ, **Richardson** nothing wrong, beneficiary not trying to claim precedence over other creditors - the settlor was the registered holder of 950 shares in a company and made a declaration that he held 50 of them on trust for another person, he changed his mind and wanted to back out, so said there was no certainty of subject matter. at first instance that court decided that it should apply the wine company case but reversed on appeal. Pointed out that the shares were identical so it didn’t matter which 50 were put in the trust. The court said would it had been possible immediately after the trust declared for execution of the trust and transfer of asset, of course it would. Been held not to apply in Australia. And some doubt whether it would apply in nz. Here the beneficiary wasn’t trying to get precedent over other creditors.

**In Re Goldcorp [1995]** (PC): G sold gold bars, supposedly held in “secure storage”, transpired they held undifferentiated bars, nowhere near enough to cover all liabilities = trust failed, **no property could be pointed to that was set aside as the subject matter of the trust. Goldcorp Exchange Case** - went all the way to the PC. Was a scheme where by investors and small investors tried to get security along with the possibility of large gains and wound up losing everything. Gold corp sold gold to members of the public. You bought the gold and then goldcorp stored it for u in a secure place. People thought they were buying actual gold bars and that their particular bar was being held in a particular vault somewhere but when they got into financial trouble that was found not to be the case. Such gold that it had was in a completely undifferentiated bunch of bars. It didn’t have enough to pay out everyone who was wanting their gold. So a case where the Ps were trying to get a trust over the bars so they would get preference above all the other creditors. They said it was a constructive trust and also said it was an express trust. PC pointed out there was no property that the ps could point to that had been set aside as theirs to form the subject matter of the trust. Future property cannot be the subject of a trust: **Williams v CIR** Future property can’t be the subject matter of the trust. e.g. **Williams v Commissionre of IRD**. Farmer trying to protect income from IRD by claiming it belonged to a trust. The subject matter was the first 500 pounds of income. But it hadn’t yet been earnt so the subject matter didn’t exist, so therefore no trust.

2. **Uncertainty as to the extent of the interest of each beneficiary**

Each beneficiary's interest must be certain so that the trustees may be sure exactly what and how much each beneficiary is to have. Of course if it's a discretionary trust thats not to apply. Because trustee has liberty to decide. Sometimes questions arise as to what the allocation should be.

One of the best examples is **Boyce and Boyce** - Mr Boyce was a builder and when he died left a number of cottages in england. one provision in his will said that one of his daughters, maria was to have whichever one she chose, and the rest was to go to another daughter called charlotte. Maria died before she could make a choice. The question then was whether there was a trust for any of the properties for Charlotte and held that there was not. There was uncertainty as to what particular houses she should get, so it was void. The trust property had been clearly identified by charlotte's beneficial interest had not been clearly defined. the requirement for certainty here does not mean that you have to be precisely correct. **Coates** - what you would need is a yardstick by which you could measure what it was the will maker wished to give. **Re Golays WT** - the will maker left to another person a flat to enjoy during her lifetime and also a reasonable income from other properties. The courts said that in the context a reasonable denoted an objective formula, to determine the amount the beneficiary was to get.

Interests must be certain so trustees know exactly what proportion each beneficiary is to have