

Equitable Assignment Checklist

QUESTION 1

Can the property be assigned at all?

What kind of property is it? Real and personal: there are a number of sub categories within these

- **What kind of property?**

- House and land- real
- The certificate of title to your house- personal
- Legal textbook
- The interest of a beneficiary under a trust
- The right to publish the book that you have written- personal (intellectual, intangible)
- A right to sue for a personal injury
- The bank cheque that you have received as proceeds from the sale of your house
- A partners interest in the partnership assets
- The \$500 that I owe you- personal, intangible
- Your left kidney
- A legatee's interest in an unadministered estate

Virtually all forms of property can be assigned in equity

- **Non assignable rights: exceptions**

- Public pay (text 5.7):
- Bare rights to litigate,
- Certain contractual rights (text 5.26).

Public Pay

- Text 5.7 “An assignment of pay by the holder of a public office is prohibited on the basis that such pay is made to enable the office holder to maintain his or her office with decorum and propriety.”
- Exception: *Arbuthnot v Norton* (1846) 18 ER 565

Bare rights to litigate

- Text 5.9. A bare right to litigate is a ‘right to claim damages divorced from any transfer of property’

Rights to sue in torts, equity

- Not property, or
- Too personal that they must attach to a particular person (e.g personal injury in tort- right to sue but you cannot assign that right to someone else? No)
- Public policy

MAINTENANCE

- Champerty is a species of maintenance and maintenance is defined by Halsbury as:
“Assistance or encouragement [provided] by a person who has neither an interest in the litigation nor any other motive recognized as justifying the interference to a party in litigation”
- MGL: “the support, by means of finance or exertion, of an action by a person who has no interest in it”
- <http://www.hillcrestlitigation.com.au/>

EXCEPTIONS TO ASSIGNMENT OF BARE RIGHTS

- ***Glegg v Bromley* [1912] 3 KB 474**
- G sued B for slander and the same time she owed her husband 7000 pounds. G assigned to her husband: “all that the interest sum of money or premises to which she is or may become entitled by virtue of any verdict, compromise or agreement which she may obtain”

Court found there was no objection

“ I know of no rule of law which prevents the assignment of the fruits of an action. Such an assignment does not give the assignee any right to interfere in the proceedings in the action. The assignee has no right to insist on the action being carried on... There is, in my opinion nothing resembling maintenance or champerty in the deed of assignment”.

- *PERSON WHO IS ASSIGNED has a genuine Commercial Interest*

Trendtex Trading Corporation v Credit Suisse [1982] AC 679.

- Trendtex contracted to sell a large quantity of cement to an English company for shipment to Nigeria.
- It had borrowed from Credit Suisse, in order to finance the purchase of the cement.
- The English company was to pay for the cement by means of a letter of credit issued by the Central Bank of Nigeria ("CBN"); that bank failed to honour the letter of credit.
- Trendtex assigned to Credit Suisse all its claims arising out of the cement contracts "until the claims of the assignee are covered".
- House of Lords held that Credit Suisse had a genuine and substantial interest in the success of the CBN litigation, however, the transfer to the third party, which involved the likelihood of a profit “savoured of champerty” and so was contrary to public policy
- Extended more than actions to breach of contract to tort and equity> no longer limitations to the principle where there is a genuine commercial interest

Read

- Text 5.22; Property with an incidental right to litigate
- Text 5.24; Assignment to insurer
- Text 5.26; Contractual rights (personal rights of employment)

Summing up: almost everything that qualifies as property can be assigned (besides the 3 exceptions)

QUESTION 2

Is the assignment of presently existing or future property?

- What are the parties trying to assign? Is it existing or only come into existence sometime in the future?

Norman v Federal Commissioner of Taxation (1963) 109 CLR

Windeyer J:

“It is impossible for anyone to own something that does not exist, it is impossible for anyone to make a present gift of such a thing to another person, however sure he may be that it will come into existence and will then be his to give. He can, of course, promise that when the thing is his he will make it over to the intended donee. But in the meantime he may change his mind and when the time comes refuse to carry out his promise even though it were by deed. A court of law could not compel him to perform it. A court of equity would not... things not yet in existence could only be the subject of agreement, not of present disposition.... ”

- It's impossible to own something that doesn't exist> cannot make an immediate transfer of something that doesn't exist
- You CAN make a promise that when you will have it, you will transfer it to the assignee
- Must be supported by valuable consideration (equity maxim)

“And, in relation to promises and agreements, equity has been faithful to its maxim that it does not come to the aid of volunteers. For equity a deed does not make good a want of consideration”

If we turn from attempted gifts of property to purported dispositions of it for value, the picture changes completely. The common law objection remains, But 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. The purported assignee thus gets an equitable interest in the property immediately the legal ownership of it is acquired by the assignor, assuming it to have been sufficiently described to be then identifiable”.

- CL will not recognise this

Examples of things that will always be Future Property (CLASS TEST)

- Interest under a will where the testator is not yet dead.
- The interest of a beneficiary under a discretionary trust in the trust property
- A bare right to litigate where the action has not yet been commenced.
- Company dividends not yet declared
- Copyright in songs not yet written

Norman v Federal Commissioner of Taxation [1963] HCA 21

- **FACTS:** In a voluntary deed Norman granted to his wife the right to receive £450 interest on a loan and £460 company dividends
- Interest on the loan accrued in the relevant tax year although the loan had been made in a previous year. The borrower had the right to pay off the loan at any time and Norman could demand payment at any time but had to allow the borrower 18 months to pay.
- **ISSUE:** HAD THERE BEEN A VALID ASSIGNMENT OF THESE TWO PROPERTIES?
- The High Court held unanimously that the *dividends were future property*.
 - It would only come into existence if and when the company ACTUALLY declared a dividend; there was no possibility of the shareholder insisting that this be done.
- It is only after the dividend is actually declared that the shareholder has a right to sue for its payment as a debt. High Court held by a bare majority that the right to receive interest was a future right or a right of a future property
 - Dixon J; “It appears to me that the future interest was the merest expectancy or possibility, having no existence in contemplation of law”
 - Menzies J – no equitable assignment of the right to interest because what was assigned was not an existing right but was no more than a right which might thereafter come into existence and so could not be effectively assigned in equity without consideration.
 - McTiernan J (minority) – A present chose in action arose from the obligation to pay interest even though that interest couldn’t be demanded until the end of the year and was subject to a reduction in rate. The obligation was in existence when the deed was made.
 - Windeyer J:

‘The distinction between a chose in action, which is an existing legal right, and a mere expectancy or possibility of a future right ...does not, in my view depend on whether or not there is a debt presently recoverable by action because presently due and payable. A legal right to be paid at a future date is, I consider, a present chose in action, at all events when it depends upon an existing contract on the repudiation of which an action could be brought for anticipatory breach

Distinction: on one hand: right to a chose or intangible right enforceable against somebody ; on the other hand: There can't be a present or immediate assignment for something that doesn't exist yet regardless if it comes into existence in the future

5.72:

- Marcus Smith, *The Law of Assignment, the Creation and Transfer of Choses in Action*, 2007 OUP

‘The distinction between future choses and rights enforceable in the future turns on existence and not on enforceability. Rights enforceable in the future exist in the present. They grow out of a present legal relationship. They exist as future rights, even if they are contingent and not certain to occur. The nature of the contingent right – or the circumstances that will transform a potential right into a presently enforceable right – is defined by the presently existing legal relationship’

By contrast, a future chose does not exist at all. There is no present legal relationship out of which an enforceable right can grow.

Problems arising in the Norman case :

- Whereas the whole of a debt can be assigned at law under s12 *Conveyancing Act*, Norman was only attempting to assign part of the interest due under the debt
- Legal means to requirement assignment needed notice but no express notice had been given to the debtor (s12)

- Legal requirement hadn't been met, we had to turn to equity but no consideration and equity doesn't assist a volunteer *Windeyer J* – the assignment was possible in equity:
 “Such an assignment can be by way of gift; and, except that writing is required by s 9 of the Statute of Frauds, no formality is necessary beyond a clear expression of an intention to make an immediate disposition”

Problem Areas

Royalties: *Shepherd v Commissioner of Taxation* (1965) 113 CLR 385

- Inventor was entitled to royalties in relation to the manufacture of castors. By a voluntary deed he assigned ‘all [his] right title and interest in and to an amount equal to ninety per centum of the income which may accrue during a period of three years ... from [the] royalties’.. Tax Com says ineffective because its future property
 HC says present property
- The right to receive royalties from the manufacture of castors not yet manufactured was held to be a present right – that is the **right** to receive the royalties rather than the royalties themselves.
 - Barwick CJ: “..if the assignment of part of the chose in action consisting of the promise to pay royalties is complete, it is effective to vest the appropriate part of the right equitably in the assignee, whether or not the assignment is for consideration or by way of gift. It is only if the donee needs the assistance of equity to complete the gift, as distinct from enforcing the right given, that he can be met with the defence that equity will not assist a volunteer
- The royalties themselves were not what was being assigned (as obviously it was future); it was the contractual right to receive the royalties was the presently existing right
 Difference; the fruit and the tree
- The presently existing contractual right to receive the property not the royalties themselves

Partnership Interests: *FCT v Everett* [1980] HCA 6

- Everett assigned 6/13th of his share in a partnership in a firm of solicitors to his wife for expressed consideration of \$3,832.50. Notice of the assignment was given to the other partners of the firm.
- The Full Bench of the High Court:
 - “A partners interest in the partnership is a chose in action assignable in whole or in part....The better opinion seems to be that, though the interest of a partner is an equitable interest, it may be assigned under s 12 of the *Conveyancing Act*, 1919 (NSW)...The interest, being a chose in action, falls within the expression “debt or other legal chose in action” because the section, in providing that notice shall be given to a trustee “as a person liable in respect of such debt of other legal chose in action” appears to contemplate the assignment by a beneficiary of an equitable chose in action against a trustee distinction between mere future income (not yet earned) and the share of the partnership interest which is a present right

Howard v Commissioner of Taxation [2014] HCA 21

Trying to interpret the terms of an assignment to see what was being transferred from one party to another>

Received equitable compensation due to breach of fiduciary duty (Howard)> he attempted to argue that the money shouldn't have come to him but to his company

Terminology of assignment: "In consideration of [Disctronics'] promises set out in paras 1 and 3 hereof the directors, and each of them, assign absolutely unto and to the sole use of [Disctronics], any award of damages (whether on revenue or capital account), costs or interest made in their favour as a consequence of their participation in the joint venture or arising out of the proceedings and the ultimate outcome thereof".