

LAWS317 – EQUITY AND TRUSTS

Session 2, 2016

Complete lecture and reading notes using:

1. Peter Radan and Cameron Stuart, *Principles of Australian Equity and Trusts* (LexisNexis Australia, 3rd ed, 2015);
2. Radan et al, *Principles of Australian Equity and Trusts: Cases and Materials* (LexisNexis Australia, 3d ed, 2015).

TABLE OF CONTENTS	
TOPIC	Page
Week One: The History and Nature of Equity	3
Week Two: The Relationship Between Law and Equity	10
Week Three: Dispositions of Property	22
Week Four: Dispositions of Equitable Interests and Writing Requirements	37
Week Four: Property with a Limited Capacity for Assignment	41
Week Five: Fiduciary Obligations	45
Week Five: Introduction to Trusts	55
Week Six: Creation of Express Trusts	61
Week Seven: Variation and Termination of Trusts	72
Week Seven: Trustees	78
Week Eight: Beneficiaries and Tracing	89
Week Nine: Charitable Trusts	94
Week Nine: The Administration of Charitable Trusts	104
Week Ten: Resulting Trusts	110
Week Eleven: Institutional Constructive Trusts	120
Week Eleven: Remedial Constructive Trusts	128
Week Twelve: Equitable Estoppel	136
Week Twelve: Confidential Information	139

Week Four: Dispositions of Equitable Interests and Writing Requirements

FOUR WAYS OF DISPOSING EQUITABLE INTERESTS

1. Assignment
2. Direction by a beneficiary to a trustee
 - a. Where BUT asks T to hold B's interest on trust for 3rd party instead. **Writing required** – *Grey v Inland Revenue*
 - b. Where BUT asks T to transfer L + E interest to a 3rd party. **Writing not required** – *Vandervell v Inland Revenue Commissioners*
3. By contract
4. By declaration of trust

SECTION 23C(1) CONVEYANCING ACT

- Instruments to be in writing (interests in land, trusts over land, disposition of subsisting equitable interests)

DISPOSITION BY A BENEFICIARY'S DIRECTION

DISPOSITION BY CONTRACT

DISPOSITION BY DECLARATION OF TRUST

Four ways of disposing equitable interests:

1. Assignment:
2. Direction by a beneficiary to a trustee;
 - a. Where BUT asks T to hold B's E interest on trust for 3rd party instead. **Writing required** – *Grey v Inland Revenue*
 - b. Where BUT asks T to transfer L + E interest to a 3rd party. **Writing not required** – *Vandervell v Inland Revenue Commissioners*.
3. By contract;
4. By declaration of trust.

SECTION 23C – CONVEYANCING ACT

Instruments to be in writing

(1)

- **Interests in land** - (a) [legal + equitable]
- **Declaration of trusts over land** - (b)
- **Disposition of subsisting** (already existing) **equitable interests** – (c) [land and personal property]

(2) – **Provision doesn't affect creation or operation of resulting, implied, constructive trusts.**

- 'Writing' satisfied by more than one doc – must be obviously interconnected: *ANZ v Widin* (1990)
- S 23C(1)(b) doesn't require the trust itself to be written, just evidence of it in writing – *Byrnes v Kendel*. However, under (1)(a) – disposition or creation of interests in land must themselves be written. Same goes for disposing subsisting interests (1)(c).

Disposition by Direction of a Beneficiary to a Trustee

Scenario one: direction to hold property for a third party

Where a beneficiary under a trust directs the trustee to hold the trust property on trust for someone else instead (i.e. giving other person an E interest only)

- **Writing required** pursuant to 23C(1)(c) CA – *Grey v Inland Revenue*

Grey v Inland Revenue Commissioners [1959] 3 All ER 603

Facts

- Hunter was a BUT of 18K shares. Grey + Randolph were trustees.
- H orally directed G + R to hold the shares on trust for H's grandchildren.
- One week later, H executed written declarations of trust.
- Stamp duty needed to be paid on the above documents.

Issue

- How should payment be calculated? Cost depended on whether the documents were merely confirming an already effective trust or whether they were creating it.
- Was H's direction a 'disposition' and thus non compliant with the requirement of writing under 23C(1)(c)?

Held

- H's direction was a 'disposition' thus non compliant with writing requirements of the subsection.
- Written declarations disposed of H's equitable interest (not the oral direction), liable to *ad valorem* stamp duty.

Scenario two: direction to transfer property to a third party

Where a BUT directs trustee to transfer legal and equitable interests in trust property to third party, so latter is absolute owner.

- **Writing not required for personal property** – *Vandervell v Inland Revenue Commissioners* [1967] 1 All ER 1.
- NB writing always necessary for realty – 23C(1)(a).

Vandervell v Inland Revenue Commissioners [1967] 1 All ER 1

Facts:

- Bank a bare trustee of shares for V. V orally directed bank to transfer shares to Royal College of Surgeons. Intended for Surgeons to have legal and equitable interests in shares.

Issue:

- Was it a 'disposition' within meaning of 23C(1)(c)?

Held:

- Not a 'disposition' of subsisting equitable interests within meaning of 23(1)(c); not a disposition of equitable interest alone thus section doesn't apply + writing not required.
- Oral direction effective to transfer.
- NB distinguishable from *Grey*:
 - *Grey v Inland Revenue* involved transfer of equitable interest only.
 - Here, dealing with L + E interest.

To note:

- This case involved personal property.

- If real property – writing required under 23C(1)(a).
- Lord Wilberforce said that if V had died before direction to T was carried out, gift would nevertheless have been valid on basis V did everything within power to transfer.

Subsequent cases:

- *Parker & Parker v Ledsham* [1988] WAR 32, 37: if person in Vandervell's position died before transfer effected, his direction to trustee would be revoked by death.

Disposition of Equitable Interests by Contract to Assign

Where there is an oral agreement for valuable consideration to transfer an equitable interest.

- **Writing not required** because the agreement gives rise to a **constructive trust**.
- 23C(2) says writing requirements inapplicable in creation/operation of constructive trusts.
- This is the **prevailing view** but **be aware of judicial controversy**.
- The view was taken by Lord Radcliffe (minority) in *Oughtred +* subsequently endorsed in *Neville v Wilson* (both UK).
- Then *Neville* upheld in Australia by HC in *Halloran v Minister Administering National Parks and Wildlife Act 1974* (2006) 229 CLR 545.
- Note **well settled principle** that a contract for value to assign property of any kind gives rise to a constructive trust, where vendor a constructive trustee of property for purchaser, provided it's specifically enforceable.
 - *Bunny Industries Ltd v FSW Enterprises P/L* [1982]

Some general issues:

- Arguably, writing also not needed because in cases of oral agreements for consideration to transfer an equitable interest in property, transferor retains property but continues to hold it as trustee. Thus arguable no question of 23C(1)(c) applying because no disposition of a subsisting equitable interest.
 - Somewhat absurd because if the trustee was to then assign their E interest as trustee, writing would be required under 23C(1)(c) as it would be a disposition of a subsisting equitable interest.
- However, if agreement interpreted as a declaration of trust (creation of a new interest carved out of subsisting equitable interest) then writing would be required pursuant to 23C(1)(c). This is because a declaration of trust comes within the meaning of a 'disposition' in this sub section.
 - Though there is no case law on this second interpretation.

Oughtred v Inland Revenue Commissioners [1959] 3 All ER 623

Facts:

- Mrs Oughtred had E life estate in shares. Son Peter held E reversionary interest in shares (i.e. gets them when she dies). Mrs O legal owner of other shares as well.
- Mrs O + son orally agreed to transfer 2nd lot of shares (that Mrs O owned absolutely) to son, and son would give back reversionary interest making Mrs O absolute owner of first lot.

- 3 docs executed:
 - 1. Deed of release noting shares formerly held by trustees on trust for Mrs O for life with with E rev interest to P, now held on trust for Mrs O absolutely and intended that legal title given to her if trustees released from trusteeship.
 - 2. Transferred shares formerly owned by Mrs O absolutely to P – nominal consideration given.
 - 3. Transfer for nominal consideration of legal title from trustees to Mrs O relating to shares referred to in first doc.

Plaintiff's argument:

- Taxing authorities argued that 3rd doc effected disposition in favour of Mrs O.

Decision:

- Bare majority found in favour of taxing authorities.
- Though no clear majority view on whether agreements for value to transfer E interest need to be written.
- Why? Because decisions were based on interpretation of the relevant tax legislation. Conveyancing Act not considered.

Lord Radcliffe's approach (minority):

- Significant because adopted in subsequent case.
- A specifically enforceable oral agreement for valuable consideration to transfer an equitable interest created a constructive trust, with the consequence that the writing requirement of s 23C(1)(c) didn't apply because of 23C(2).

Neville v Wilson [1996] 3 All ER 171

- Court of Appeal in England.
- Upheld Lord Radcliffe's approach in above case.

Facts:

- Shares held on trust for family company (Neville). Shareholders in Neville orally agreed to liquidate Neville and divide E interest in shares amongst them.

Held:

- Oral agreement enforceable because it gave rise to a constructive trust, and in such a case section 23C(2) applies and writing is not required.

Subsequent Australian decisions

- Upheld in *Halloran v Minister Administering National Parks and Wildlife Act 1974* (2006) 229 CLR 545.

Disposition of Equitable Interests by Declaration of Trust

In this context we are looking at situations falling under 23C(1)(c), where an equitable interest holder (subsisting E interest holder) declares a trust on that interest so that someone else has the E interest.

- Writing required.
- Why? A declaration of trust is a form of 'disposition' under 23C(1)(c) + writing needed for such dispositions of subsisting equitable interests in real and personal property.

Week Six: Creation of Express Trusts

SUMMARY

CREATING EXPRESS TRUSTS

Express trusts may be created in three ways:

1. **By declaration of trust:** title holder expresses intention to hold property on trust for another.
2. **By transfer:** title transferred to a person with instructions that it be held on trust for someone else. Can occur as a settlement (*inter vivos* – during lifetime) or by will (*post mortem*).
3. **By direction:** B of existing trust directs trustee to hold interest on trust for another.

REQUIREMENTS

1. THE THREE CERTAINTIES

1. **Certainty of intention:** trust intended.
2. **Certainty of subject matter:** property.
3. **Certainty of object:** beneficiaries.

If trust is uncertain, it will fail and property held on resulting trust for creator or their representatives.

2. COMPLETE CONSTITUTION

Must be completely, irrevocably transferred.

This is relevant for trusts over land: has everything been done? writing needed, deed + CT (old system), registration, transfer, CT (torrens).

See *Milroy v Lord*, *Corin v Patton*.

3. WRITING REQUIREMENTS

Not a 'disposition' thus no writing under s23C(1)

Though writing required under s54 if over land

Though statute cannot be used to perpetuate fraud, i.e. won't fail for lack of writing if this would be fraudulent.

REQUIREMENTS

1. THE THREE CERTAINTIES

CERTAINTY OF INTENTION

The nature of intention

Was there an intention to create a trust now or later?

Can expressed intention be rebutted by evidence of a subjective intention?

Shams

Burden of proof

Precatory words

Mutual intention of creator and trustee to create a trust

Sole intention of trustee

Knowledge of beneficiaries

Nominating beneficiaries for life insurance policies

The parole evidence rule

Where the trust instrument is lost or destroyed

CERTAINTY OF SUBJECT MATTER

'Trust property'

CERTAINTY OF OBJECTS

Certainty of beneficiaries in fixed trusts

Certainty of beneficiaries in discretionary trusts

Trusts for unincorporated associations

Rule against delegation of testamentary capacity

2. THE COMPLETE CONSTITUTION OF TRUSTS

Declarations of trust

- Declarations of trust over realty
- Declarations of trust over equitable interests of realty and personalty
- 'Manifested and proved in writing'

Creation by transfer

Creation by direction

THE REQUIREMENT OF WRITING

Agreement to create a trust in future

The effect of non-compliance with writing requirements

VOLUNTEERS AND INCOMPLETELY CONSTITUTED TRUSTS

Examples

- Situation one
- Situation two
- Situation three

Is there a trust of promise?

SECRET TRUSTS

Intention of the testator

Communication of intention to donee

Acceptance by the donee

Proof

Nature of the secret trust

REQUIREMENTS

1. THE THREE CERTAINTIES

1A - CERTAINTY OF INTENTION

- Must be clear that creator intended to create a trust – *Korda v Australian Executor Trustees (SA) Ltd* [2015] HCA 6.
- *Saunders v Deputy Commissioner of Taxation* [2010] WASC 101
 - Don't need specific words.
 - Discern from language and conduct.
 - Parol evidence rule doesn't limit evidence to be considered.
 - Burden of proof rests with person asserting trust.
- *Shah v Shah*: don't need word 'trust'.
- *Foley v Foley*: silence (i.e. failure to rebut allegation of trust) won't amount to intention.
- One must intend to create a trust at that time so it is operative at that time.

Was there an intention to create a trust now or later?

- One must intend to create a trust at that time so it is operative at that time.
- If a party expresses intention to create a trust later on, but trust isn't created, purported B's can't force constitution of trust (they're volunteers) – *Pascoe v Boensch* (2008) 250 ALR 24.
- However, **you can create a trust immediately but postpone B's rights of entitlement to a later date.**
 - *Re Armstrong (dec'd)* allowed trust for sons over capital in bank account despite B's rights postponed until investments matured.

Can expressed intention be rebutted by evidence of a subjective intention?

- Old law – use of the word 'trust' was insufficient evidence of intention to create a trust – *Commissioner of Stamp Duties (Qld) v Jolliffe* (1920) 28 CLR 178.
- Current law – **word 'trust' is sufficient evidence of intention**- *Byrnes v Kendle* (2011) 243 CLR 253.

Byrnes v Kendle (2011) 243 CLR 253

Facts:

- House registered to Kendle. K married to Byrnes and signed 'acknowledgement of trust' which declared he held one undivided half interest as tenant in common for Joan.
- They separated and Joan assigned her interest to her son Martin.
- K argued he didn't have a real intention to create a trust and he could bring evidence to show his true intention.

Held:

- **Intention proven by objective evidence** contained in the acknowledgement **NOT by subjective intention.**
- 'Intention' to create a trust is intention to be extracted from words, not a subjective intention which may have existed but which can't be extracted from those words.
- I.e. word '**trust**' = **intention to create trust.**

Korda v Australian Executor Trustees (SA) Ltd [2015] HCA 6

Facts:

- AET, Forest Co and Milling Co entered into a deed providing that proceeds of sale of timber products and land would be paid to AET. Expressly acknowledged that AET would hold proceeds of trust for investors. FC and MC went into receivership.
- Secured creditors sought access to proceeds of sale and land to satisfy debts.
- AET argued that FC and MC held proceeds and land on trust for AET.

Held:

- No intention to create a trust.
- Claimant needed to prove either express or implied intention to create a trust.

Reasoning:

- Parties had deliberately created an express trust b/w AET and investors, but hadn't done so for companies and AET. Evidence against finding an intention.
- **Wouldn't find an intention to create a trust just to be commercially sensible/expedient for investors.**

Shams

- Shams/fake trusts are an exception to objective test in *Byrnes v Kendle*
- Shams are 'Steps which take the form of a legally effective transaction but which the parties intend should not have the apparent or any legal consequences' – *Equuscorp P/L v Glengallan Investments P/L*.
- 'Strong and natural presumption' against finding a sham – *Sharrment P/L v Official Trustee in Bankruptcy*.
- Natural suspicion of sham where settlor is insolvent – *Arogen P/L v O'Meley* [2013] NSWSC 1197
- A transaction won't be a sham simply because it was entered into with an improper motive. Look for intentional deception as to the **effect**, not purpose – *Lewis v Condon*.
 - In *Lewis v Condon*: intention to create trust satisfied where created to deceive former husband and Family Court about extent of her assets and to avoid tax.

Precatory words

- If creator transfers property and expresses hope that property used in some way, condition is precatory and imposes no obligation.
- 'I direct' generally indicates intention

Knowledge of beneficiaries

- B's don't need to know about trust – *Moriarty v Various Customers of BA Peters plc (in admin)* [2008] EWHC 2205 (Ch).

The parol evidence rule

- If disposition made in writing, may be subject to parol evidence rule which prevents admission of extrinsic evidence.
- Parol evidence rule **doesn't apply where**:
 - 1. Disposition of trust property **not required to be in writing** (e.g. personal property);
 - 2. Document not intended as a complete expression of transferor's intention;
 - 3. Parol evidence needed to establish actual intent of settlor at time;
 - 4. Document ambiguous;
 - 5. Document created in circumstances of fraud, duress, mistake.

Where the trust instrument is lost or destroyed

- May be able to use oral evidence.

- Where original writing not produced, can use secondary evidence if there is clear and convincing proof of existence + contents of writing – *Maks v Maks* (1986) 6 NSWLR 34
- S 48 Evidence Act allows party to prove existence of a document by adducing evidence of an admission by another party to proceedings as to contents of document or where document not available.

1B - CERTAINTY OF SUBJECT MATTER

- Trust property must be reasonably identifiable or ascertainable at the time the trust is created.
- It must have been attributed to be held on trust.
- **Vague dispositions fail** – *Re Appleby's Estate* (1930) 25 Tas LR 126
 - Examples:
 - 'consider my near relations' – *Sale v Moore*
 - 'make ample provision' – *Winch v Brutton*
- If interest divided, amount must be specified.

Where trust property is part of a number of identical items

- Sometimes trust property is part of a number of identical items, such as '5% of 950 shares'.
- Issue: may be uncertain if shares aren't specifically identified/numbered.
- Old law – *Herdegen v Federal Commissioner of Taxation* (1988)
 - Subject matter not certain because no way to ascertain how shares would be selected, even though the shares themselves were numbered.
- New law – *Hunter v Moss* [1994] affirmed in *White v Shortall* (2006) 68 NSWLR 650

White v Shortall (2006) 68 NSWLR

Facts:

- Declaration of trust over 1.5 million shares
- 222K held for P, remaining for D.
- D promised in writing to hold shares on trust but later refused to recognise disposition.
- D argued trust ineffective because it offended certainty of subject matter.
- Shares not numbered.

Decision and reasoning:

- **A gift of part of a shareholding not uncertain as to subject matter.**
- Don't need to identify particular shares in which B has beneficial interest.

'Trust property'

- Must be property in legal or equitable form.
- Can be tangible and intangible, e.g. choses in possession, contractual rights, choses in action.
- **Cannot hold future property on trust** – *Re Rule's Settlement* [1915] CLR 670.
- **Creator can't transfer title in property in which he has no interest.**

- **A mere expectancy, like interests of a discretionary beneficiary or of an intended beneficiary under a will, cannot be held on trust.**

1C - CERTAINTY OF OBJECTS

- **Beneficiaries must be identified with sufficient certainty** – *Morice v Bishop of Durham* (1804) 32 ER 656.
- Called 'beneficiary principle'.
- This BP strikes down trusts made **only** for a purpose (without specific beneficiaries). Exception: charitable trusts.
- Issue: trusts for purpose with indirect beneficiaries.
 - *Yeomans v Yeomans* [2005] QSC: trust establishing fund for indigenous and intercultural education of my grandchildren within Asia Pacific and Indian Sub continent region upheld as being a purpose trust with defined beneficiaries (grandchildren definable).
- **Level of certainty depends on whether fixed or discretionary trust.**

Certainty of beneficiaries in fixed trusts

- '**List certainty**' required – court must be able to draw a complete list of B's at time beneficial interests come into effect *Kinsela v Caldwell* (1975) 132 CLR 458.
- Satisfied if **substantial majority of beneficiaries** can be ascertained within a reasonable time after gift comes into effect – *West v Weston* (1998) 44 NSWLR.
- It is okay to misdescribe B's identity if it can't be discerned *Andrew v Dobson* (1788).

Certainty of beneficiaries in discretionary trusts

- '**Criteria certainty**' required – test is whether or not an individual is a part of a class – *Re Baden's Deed Trusts; McPhail v Doulton* [1971] AC 424.
- Test used to be list certainty but this changed with *Re Baden*.
- *Re Baden* also stated that a trust power may fail because it's **administratively unworkable**. For example,
 - Where criteria so hopelessly wide as not to form anything like a class e.g. 'all the residents of greater London'. Couldn't be sensibly administered by trustee.
- High Court is yet to rule on validity of *Re Baden* though has been favourably received in states – e.g. *Hyde v Holland* [2003] NSWSC 733.

Rule against delegation of testamentary capacity

- There was a rule that you couldn't delegate testamentary power though it has been overturned by *Succession Act 2006* (NSW).
- I.e. previously couldn't delegate powers of appointment in a will

2. THE COMPLETE CONSTITUTION OF TRUSTS

- Trust **must be 'completely constituted'**. This requires:
 - An **irrevocable transfer**;
 - Creation of a **beneficial interest**.
- No transfer of property = no trust.

- Exception: where **SP** available based on promise to create trust.
- **Rules vary** depending on **how trust is created**, whether it's **voluntary** and whether transfer must be **written**.
- **Mainly relevant for trusts over land**, i.e. has everything necessary been done?
 - Torrens title: CT, Transfer in registrable form, registration.
 - Old system: CT, Deed.
 - Both need writing.
 - Statute can't be used to perpetuate fraud, so if there is fraud then equity won't allow it.

Declarations of trust

Where creator declares themselves trustee

- No transfer of property needed as T and C same person.
- Though they are 'dispositions' per CA thus subject to writing requirements.

Declarations of trust over realty

- Must be evidenced in writing – CA 23C(1)(b)
- Cases suggest that they do not need to be **created** by writing (i.e. not subject to CA 23C(1)(a) – *Secretary, Department of Social Security v James* (1990) 95 ALR 615)

Declarations of trust over legal personality

- Declarations of trust over legal interests in personal property not required to be in writing because not concerned with realty or subsisting equitable interests.

Declarations of trusts over equitable interests of realty and personality

- Declaration of trust of a subsisting equitable interest (whether over real property or personal property) must be written – s23C(1)(c) CA

'Manifested and proved in writing'

Pascoe v Boensch (2008) 250 ALR 24

- Section 23C(1)(b) CA requires declarations of trust over land to be evidenced in writing and signed by declarant.
 - Requires that writing admits trust and satisfies three certainties of intention, subject matter and object.
- When declaration involves a subsisting equitable interest, it's subject to 23C(1)(c). Here, the trust itself must be in writing. Has the object of preventing secret transactions. Terms of trust don't have to be written or fact trust exists.

Creation by transfer

- Trusts created by transfer executed when title of trust property transferred completely and irrevocably to trustee.
- Occurs in two contexts: inter vivos and post mortem trusts.

Inter vivos trusts

- Consider relevant writing requirements.
- Rule in *Milroy v Lord* applies to trusts created by voluntary transfer. I.e. Executory trusts may be enforceable if everything necessary to transfer title done by creator.

Post mortem trusts

- Must be written, signed by testator in presence of two or more witnesses – *Succession Act*
- Exception: secret trust

Creation by direction

- Where BUT directs T to hold interest on trust for another. This is a disposition of a subsisting equitable interest and must be written – *Grey v Inland Revenue*.

3. THE REQUIREMENT OF WRITING

Agreement to create a trust in future

Issue: must contracts to create a trust over land in future be in writing?

- An agreement to create a trust in future is not a 'disposition' because interests aren't disposed thus s23C doesn't apply.
- However, s 54A(1) of Conveyancing Act applies which requires writing and signature of party to be charged or of another authorised person.
 - *Ciaglia v Ciaglia* (2010) 269 ALR 175; *Khoury v Khouri* (2006) 66 NSWLR 241.

The effect of non-compliance with writing requirements

- Would normally be unenforceable.
- However, **statute cannot be used to perpetuate fraud.**
 - Therefore a **trustee cannot rely on the requirement of writing to deny existence of a trust (when it wasn't written) that they knew existed.**
 - *Schweitzer v Schweitzer* [2010] VSC 543.