

Lecture notes

Week 4 – Dispositions in Equity (continued)

Intro Lecture

Summary of Week 3

Assignments of property can be done in two ways:

1. For consideration
2. As a gift (voluntary)

Differences in equity

- A transfer of property can be complete in equity even though the common law would say the transfer is incomplete (i.e. *Milroy v Lord* – legal chose that has not complied with s12 Conveyancing Act e.g. notice requirement)
- A transfer may be recognised in equity, even though the property may not be assignable at common law (e.g. a partial chose in action)
- Some forms of property are only recognised in equity and therefore only assignable in equity (e.g. beneficial interest under a trust)

Assignments overview

3

- **Legal assignment of legal property:**
 - What is the property?
 - What are the formalities? (Eg shares, land, chattels)
 - Chose in action :s12
- **Legal property, ineffective legal assignment**
 - Is the assignment recognized in equity?
 - × Has there been consideration? (can the contract be specifically enforced)
 - × If no, (voluntary) is the assignor's conscience bound?
- **Legal property, unassignable at law**
 - Ie partial chose in action
 - Treated the same as equitable assignment of equitable property: immediate, irrevocable intention
- **Is it present or future property?**
 - Presently existing property, but not yet owned by assignor
 - Property that is not yet in existence
 - Is unassignable at law, assignable in equity for consideration. (*Norman, Shepherd*)
- **Assignment of Equitable Property**
 - Assignment is complete **in equity** where there is an immediate, irrevocable intention by assignor to assign the property.
 - **However: the transaction may still subject to statutory requirements of writing**

Reminder

4

- The assignment of equitable property can only be achieved in equity. Because equitable property is not recognised at common law it cannot be the subject of a legal assignment. *Apart from any statutory requirement of writing*, all that is necessary for a valid equitable assignment is 'a clear expression of an intention to make an immediate disposition': *Norman* at CLR 30; ALR 149, per Windeyer
- *So, if you're looking at the assignment of equitable property, ask: are there formalities that need to be complied with?*

Moving onto Week 4

Equitable interest in property can be disposed of in 4 ways:

1. Assignment (week 3)
2. Direction by a beneficiary to a trustee (week 4)
3. Contract to assign an equitable interest
 - agreement to assign: if there is consideration and a court would order specific performance, then assignee has an equitable interest i.e. in **Re Lind**
4. Declaration of trust in an equitable interest
 - a beneficiary can declare themselves a trustee for benefit of someone else, which creates a 'sub trust', who has the interest in the property?

Section 23C CA

6

23C Instruments required to be in writing

(1) Subject to the provisions of this Act with respect to the creation of interests in **land** by parol:

(a) no interest in **land** can be created or **disposed** of except by writing signed by the person creating or **conveying** the same, or by the person's **agent** thereunto lawfully authorised in writing, or by **will**, or by operation of law,

(b) a declaration of trust respecting any **land** or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by the person's **will**,

(c) a **disposition** of an equitable interest or trust subsisting at the time of the **disposition**, must be in writing signed by the person disposing of the same or by the person's **will**, or by the person's **agent** thereunto lawfully authorised in writing.

(2) This section does not affect the creation or operation of resulting, implied, or constructive trusts."

WRITING NEEDED

- Creation and disposition of legal interests in **land** : s23C(1)(a)
- Creation and disposition of equitable interests in **land** : s23C(1)(a)
 - Therefore an assignment of a legal or equitable interest in land is void, unless it is in writing
 - UNLESS it is pursuant to an implied, resulting or constructive trust (specifically excluded) or by will.
- Dispositions of **subsisting equitable interests (land or personalty)**: s23(1)(c) (ie equitable interests that exist prior to the disposition). Note the relevance of this section in reference to sub-trusts: see Dixon J in *Comptroller of Stamps v Howard-Smith* p621-2
- **MANIFESTED AND PROVED by writing**
- Declaration of trust: s23(1)(b)
- However, a declaration of trust actually creates an equitable interest ie in the beneficiary. So does a declaration of trusts over land have to be in writing, or only manifested and proved by writing?

The difference between requirements for something to ‘be in writing’ and something to ‘be proved in writing’ is that the latter will still exist it just won’t be enforceable.

Main cases we look at in week 4

Grey v Inland Revenue Commissioners [1960] AC 1

Vandervell v Inland Revenue Commissioners [1967] 2 AC 291

Oughtred v Inland Revenue Commissioners [1960] AC 206

Dispositions in Equity – Part III**S23C(1) Conveyancing Act**

Dispositions of land will be caught by the writing requirements of this section. **S23C(1)(a)** deals with the creation or disposition of any interest in land and **S23C(1)(b)** deals with a declaration of trust over the land.

Given this is the situation for land, we will focus on the disposition of personal property.

When we’re disposing of a legal interest in personal property **S23C(1)** does not apply, however if the disposition is of an equitable interest in personal property, the issue is whether this is captured within the requirements of **S23C(1)(c)** which states:

(c) a **disposition** of an equitable interest or trust subsisting at the time of the **disposition**, must be in writing signed by the person disposing of the same or by the person’s **will**, or by the person’s **agent** thereunto lawfully authorised in writing.

Despite this being in the CA, it has been held that paragraph C DOES capture disposition of equitable interest in personalty.

Meaning of disposition

Timpson's Executor v Yerbury [1936] 1 KB 645

We've already covered this, however the court in this case said there are four types of disposition:

1. Assignment (week 3)
2. Directions by beneficiaries to trustees
3. Agreements to assign
4. Declarations of trusts

We will now consider if **S23C(1)(c)** does mandate writing requirements in each of these forms of disposition where the property being disposed of is an equitable interest in personal property.

Note: All of the cases we consider are looking at equitable interests in shares. The practical issue in all the cases we look at is if the position attracted 'ad valorem' stamp duty, which is a tax assessed based upon the value of the property being disposed of, but is only required when the disposition is required to be done in writing, and not when it can be done orally. In all cases we look at, there was an earlier oral disposition, followed by written evidence of this oral disposition.

The questions considered is, was the earlier oral disposition effective? If it was, then the written documents were just evidence of this and not amount to instruments of disposition, which means only nominal stamp duties were required. If the oral dispositions were in effective because they had to be in writing, the written documents effected the disposition and the 'ad valorem' stamp duty would be required.

Directions by beneficiaries to trustees

A direction to a B by a T can be one of two types:

1. Direction to the T that they hold trust property for a 3rd party
2. Direction to the T to transfer trust property in its entirety to a 3rd party

Direction to the T that they hold trust property for a 3rd party

Here, the B instructs the T to hold the equitable interest in the property on trust for someone else. The result is the B giving the direction is no longer a beneficiary.

E.g. A holds personal prop on trust for B, the effect of the direction is that A now holds the prop on trust for C

This occurred in the below case:

Grey v Inland Revenue Commissioners [1960] AC 1

The prop here was shares in a corporation. Was the oral direction effective to dispose the property? The court found it was ineffective in the face of the requirement of writing set out in **S23C(1)(c)**.

Direction to the T to transfer trust property in its entirety to a 3rd party

Here, the B directs the T to transfer both the legal and equitable interests in the prop to a 3rd party, making the 3rd party the absolute owner of the prop.

E.g. A is the trustee for shares for B, where B makes the above direction for C, making C the absolute owner of the shares.

This occurred in the below case:

Vandervell v Inland Revenue Commissioners [1967] 2 AC 291

The question in this case was whether the direction was effective, or was ineffective due to the writing requirement in **S23C(1)(c)**? The court found the direction was effective and that **S23C(1)(c)** did not impose a writing requirement for trusts of personal property.

The court said this was different to **Grey v Inland Revenue Commissioners** because the beneficial owner wants to deal with both the equitable and legal estate of the property. Therefore **S23C(1)(c)** only applies when the direction relates to the equitable interest in the property only.

An unresolved issue here is what happens if, having given the direction, but before it is carried out, the B who gave the direction dies? In this case, the court said the gift would be valid as the B had done everything within their power to transfer the property to C.

However, in the below case:

Parker & Parker v Ledsham [1988] WAR 32

Here, the court held that in these circumstances, the death of the person requesting the transfer would render the gift as revoked.

Agreements to assign

Contracts for valuable consideration – does the contract have to be in writing per **S23C(1)(c)**? To answer this, we need to consider the relationship between **S23C(1)(c)** and **S23C(2)**.

S23C(2)

(2) This section does not affect the creation or operation of resulting, implied or constructive trusts."

It is well settled that when a contract for valuable consideration is entered into, the vendor becomes a constructive trustee for the purchaser. This section would therefore indicate that such a contract does not have to comply with **S23C(1)(c)**. The below case helps us determine if this is correct.

Oughtred v Inland Revenue Commissioners [1960] AC 206

In this case, the question was if an oral contract to transfer an equitable interest in shares in exchange for valuable consideration was an effective disposition of his equitable interest.

The majority found that the oral contract was not effective, and that the later written agreement created the disposition. The most important speech was from **Radcliffe L**, who was in the minority. He stated the oral agreement was a constructive trust and it was an effective disposition, resulting in no need for writing and only nominal stamp duty as a result of **S23C(2)**.

This was later proved to be the right view in the below case:

Neville v Wilson

N held shares in another company on trust for shareholders of N. the shareholders of N orally agreed to liquidate that company, and distribute these shares amongst themselves. The oral agreement was held enforceable and gave rise to a constructive trust.

The court said that **S23C(2)** renders **S23C(1)(c)** inapplicable for constructive trusts.

It could be argued that the circumstances in the above cases did not create a constructive trust, rather a new trust, which is a disposition by definition and covered under **S23C(1)(c)**, meaning **S23C(2)** would not apply and writing would be required.

Declarations of trusts

The first thing to note is that a declaration of trust of an equitable interest means, the person making the declaration retains the title to the equitable interest, but makes himself a trustee for the 3rd party and makes himself a trustee for them.

Given a declaration of trust is required to be in writing, this situation is also covered by **S23C(1)(c)**. Academics say the writing requirements should not apply, as this situation does not relieve the declarant of their interest in the property, rather making them a trustee in the property which means there is no disposal of the entirety of their equitable interest this doesn't meet the definition of 'disposition'. This view does lead to a crazy result, meaning a declaration of trust in this way has no need for writing, but if it is later disposed of by the beneficiary it does require writing. To avoid this, we give **S23C(1)(c)** its ordinary meaning, which is that a declaration of trust with respect to equitable interests in personal property must be in writing per **S23C(1)(c)**.

BUY NOTES TO SEE THE REST!