

Equity and Trusts

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- May encourage more structured approach to enforceability of equitable rights against registered interest holders – under in personam principle, full equitable beneficial interest will be enforceable against registered proprietor BUT enforceability of mere equitable interest is less clear
- Clear endorsement of well-structured equitable classification may encourage more logical and consistent relationship between equitable principles and statutory indefeasibility
- Overriding utility of equitable classification is not simply its capacity to rationalise, clarify and explain different perspectives of equitable rights, but its explicit articulation of a diverse equitable landscape

The Law of Assignment

- Disposition: Alienation of property by one person for benefit of another
- **Conveyancing Act 1919 (NSW) s 7(1):**
 - Disposition includes a conveyance, and also an acknowledgment under section 83 of the Probate and Administration Act 1898, vesting instrument, declaration of trust, disclaimer, release and every other assurance of property by any instrument except a will, and also a release, devise, bequest, or an appointment of property contained in a will; and ‘dispose’ has corresponding meaning
 - Stipulates assurance includes conveyance and disposition made otherwise than by will
 - Sec 7(1) also stipulates conveyance includes any assignment, appointment, lease, settlement or other assurance by deed of any property
 - Assignment of property is disposition of property
- Disposition can be of legal interest in property or of equitable interest in property
- Consideration not necessary for disposition of presently existing property and owners able to dispose of such property by way of gift
- But disposition by way of assignment of future property requires valuable consideration

The meaning and importance of assignments of property

- Assignment: transfer of an existing proprietary right from assignor to assignee: ***Yara Australia Pty Ltd v Oswal (No 2)***
- Transfer: when assignor parts with something in circumstances where recipient (assignee) of that thing receives same thing previously held by assignor: ***Lyle & Scott Ltd v Scott’s Trustees***
- Result: assignor no longer has interest in property
- E.g. sale of goods and conveyance of land
- Assignment distinguished from agreement to assign – immediately dispositive act vs promise which must be supported by valuable consideration (***Hawcroft General Trading Co Pty Ltd v Hawcroft***)
- Intention of assignor must be he is to have no interest in property once assignment completed
- Express private trust: settlor does not retain any form of ownership – trustee owner of legal interest in property and beneficiary acquires equitable interest
- OR creator of trust may create trust by declaring himself trustee of property for beneficiary – creator retains legal interest
- Although both disposition, intention for assignment quite different from intention for declaration of trust
- Legal assignment: assignment pursuant to principles of common law or statute
- Equitable assignment: assignment pursuant to principles of equity

- Legal assignment only occur in relation to rights and liabilities recognised by common law or statute → If requirements not satisfied, may have been assigned in equity
- If right or liability only recognised in equity, can only be subject of equitable assignment
- Legal assignment gives assignee legal interest in property
- Equitable assignment gives equitable interest
- Express private trust → to be completely constituted, must be legal or equitable assignment of property from settlor to trustee

Assignments at law

- Requirements depend upon nature of property being assigned
- **Land**
 - Legal assignment of old system title land: delivery of deed of conveyance from assignor to assignee: **CA s 23B(1)**
 - Legal assignment of Torrens title land: registration of relevant dealing in form prescribed by legislation: **RPA s 41(1)** → **Breskvar v Wall**: system of title by registration
- **Goods**
 - Title to specific goods sold under contract of sale passes when intended by parties to contract: **Sale of Goods Act 1923 (NSW) s 22**
 - Assignment of goods at law by way of gift effective by delivery of goods with intention to give or by deed of gift: **Rowland v Stevenson**
- **Debts and choses in action**
 - **Torkington v Magee**: Choses in action are personal rights of property which can only be claimed or enforced by action, not by taking physical possession
 - Form of intangible property: **Berryman v Zurich Australia Ltd**
 - Can be legal or equitable
 - Legal choses in action
 - Debt – obligation of one party to pay a sum of money to another: **Freyer v Powell**
 - Assignable right to sue incl assignable right to sue for damages for personal injuries: **Simpson v Norfolk & Norwich University Hospital NHS Trust**
 - Shares: **Qilin World Capital Ltd v CPIT Investments Ltd**
 - Equitable chose in action: interest in a partnership: **Commissioner of State Taxation of the State of SA v Cyril Henschke Pty Ltd**
 - **Investors Compensation Scheme Ltd v West Bromwich Building Society**: Assignment of chose in action = what is assigned is the chose, the thing, the debt or damages to which the assignor is entitled – existence of a remedy is essential condition for existence of chose in action
 - Originally legal choses in action generally not assignable at law
 - Considerations of mercantile convenience and necessity led equity to recognise legal choses in action could be assigned: **Sprint Communications Company v APPC Services Inc**
 - No particular form of words necessary for such equitable assignments: **Row v Dawson**
 - Nor is consideration required for equitable assignment of legal chose in action: **Jaeger v Bendigo & Adelaide Bank Ltd**
 - Effect: make assignor bare trustee of legal chose in action for assignee
 - Equity intervenes by insisting assignor do whatever is necessary to enable assignee to obtain benefit of assignment – requires assignor to lend name to any suit to recover debt or enforce chose in action: **Dwyer v Derek** → assignor bound by its result and precluded from subsequently suing on debt or chose in action at common law

- Four days after will executed, signed unattested memorandum which gave husband life interest with instructions that, after his death, should be divided equally among number of named beneficiaries
- Husband had been told of testatrix's wishes and had agreed to conditions shortly after will executed
- 10 years later, testatrix died leaving only personal property
- Husband died soon after
- One of named beneficiaries (niece) had died after will and memorandum were executed but before testatrix had died
- **Issue:** whether niece's interest failed or whether it would pass to her legal personal representative
- **Held** husband held corpus of property upon trust for two nieces and nephew, notwithstanding fact niece predeceased testatrix
- Second theory
- Second theory more favoured in modern times and accepted in **Ledgerwood**
- Issue then whether secret trust is express trust or constructive trust
- Suggested constructive trust as enforced notwithstanding lack of compliance with statutory requirements of wills legislation – suggested in obiter comments of HC in **Bathurst City Council v PWC Properties Pty Ltd**
- Issue significant where property is land
- If constructive trust – statutory requirements of writing not applicable: **s 23C(2)**
- If express trust – writing would be required in cases of land: **s 23C(1)** BUT could be argued writing not required on basis equity would not allow requirements of s 23C(1) to be used to perpetrate a fraud

Variation and Termination of Trusts

Variation of express trusts

- **Powers to vary contained in express trusts**
 - Express provisions that give trustee power to make certain amendments to trust arrangement: **Mercanti v Mercanti**
 - **Kearns v Hill:** Power of variation contained in trust instrument given natural and ordinary meaning
 - BUT not likely power will extend to varying trust in way that would destroy its substratum: **Mercanti**
 - **Andtrust v Andreatta:**
 - Trustee given power to vary trusts 'in any manner whatever'
 - Accepted phrase included power to vary vesting date of trusts in question as 'the power to vary the trusts set out in the deed should be taken to include a power to vary them by extending the time for which they are to endure'
 - Must be exercised bona fide and in way that benefits the trust overall: **Wilson v Metro Goldwyn Mayer**
- **The court's inherent powers to vary trusts**
 - Court may declare trustee can deviate from terms if it can be shown there is emergency and variation necessary to salvage trust property or prevent trust from unexpectedly suffering loss
 - **Chapman v Chapman:**
 - House of Lords held 4 types of emergency that could be remedied:

1. Changes in nature of investments for infants from personalty to realty
 2. Investments in business transactions not authorised by a trust of settled land
 3. Payment of maintenance out of income even where there is direction to accumulate income
 4. Compromises in favour of unborn children
- ***Tickle v Tickle:***
 - Inherent power might embrace circumstances where there was element of salvage and flavour of compromise and combination of these factors may make it proper case for court to exercise jurisdiction to vary
 - 5th category: circumstances have occurred that have tended to thwart creator's intention and parties consented to course which will effect alternative scheme in line with creator's intention
 - Must only be used in cases of emergencies considered to be unforeseen or unexpected events that are embarrassing to trustees
 - ***Re Langford (dec'd); Equity Trustees Ltd v Langford:*** Sale of settled land to pay outstanding land tax not emergency as possible that beneficiaries could all agree to sale even though not done so by date of hearing
 - ***Paloto Pty Ltd v Herro:*** Request to change vesting date to avoid capital gains tax not emergency as while trust created in 1965, tax introduced in 1985 and settlor had many years to make changes in response to tax's imposition
 - ***James N Kirby Foundation v A-G (NSW):*** No inherent power to vary trust deed for charitable trust → can only create schemes when execution of charitable trust become impossible: ***Ku-ring-gai Municipal Council v A-G***
- **Statutory power to vary trusts when expedient**
 - **Trustee Act 1925 (NSW)**
 - **81 Advantageous dealings**

(1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure, or transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the instrument, if any, creating the trust, or by law, the Court:

 - (a) may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, including adjustment of the respective rights of the beneficiaries, as the Court may think fit, and
 - (b) may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.

(2) The provisions of subsection (1) shall be deemed to empower the Court, where it is satisfied that an alteration whether by extension or otherwise of the trusts or powers conferred on the trustees by the trust instrument, if any, creating the trust, or by law is expedient, to authorise the trustees to do or abstain from doing any act or thing which if done or omitted by them without the authorisation of the Court or the consent of the beneficiaries would be a breach of trust, and in particular the Court may authorise the trustees:

 - (a) to sell trust property, notwithstanding that the terms or consideration for the sale may not be within any statutory powers of the

- Although trustee may have acted honestly and reasonably, court will refuse relief if to do so would unduly prejudice beneficiaries: **Hagan v Waterhouse**
- Court will refuse to excuse breach if general equitable defences such as delay on part of trustee are established
 - If trustee acted on basis of legal advice – will generally mean acted reasonably: **Re Investa Properties Ltd**

Personal claims against third parties

- If beneficiaries overpaid or strangers receive trust property, remaining beneficiaries entitled to bring personal action (*in personam* claim) against them to recover loss
- **Re Diplock's Estate; Diplock v Wintle:**
 - Executors of large estate innocently distributed large sum to over a hundred charitable institutions in mistaken belief empowered to do so under will
 - Provision in will failed – challenged to its validity successfully brought by other beneficiaries of the estate
 - Settlement was reached with executors but beneficiaries brought personal actions against recipients who had been wrongfully paid
 - **Upheld** bringing of personal actions for recovery even though recipients innocent of any wrongdoing
 - Could only be brought by beneficiaries after all remedies been pursued against executors and had been exhausted
 - Decision upheld in **Ministry of Health v Simpson**
- **Ron Kingham Real Estate Pty Ltd v Edgar:** Right was general equitable right available to all beneficiaries
- **Heperu Pty Ltd v Belle:** *Ministry of Health v Simpson* not authority for wider proposition that equity permits personal action against a volunteer receiving the traceable proceeds of misappropriated funds

Tracing

- Beneficiaries right to pursue trust property wrongfully taken or misappropriated by trustees or placed in hands of third parties who are not bona fide purchasers taking for value and without notice: **Relfo Ltd v Varsani**
- Tracing = allows beneficiaries to pursue their equitable rights to trust property through the hands that receive it, as well as into the new property that may have been created from or mixed with the trust property
- Personal remedies of little value of trustee insolvent
- Tracing claims allows beneficiaries to reclaim trust property and keep it immune from claims of other creditors in the insolvency
- If tracing not possible (bona fide purchaser for consideration and without notice) – only personal remedies available: **Akita Holdings Ltd v Honourable A-G of the Turks and Caicos Islands**

Common law and equitable tracing

- Equity recognises beneficiary retains property rights over trust property where mixed with other property or converted into new type of property: **Brady v Stapleton**
- Common law – mixture or conversion = only right to damages remains: **Puma Aust Pty Ltd v Sportsman's Aust Ltd (No 2)**
- **Foskett v McKeown:**

- Tracing is neither claim nor remedy
- Merely process by which claimant demonstrates what has happened to his property, identifies its proceeds and persons who have handled or received them, and justifies his claim that proceeds can properly be regarded as representing his property
- Identifies the traceable proceeds of claimant's property
- Enables claimant to substitute traceable proceeds for the original asset as the subject matter of his claim
- Does not affect or establish his claim
- Because tracing is evidential process – judges free to assess evidence and make reasonable inferences based on common sense: **Lawrie v Hwang**
- **Toksoz v Westpac Banking Corporation:**
 - Where facts as proved are sufficient to permit inference that moneys have been received or property bought without there being honest source available to explain wealth and sums or value can be seen as referable to following party's property wrongfully obtained, such that inference is open that wrongfully obtained funds were source of wealth, the funds can be so treated

Sources of the jurisdiction to trace – fiduciary duty

- Prior fiduciary relationship = essential prerequisite to claim of tracing in equity: **Sinclair v Brougham**
- Remedy of tracing comes from equity's exclusive jurisdiction to deal with purely equitable claims
- **Foskett:** Critical of necessity for fiduciary relationship to exist as precondition but comments fell short of removing requirement
- **CBA v Saleh** (NSW): Better view is tracing protects property rights rather than enforcing fiduciary relationships
- Trend of authority away from requiring fiduciary duty
- **The need for property**
 - Claimant seeking to trace trust property must establish had equitable interest in property prior to breach of fiduciary duty and that property now lies in hands of def → necessary to ascertain trust property and identify it as being held by def
 - Does not matter if mixed with other property or trust funds used to purchase other property
 - BUT if property dissipated or destroyed – right to trace ceases
 - **Raulfs v Fishy Bite Pty Ltd:**
 - Raulfs entered into partnership agreement with Fishy Bite
 - FB owned and controlled by Ajaka
 - Raulfs paid \$400 000 as contribution to capital of partnership
 - Ajaka withdrew money and used it to pay out mortgage over house he owned with de facto partner Ablett
 - Commercial partnership broke down
 - Ajaka and Ablett's relationship broke down – entered into termination agreement
 - Ablett became sole registered owner of house
 - Raulfs claimed she could trace her partnership contribution into house and sought to secure her rights by way of a charge over the house
 - **Held** Raulfs could not trace proceeds – money paid to partnership = became partnership asset so no longer hers → no property to trace