

### 3 TOPIC 3 Chose in Action

#### The Concept of a Chose in Action

"The nature of a partner's interest in the partnership property has often been explained. The partner's **share in the partnership is not a title to specific property** but a right to his proportion of the surplus after the realization of assets and the payment of debts and liabilities. However, it has always been accepted that a **partner has an interest in every asset of the partnership** ... As such it constitutes an **equitable interest and is not a mere equity**" - *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321, 327-328

#### Identifying choses in action

##### *Assignability - Bare Rights*

Generally, one cannot assign the bare rights to litigate, but the fruits of the action may be assigned (*Glegg v Bromley* [1912]). However, bare rights to litigate can be assigned to someone with genuine commercial interest. Such assigning damages to as a party's creditor, this includes unliquidated (*Trendtex Trading Corp. v Credit Suisse* [1982], confirmed in Australia by obiter in *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498).

Litigation funding was also found to be allowed. Maintenance and champerty are no longer criminal or tortious and therefore litigation funding cannot be considered to be against public policy (*Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386). (not a bare rights to litigate is unclear)

##### *Assignability - Contract Benefits*

Benefits of a contract can be assigned. However, burdens of a contract cannot be assigned. Novation is required from original parties to complete assignments (*Linden Gardens Trust* 1994).

*Nokes v Doncaster* 1940 states that personal service contracts cannot be assigned. Company buying companies could not compel existing service contracts. However, by buying the shares of the company and holding the old company's identity in place, it would have been allowed. This concept was further extended in service contracts that are not purely personal such as was the case of *Pacific Brands Sport* 2006.

#### Equitable choses in action (i) Interests under Trusts

##### *(b) 3 Certainties and the Certainty of intention*

For a trust to be created there must be three certainties (*Re Kayford* 1975). First there must be a Certainty of intention to create a trust. The intention objectively determined based words used rather than the subjective intent of the parties (*Paul v Constance*, *Byrnes v Kendle* 2011). Intention must be imperative (expression of confidence fails, *Re Adams and the Kensington Vestry* 1884). Second certainty of the subject of the trust, (reference such as the "bulk of" is not considered certain enough, *Palmer and Simmonds* 1854). Finally there must be a certainty of objects, or for whom the trust is made for. Additionally the trust property must reach the trustee (*Oughtred* 1960).

### **(c) Nature of interests under trusts**

Trusts confer certain proprietary rights actionable in rem. This includes the negative rights of preventing wrongful disposal (negative right) and positive rights to assert that particular assets belong to them. (Baker v Archer-Shee 1927)

### **(a) Trusts and other legal relationships**

#### **Relating to Trust vs debt**

Money held in trust is not part of insolvency, unlike unsecured debts. (Re Kayford Ltd (in liq) 1975)

#### **Relating to trusts v bailment/equitable charge**

In cases where the sale of goods was on a retention of title basis, where the buyer uses the goods manufacturer products on behalf of the seller, question arises one whether there was a charge relationship or a trust relationship. Judgement in *Associated Alloys 2000* takes the view that if the manufactured output can be ascertained rather than being within a bulk mix, then the relationship could be characterised as a trust i.e. certainty of the subject post-manufacturing. Note that PPSA may come into play if the trust obligation was used as security instead of discharging a debt.

#### **Relating to Trust vs agency**

Agent under personal obligations to pay is a debt. However, it is possible that a trust relationship co-exists with an agency relationship based on the intentions of the parties. In NSW court of appeals case *Walker v Corboy* (1990) an agent selling farm produce became insolvent and the court had to determine whether a trust relationship could be implied from the intention of the parties. The court considered the large number of vendors and the fact that proceeds are mixed together with other parties and their own assets where the agent could choose what funds could be used to meet their obligations, it was unlikely that the parties really intended for all suppliers to be held in trust.

### **Equitable choses in action (ii) Interests in unadministered deceased estates**

The legatee's rights over an unadministered estate, the *livingston* right is a chose in action to enforce the full and correct administration of the will of a deceased, it is a right which is separate from the proprietary rights of the asset contained within the will itself (*Livingston* 1965). It will only be a proprietary right when fully administered, and until such time exists only as a right in personam, enforceable against the administrator of the estate.

However this right is assignable to third parties where the proprietary rights from the estate to be vested in the assignee when it comes into existence when the estate is fully administered. (*re Leigh* 2008).

In cases where the right holder passes away before full administration she could assign that livingstone right by reference to the property which would have come into their position when the estate is administered. The construction of the will is relevant and the court may decide based on the words used.

Even where no clear residue had yet been ascertained and, consequently, no final balance attributable to the shares of residue had been determined, the livingstone rights can be confiscated (*In re Maye*, 2008) could be vested into the trustee in bankruptcy (*ORB v Schultz* 1990). It cannot be used to claim specific assets until the

administration is complete, therefore the confiscating party can only enforce the right after it is completely administered.

## TOPIC 4 Legal (Statutory) assignment of choses in action

### *Conveyancing Act 1919 (NSW), s 12*

#### Assignment of debts and choses in action

There are four conditions in conveyancing act are assignments give effects to passing of legal title require: 1, that the assignment is absolute (Not partial) and non conditional (*Robertson*, 1898). 2 by writing. 3 With notice to the debtor and 4 with notice to all other legal choses in action relevant to the property.

### Equitable assignments

#### Generally

Q1. Chose in possession or action - shares require assignment and registration

Q2. legal or equitable

Q3. What am i doing with it - gift, sell or trust

Q4. Why am I doing with it

#### Equitable assignments of legal interests

- Text, Chapter 16. Especially note:

#### *Milroy v Lord (1862) 4 De GF & J 264, 45 ER 1185*

Company constitution conditions for transfer, can equity step in? Imperfect gift cannot pass.

- *Anning v anning*, may be possible if they did everything he possibly could (J higgins)
- Everything that only the owner can do (CJ)

#### *Corin v Patton (1990) 169 CLR 540*

#### -Relating to imperfect gift - falling within Conveyancing Act section 12

In regards to imperfect gifts falling within CA s12, whether the equitable interest arises depends on whether the donor has done all that is necessary to place the vesting of the legal title within the control of the donee and beyond the recall or intervention of the donor. (*Corin v Patton* (1990) 169 CLR 540 at 582, per Deane J). If that is the case, the legal owner is bound in conscience to act as a trustee for the equitable owner and complete the transfer. This was confirmed in a later case relating to an assignment of to shares under the corporation act (*Costin v Costin* 1997 applying Deane J minority judgement from *Corin v Patton*).

However more recent cases have put the *Corin v Patton* requirement into some doubt (*Equuscorp Pty Ltd v Haxton* (2012))

#### -Relating to imperfect gift - falling outside section 12

Equity assignments outside of section 12, such as by way of gift, or a non absolute, are not bound by those requirements. Creation of trust only requires a clear expression of intentions (*Norman v FCT* (1963) Windeyer J).

### Contracts to assign legal property

#### 54A Contracts for sale etc of land to be in writing

(1) No action or proceedings may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action or proceedings is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto lawfully authorised by the party to be charged.

***Lysaght v Edwards (1876) 2 Ch D 499 (Text at [3.55])***

for a specifically enforceable contract in land, where there is a valid contract, the vendor becomes trustee for purchaser in equity.

***Chang v Registrar of Titles (1976) 137 CLR 177***

The purchaser of land under a contract of sale of land becomes its equitable owner if the contract is specifically enforceable. When purchase money is paid, the vendor becomes the trustee for the purchaser in equity. Jessel MR in *Chang* 1976 held that a trust sub modo arises on execution of the contract but that the constructive trust comes into existence when title is made out by the vendor or is accepted by the purchaser (based on *Lysaght v Edwards* (1876)) If consideration is already paid, equity regard that is done that ought to be done.

## **Dealings with Equitable Interests**

### **Declarations of trust**

Relating to **intention to declare trust**

Declaration of trust requires an intention to create a trust. The intention objectively determined based words and actions rather than the subjective intent of the parties. In *Paul v Constance*, 1977, the comments "Money is much as yours as mine" and the acts of buying christmas presents together were considered to be sufficient. However, a failed legal assignment cannot be turned into a declaration of trust. [Giving baby a check is not trust declaration, it is a imperfect legal transfer failing provision (*Jones v lock* 1865)]

***Khoury v Khouri (2006) 66 NSWLR 241***

### **Agreements to declare a trust**

Payment of money is not sufficient part performance.

### **Assignment of Equitable interests**

Conveyancing Act 1919 (NSW), s 23C(1)(C)

(c) with respect to the creation of interests: 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.

Assignment of any equitable interest even those not relating to land must be done in accordance to s23(C) (*PT Ltd v Maradona Pty Ltd (No 2)*, 1992). The significance of an interest falling under s23C(1)(c), other than the requirement of writing to be valid, is that it may be subject to stamp duty. The question is whether the value under a document in question.

### **Stampability - use certainty of intentions from topic 3 for analysis**

Authority to charge in the future is not the same as disposition via document, therefore value did not move in a way which was stampable. (*Howard-Smith*, 1936). Direction to a trustee is a revocable mandate until acted upon. Authorisation is extinguished at death

(Parker & Parker v Ledsham). However a direction for a trustee to hold for new beneficiaries, s23(C)1(c) is applied and value will be considered to move under the document (Grey v IRC, 1960).

In cases where the trustee is instructed to transfer the title directly to a new full legal owner, it is not caught by 23C1(c) because the recipient of full legal title isn't intended to take it as a trustee (Vandervell v IRC, 1967). The reason appeared to be due to a historical from the Statute of Frauds where the protection of the act was intended for the trustee,

-Relating to **subtrusts**.

If there are active duties for the first beneficiary in a sub trust, then it will not be caught by 23C1(c) . Subtrust retaining no active duties is caught by 23C1(c) and requires writing. (ISPT Nominees Pty Ltd v Commr of State Revenue, 2003). E.g. "discretionary trust".

### ***Release to trustee***

In cases where trustee is released, vandervell, no need for writing. However, uncertainty exists on this point. (Crichton v Chrichton, 1930)

### ***Contracts to assign equitable interests***

Conveyancing Act 1919 (NSW), s 23C(2)

s23C(1) does not affect the creation or operation of resulting, implied, or constructive trusts.

Minority judgement of Cohen: Vendor-purchaser constructive trust move value at consideration. (As was the case in Chang). This transaction will not be stampable (Minority judgment confirmed in Halloran v Minister Administering National Parks and Wildlife Act 1974).

### ***'Assignment' of future property***

Right to be paid - current right

Payment be in the future

Assignment of property is not possible in law or equity. However the present rights to receive property with future right can be assigned with legal effect (*Shepherd v Federal Commissioner of Taxation*, 1965). However, it is important to consider the language of the contract. In *Norman v Federal Commissioner of Taxation* 1963, the interest from a loan payable at will was not considered to be assignable as there is a possibility of non-existence in the future and cannot be interpreted as present right. (If sheperd check corrin v patton)

### **Regarding assignment future property for value**

In a **for value agreement** with reference to the assignment of future property rather than the present rights to receive future property. Equity reinterprets that as a constructive trust for the assignee when the future property come into existence and to compel them to perform (*Holroyd v Marshall*, 1862, Westbury LC). In such cases this is due to equity regards as done what ought to be done (*Tailby v Official Receiver*, 1888). In cases where multiple assignment of future property for value, priority will be done based on first in time (*Re Lind*).