Lecture 9: Equitable assignments of equitable property

When will Equity recognise an assignment?

Equitable interests are those property rights recognised in equity

- For example, the interest of a beneficiary in a trust.
- The interest of a beneficial owner of company shares registered in the name of a nominee.
- The interest of a partner in partnership assets.
- The interest of an assignee of property, where the assignment was not effective at law, but is effective in equity.

Assigning equitable property

Assignment of equitable property can only be achieved in Equity.

Required = Immediate, irrevocable intention to assign AND some formalities for certain kinds of transactions.

Writing requirements

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

What kinds of problems arise?

- Most commonly, the cases concern attempts to convey property orally (without any writing), because the assignor wanted to avoid obligations to pay stamp duty.
- **Stamp duty is generally paid on instruments or documents and paid usually on the value passed by the instrument – (but note that legislative amendments to stamp duty laws subsequent to the cases have dealt with some of these stamp duty avoidance strategies; meaning they are no longer relevant).**
- **We are not interested in stamp duty law for the purposes of this course –** We are using the case to help us understand the principles of equity that apply when a person purports to assign an equitable interest.
- **So usually the assignor deliberately fails to complete formalities**
- When will Equity recognise that the assignment is effective to pass property to the assignee?

Comptroller of stamps (Vic) v Howard-Smith (1936) 54 CLR 614

Howard-Smith was a residuary beneficiary of his late wife's estate (hence he had an equitable chose in action to have his estate duly administered.) Prior to grant of probate he wrote a letter to the executor asking that his share of the estate be paid to a list of named recipients.

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Comr of Stamps assessed the letter for stamp duty, and H-S contested the assessment.

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Held: the letter did not assign his equitable interest, it merely gave an instruction (a revocable mandate) to the executor. The assignment of the property right did not occur until the executor acted upon the instruction.

- This case is important for distinguishing between a merely recoverable mandate and an immediate assignment.

Three modes for making a voluntary disposition of an equitable interest:

Declaration of trust: owner declares self a trustee of the interest for others.

Immediately and irrevocablely demonstrate intention to assign, whole or part. No need to provide notice to the legal holder of the property, although this is wise if you don't want legal owner to recognise some other interest in the meantime.

Give a direction to the trustee who holds the property for your benefit to hold that interest for another.

Is a Direction to trustees a 'disposition'?

- ***Grey v IRC* [1960] AC 1**
  – a direction to a trustee to hold for another IS a disposition of an equitable interest.
  - H transfers shares to trustees to hold for H.
  - H then orally directs trustees to hold the shares for grandchildren.
  - Trustees execute new declarations of trust, citing H's instructions.
  - Question: Was Grey's oral direction successful in disposing of his equitable interest without writing (and hence with no liability to stamp duty)?
  - If the oral direction was successful there would be no liability to pay stamp duty
  - NO. It was held no, there was in fact a 'disposition' of a subsisting equitable interest, therefore the oral direction had failed because writing was required to effectively transfer that interest.

- The arguments…

H argued that he didn't dispose of his equitable interest to his grandchildren: he relinquished his interest so that the Trustees would create new interests.

BUT . . . The court was not convinced and held that this kind of transaction was still within the meaning of 'disposition' for the purposes of the writing requirements in the statute.

***Vandervell v IRC* [1967] 2 AC 291**

- NP Bank (NPB) holds shares in Vandervell Products Ltd (VP Ltd) as nominee (on bare trust) for V.
- V wants to provide a big tax-free donation to Royal College of Surgeons (RCS).
- So V instructs NPB to transfer shares – absolutely – to RCS by saying 'you my trustees must transfer the shares absolutely to the college'
- VP Ltd spits out a handsome dividend.
- Question: Who pays tax on the dividend? The IRC said V must – because V retained beneficial ownership of the shares.

<u>The essential issue . . .</u>

- Did V need to give a *written* direction to dispose of V's equitable interest in the shares?
- IRC argued that V always retained the equitable interest in the shares: an oral direction was not effective to dispose of it.
- ***Held***: The finding was consistent with DKLR Holdings – There was no need for separate writing to pass a beneficial interest in the shares. The *whole* interest in the shares transferred when legal title passed from NPB (the trustees) to RCS (the college). At that point, V had no claim in equity against RCS.

- It is a nonsense to say that he needed to transfer his legal and equitable interest separately – the legal transfer was sufficient to carry the whole interest in the property.

<u>A complication:</u>

In accepting the shares RCS also agreed to issue an option to purchase the shares to another trustee company, associated with V.

After RCS received the dividend, the trustee company associated with V exercised the option to purchase the shares. So V was ultimately held NOT to have divested himself absolutely of the shares for the purposes of the taxing statute. (See *Vandervell's Trusts* No 2 [1974] 1 All ER 47.)

(We don't need to understand tax law: we need only to understand that a transfer of the legal interest in property does not require a separate transfer of the beneficial interest.)

- V did not want RCS to be a perpetual shareholder in his company – he wanted them to hold his shares long enough to receive the parcel of dividends and then he wanted to oblige them to transfer the shares back so he would retain beneficial ownership eventually.
- This particular strategy ended up being a problem for V – it was held that because he effectively obtained an option to repurchase the shares he had not divested himself absolutely of the shares for the purposes of the taxing statute.
- Often these cases tare decided on the interpretation of taxing statutes – you need only understand that the transfer of a legal interest in property does not require a separate transfer of any beneficial interest – It is a nonsense to say that an owner of property who transfers the property absolutely must also provide writing to the transfer of the equitable interest in the property – because there is no equitable interest in the property while the legal owner's conscience is not bound to recognise another person's interest.

Sub-trusts
- Imagine: L is the legal owner of property X.
- L declares a trust over X in favour of T, so that T now holds an equitable interest in X.
- Imagine now: T declares a trust of T's interest, in favour of B.

<u>***Question:*** Does T need to put the declaration of sub-trust in writing?</u>
- If the interest is in land, yes - s 23C(1)(b).
- What if it is personal property? Does s 23C(1)(c) apply?

The debate:

YES	NO
• Conveyancing Act defines a 'disposition' to include a declaration of trust.	• Meagher Gummow & Lehane's *Equity: Doctrines and Remedies* 4th ed, 2002, 304. ➢ There is a statement that a declaration of a sub-trust does not dispose of the equitable interest oof the sub-trustee
• In Howard-Smith's case, Dixon J referred to a declaration of trust of an equitable interest as a type of disposition	• Denis Ong, *Trusts Law in Australia,* 3rd ed 2007, 139-140 – made an argument based on the disparity between requirements of s 23C(1)(b) and (c). The requirements of s 23C(1)(b) dealing with declarations of trust in land have less onerous writing requirements than in s 23C(1)(c) so it would be an odd conclusion that a declaration in respect of land would require more lenient writing requirements than a declaration of a sub-trust over personal property.

If you strategically wanted to ensure that the declaration of sub-trust was effective – you would want to put it in writing to improve your chances.

Transactions for value

- What is the effect of consideration when it is given?

Oughtred v IRC.

- Mrs Oughtred owns 72K shares in Co Pty Ltd outright.
- Her husband, leaves 200K shares to his estate: life estate to Mrs O, remainder to son, Peter.
- Mrs O and P agree – orally - to exchange Mrs O's 72K for P's remainder. Subsequently they arrange the transfers for consideration of 10 shillings.
- Mrs O transfers 72K shares to P. Mrs O and P instruct Trustees to transfer 200K shares to Mrs O.
- The consideration of 10 shillings was far less than what the parcel of shares had originally been paid for.

<u>Was duty payable ad valorem on transfers?</u>

- Mrs O and P argued that the value of the shares had already passed under the oral contract – which was not dutiable.
- IRC argued that the oral contract failed the requirement of writing, so was ineffective.
- Mrs O and P argue that the agreement – being for consideration – gave rise to a constructive trust, whereby P held his remainder on trust for Mrs O.
- Mrs O also held her interest in the parcel of shares on trust for Peter because it was an agreement supported by consideration.

<u>Resolution:</u>

- Minority: Radcliffe and Cohen LJ agree with Trial Judge (Upjohn J) that the oral transaction was effective to pass title. No ad valorem duty was payable on the subsequent transfer, because it passed no value. (The value had already been conveyed by the enforceable oral agreement.)
- Majority: Denning LJ, Keith LJ and Jenkins LJ: stamp duty was payable. Although there was a constructive trust of the shares, this did not prevent the subsequent transfer of the legal interest from attracting duty according to the statutory scheme's rules.
- Oughtreds did not end up winning their case. The finding was based on an interpretation of what the stamp duty legislation meant. There's no need to understand stamp duty law, you only need to understand the principles that apply to equitable transfers of equitable property.

<u>Does s 12 of the Conveyancing Act also apply to equitable choses in action?</u>
→ See *FCT v Everett* (1980) 143 CLR 440
Or does it deal only with legal choses in action?

FCT v Everett

- A partner in a professional firm wanted to income-split with his wife so assigned her a 6/13th share in his interest in the partnership, and complied with s 12: the assignment was in writing and he gave notice to partners. He WANTED this to be a successful assignment so that he would not have to pay tax on this share at his marginal tax rate.
- The Court held that "The better opinion seems to be that, though the interest of a partner is an equitable interest, it may be assigned under s 12 . . ."*
- But s 12 is not mandatory for equitable choses in action – but it is certainly an effective method
- [* In *Everett*, the taxpayer assigned only part of his chose in action – so s 12 was inapplicable in any event – he did not need to follow s 12 for it to be effective.]
- Taxing authorities made the argument that he had not assigned his interest and that in fact he received the interest was liable to pay tax on it and could give it to his wife - in this case Everett won and the case became precedent for income splitting arrangements in professional partnerships

Prescribed reading:

- Textbook, Ch 9, pp 218, 223-230.
- *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9; [1963] HCA 21
- *Grey v Inland Revenue Commissioners* [1960] AC 1

Recommended reading:

- Textbook, Ch 9, pp 138-145.

Lecture 10: 'Future property'

What if a person purports to give or sell property that doesn't exist yet?

- For example, royalties under a publishing agreement for a book that hasn't been written yet; interest not yet earned on an investment; dividends not yet declared on company shares.

This is a very important question for commercial lending…

Lenders will often lend money on the security of a charge over the assets of a business, including inventory, book debts, and balances in bank accounts. While the business is solvent, it can trade with these assets. The property interest of the lender does not crystallise until the borrower defaults on the loan, and the charge attaches to whatever assets the business owns at that time. Often these assets will not have been owned at the time the secured loan agreement was made.

The effectiveness of these lending practices depends upon Equity's recognition of assignments of 'future property'.

First distinguish between…

A presently existing right (eg, a contractual right to receive royalties) – the **TREE**

Future property (eg the royalties themselves if and when they are earned) – the **FRUIT**

Check the wording of the assignment: what was intended?

- Did the assignor intend to assign the presently existing tree – the right?

If so, the presently existing right (TREE) can be assigned at law, and it can be assigned by way of gift.

The FRUIT can only be assigned in Equity for value / consideration. (Equity treats the purported assignment of future property for value as an agreement to assign when the property comes into existence).

Authority:

- ***Tailby v Official Receiver* (1888) 13 App Cas 523** → the authority for this proposition is ancient.
- ***Holroyd v Marshall* (1862) 11 ER 999**, 1007.
- Equity treats a purported assignment of future property for value as an agreement to assign in the future. Equity acts upon the conscience of the assignor who has accepted consideration, and binds them by holding them to be a trustee of the property for the benefit of the assignee as soon as it comes into existence.

- This is supported by the maxim of equity: *Equity regards as done that which ought to be done.*

Norman v FCT (1963) 109 CLR 9

Norman made a gift to his wife by deed, as an income-splitting arrangement.

He purported to assign all his right, title and interest in and to certain interest to accrue due on a loan that was repayable by the borrower at will; and also all his 'right title and interest in and to all the dividends' which might be declared on certain shares he held in public companies.

The majority held that the interest and the dividends were 'mere expectancies' and could not be assigned without consideration. The loan could have been repayed early so there was no interest and the company may never have declared any dividends.

Windeyer J held that the interest was a presently existing right to be paid money in the future = could be assigned as a presently existing right.

- *Norman* is an importance case which you should read.

Shepherd v Commissioner of Taxation (1965) 113 CLR 385

- Shepherd patented an invention and granted a licence to a manufacturer to produce the invention, in exchange for royalties.
- He purported to assign to members of his family 'all his right title and interest in' an amount equal to 90% of the royalty income that may accrue during a period of 3 years (an income-splitting arrangement).
- Barwick CJ (at 393): 'That a promise might not be fruitful does not make it incapable of assignment. The fact that a present right might be barren should not alter its character as a present right.'
  - ➢ What he meant by this was, so long as the assignment is expressed as the assignment of a presently existing right – it does not matter what the value of that right is in terms of how much fruit it produces. Shepherd's assignment of all his right title and interest in royalty income was the assignment of a presently existing right even though perhaps there would be no royalties. It came down to how the assignment was expressed.

<u>How do we assess this kind of problem?</u>

- Consider whether the assignor actually has a presently existing right e.g. a contract which gives them rights they can assign. If there is no right, only a mere expectancy, there cannot be an assignment at law, and any assignment in equity is only effective if consideration is given.
- If the assignor does have a presently existing right, ask whether the assignor has purported to assign that right (the tree) or merely the fruit. To understand what was intended you need to look at the words used.
  E.g.: Compare:
  - ➢ I hereby assign my right under contract dated 30/1/21 with Publisher to receive royalties on my biography = presently existing right (tree) and the assignment is expressed as an immediate assignment of that presently existing right.
  - ➢ I assign you any royalties I receive in 2022 on any of my publications = future property (fruit). This is not clear whether there is any presently existing right. The fruit (future property) is assigned.

Litigation funding as an example

- The law against 'champerty and maintenance' precluded the recognition of assignment of rights to sue.
- It maintained a public policy against allowing people to assign their right to sue someone else – avoid multiplying occasions of litigation.

- Today, litigation funders will often fund litigation agreements and these agreements are upheld – because they are an assignment for value of the potential fruits of the litigation and not the right to sue itself.

Summary:

Future property doesn't exist at law, so cannot be assigned at law

Equity will treat a purported assignment of future property as an agreement to assign when the assignor acquires the property.

Equity will specifically enforce this agreement if it is supported by consideration.

Hence, Equity will recognise a purported assignment of future property for value – but will not enforce a gift of future property.

Prescribed reading:

- Textbook, Ch 9, pp 210-218.
- *Shepherd v Federal Commissioner of Taxation* (1965) 113 CLR 385; [1965] HCA 70.

MODULE 4: TRUSTS

<u>List of terminology for this module:</u>

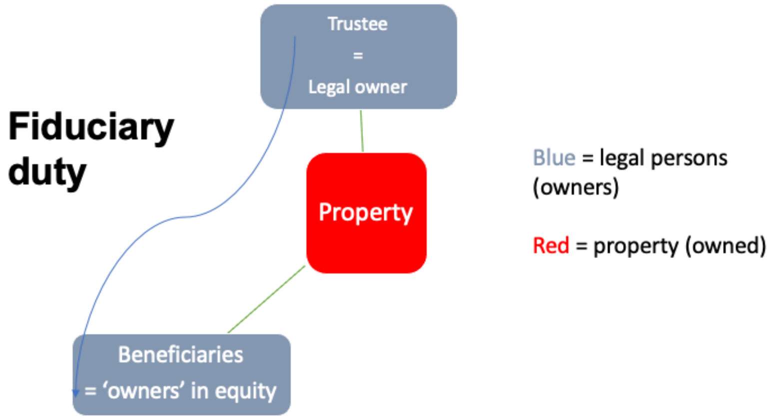
- The **settlor** – is the person who settles property on trust. Typically, a settlor transfers property to a trustee, and names the beneficiaries (or the class of persons entitled to be selected as beneficiaries).
- **'Cestui que trust**' is an old Norman French term (still used in case law) for the beneficiary of a trust.
- A **testator** or **testatrix** (female) is what we call a deceased person who has left a will bequeathing property to others. Many trusts are created by will.
- An ***inter vivos*** trust is created during the settlor's lifetime.
- A trust is **executed** where the respective interests of the beneficiaries have been specified in the
- instrument or declaration creating the trust.
- A trust is **executory** where the settlor has expressed a general intention as to the disposition of
- the property to beneficiaries, but has not finally determined their respective beneficial interests.
- A **fixed trust** determines with precision the beneficiaries entitlements. So for example, if a settlor settles a parcel of 1000 shares on trust, to be beneficially owned in equal shares by his four
- siblings, each sibling with be entitled to a one fourth share in the property.
- A **discretionary trust** leaves decisions about the distribution of entitlements to beneficiaries, to the trustee or to some other person with a power to exercise that discretion. So for example, if a settlor settles a parcel of 1000 shares on trust, and instructs the trustee to distribute the dividends on the shares each year to 'such of my four siblings who are in greatest need', the trustee is empowered to exercise a discretion as to which of the siblings should receive the dividends, and how much. The class of beneficiaries is certain – it is the four siblings. But the distribution to them
- is discretionary.
- A '**power of appointment**' is a power to select the recipients of a gift. A '**general power**' is a power
- to appoint property to anyone, including oneself. A '**special power**' is a power to select recipients from among a specific group or class of persons, not including the donee of the property. A '**hybrid power**' is a power to select anyone in the world except particular individuals or members of a particular class of persons. '**Intermediate powers**' permit the person holding the power to add to the class of persons who can be selected. Powers of appointment are relevant to the question of whether a settlor has created a trust with sufficiently certain objects (beneficiaries).
- A **bare trust** is one in which the trustee has no active duties to perform. They simply hold title to the property.
- A **charitable trust** is a trust for purposes rather than for persons. The purposes must be charitable within the meaning of the law on charitable trusts. (See Lecture 13.)
- A '**unit trust**' is the term generally used for commercial investment trusts, where trustees hold investments on behalf of beneficiaries who are 'unitholders'. Unit trusts are fixed trusts, and the rights of beneficiaries are usually tradeable. The trust is a very convenient structure for investment schemes. The trustees, as legal owners of the underlying assets, are able to deal with those assets (usually upon the instructions of expert financial and investment managers), according to the powers set out in the trust instrument, for the benefit of the investor beneficiaries.

Lecture 11: Express trusts – Distinguishing trusts from other obligations

Express trusts

- This lecture explains the nature of express trusts and distinguishes trusts from other kinds of obligations
- Trusts originated when property owners wanted to pass property on for the use of their dependants, in a way which avoided various feudal taxes.
- Today, they are used in commercial settings, and not only as a tool for family estate planning.

Diagrammatic representation of a trust relationship



What is a trust?

- A trust is not a separate legal entity in the way that a corporation is an entity separate from those who participate in it: ***Commissioner of Taxation v Bamford* (2010) 240 CLR 481**, [17]-[20].
- The trustee is the legal owner of the trust property – there is no separate legal entity constituted by the pool of property itself
- A trust is a relationship between legal persons – the trustee and the beneficiaries – and it is a relationship concerning property.
- A trust arises when one legal person (the trustee) holds property which the trustee is obliged to use for the benefit of others (the beneficiaries).
- The trustee holds legal title to the property. Beneficiaries hold equitable interests.
- The trustee owes fiduciary duties to the beneficiaries.

How are express trusts created?

By declaration: ' I declare I hold this property on trust for B'. There is no transfer of any legal interest in the property, only the creation of a new equitable interest.

By transfer of property by a settlor to a trustee, either inter vivos (during life) or by a will, effective on the death of the settlor (testator).

By direction – the beneficiary of an existing trust directs the trustee to hold the interest for another (recall Grey v IRC – this does involve a disposition of a subsisting equitable interest).

Other obligations involving property that are NOT trusts…

- **Bailment:** Where one person (the bailor) hands over possession, but not legal ownership of property to another, the bailee, who owes common law duties in respect of the property. They remain the legal owner and only hand over possession. It is a relationship known to the common law with the bailee owing common law duties in respect of property. Bailees are not trustees.
- **Agency:** An agent owes fiduciary duties to the principal, but the existence of fiduciary duties online does not necessarily act as an express trustee, even when they receive property in the course of their agency work. It depends upon the agreement made between the agent and the principal. See for example ***Walker v Corboy* (1990) 19 NSWLR 382**, where the court had to decide whether a farm produce agent

who sold produce for many different farmers at markets was a trustee of the money he received from selling his farmer clients' produce.

***Walker v Corboy* (1990) 19 NSWLR 382, 389 (Clarke JA):**

- The approach is best evidenced in the oft-quoted statement of Channell J in ***Henry v Hammond* [1913] 2 KB 515** at 521, which reads: "… It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his cestui que trust. If on the other hand he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor": see Finn, *Fiduciary Obligations*(1977) at 106.

Debt

A debtor is under a personal obligation to repay a creditor. Unless some additional security arrangement has been made, which attaches the obligation to property, then the debtor's obligation does not attach to specific property and is simply a personal obligation to pay some money of equivalent value.

If a debtor owes money to a number of creditors - then all the unsecured creditors will share pari passu or according to their respective shares in a debtor's assets if a debtor becomes bankrupt. They cannot claim priority over specific property.

Creation of an express trust requires a certain intention…

- ***Kauter v Hilton* (1953) 90 CLR 86 at 97:**
  '… in order to constitute a trust the intention to do so must be clear and… It must also be clear what property is subject to the trust and reasonably certain who are the beneficiaries.'