

LAWS2385 EXAM NOTES

IRAC

- 1) Identify the issues
- 2) For each issue explain the relevant rule/law (with statutory/case authority as appropriate)
- 3) Apply the law to the facts
- 4) Come to a conclusion

Equity's Maxims

- He who seeks equity must do equity
- He who comes to equity must come with clean hands
- Equity looks to intent, rather than form
- Equity treats as done what ought to be done

Equitable Property

Equity recognises and enforces interests in property which are not recognised or enforced at common law.

An owner of property does not hold two estates, one legal and the other equitable.

- They only hold the legal interest in the property (*DKLR*)

Fiduciary Relationships/Obligations

Relationship of trust and confidence.

- F undertaking to act in the interests of B in a manner which confers discretion on F, and in respect of which the exercise of a discretion affects B's economic interests.

Fiduciary must act **exclusively in the interests of the beneficiary** in matters coming within the scope of the relationship.

Recognised fiduciary relationships:

- Trustee/Beneficiary
- Solicitor/Client
- Employee/Employer
- Agent/Principal

Categories are not closed (*Tufton*)

Undertaking Test:

Critical feature: fiduciary **undertakes to act in the interests** of another in the exercise of a **power or discretion** which **affect the interests of that person** (*Hospital Products*)

- The fiduciary acts in a **'representative' character** in the exercise of his responsibility.

Vertical relationships:

- Where one party has greater access to resources, skill, or information than the other.

Horizontal relationships:

- Where resources, skill and information are shared between parties for the purpose of achieving a common goal.
e.g. business partnerships

Test: whether the parties have placed a **high degree of mutual trust and confidence in each other in the pursuit of a common goal** (*Brian*)

Multifactorial approach:

Breen:

- Relation of **confidence**
- **Inequality of bargaining power**
- Undertaking of one party to **fulfil a duty in the interests of another party**
- **Discretion or power affecting the rights or interests** of another
- **Dependency or vulnerability** on the part of one party that **causes reliance** on another

Entitlement to expect approach:

Whether, given the circumstances, the principal is entitled to expect that the person will act in the principal's interests and for the purposes of the relationship.

Grimaldi: undertaken to perform a function or has assumed such a responsibility to another as would thereby **reasonably entitle that other to expect that he would act in the other's interests to the exclusion of all others**.

Scope of the Relationship

- Determined by reference to the fiduciary's undertaking.
- Referring to the subject-matter of the obligations
- The conduct of the parties can be considered in full (*Breen*)

Concurrent contractual and fiduciary relationships

- Often co-exist
- Fiduciary obligations can be modified or even excluded by the terms of a contract (*Hospital Products*)
-However, cannot exclude liability for a fundamental nature of the relationship.
- Fiduciary obligations can survive the termination of contract which brought them into existence (*Spincode*)
-A fiduciary is not permitted to terminate the contract to get rid of their fiduciary duties in order to obtain a personal advantage.

Fiduciary Obligations

No Conflict Rule – conflicts of duty and self-interest

- A fiduciary must not put himself in a position where **his duty and his personal interest may conflict** (*Boardman*)
- It applies even if the fiduciary acts honestly and the beneficiary does not suffer any loss (*Boardman*)
- Not only where there is an actual conflict but **also in circumstances of potential conflict** (*Smith*)

No Profits Rule

- Prohibits a trustee from making any **unauthorised profit** by his management (*Regal*)
- It applies even if the fiduciary acts honestly (*Regal*)
- The fiduciary will be brought to account for any benefit or gain which was obtained or received **by use or by reason of the fiduciary position or opportunity or knowledge resulting from it** (*Breen*)

-Almost all fiduciary obligations can be excluded by the terms of the trust instrument, contract, or other document.

- An exception is the fiduciary's obligation of good faith – it is central to the relationship.

Fully Informed Consent

- Defence for breach

Generally requires that a fiduciary disclose to the beneficiary all information in his possession which is relevant to the beneficiary's consideration of whether or not to consent to it (*Barescape*)

The sufficiency of the disclosure depends on the sophistication and intelligence of the person to whom the disclosure must be made (*Farah*)

Assignment

Choses in possession: Things which can be physically held (tangible)	Choses in action: Things which cannot be physically possessed (intangible)
Legal property: All forms of property which the common law recognises. (land, tenancies, chattels, legal choses in action (shares))	Equitable property: A right recognised in a court exercising equitable jurisdiction. (beneficiary's interest in a trust) - all equitable rights are intangible

Legal Assignment of Legal Property

Frequently specified by statute

- e.g. ownership of bank notes pass with possession, title to land pass by registration

Equitable Assignment of Legal Property

Where the legal assignment has been ineffective – equity may regard the transfer as complete.

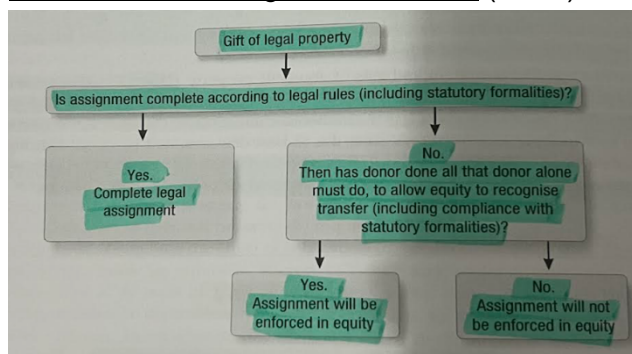
- Whether equity regards the assignor's conscience as bound by the transaction (by consideration or gift)

Consideration:

Equity regards the assignor's conscience as 'bound' by the receipt of consideration.

Gift:

Equity regards the assignor's conscience as bound when he has done all that he alone must do to make the assignment effective (*Corin*)



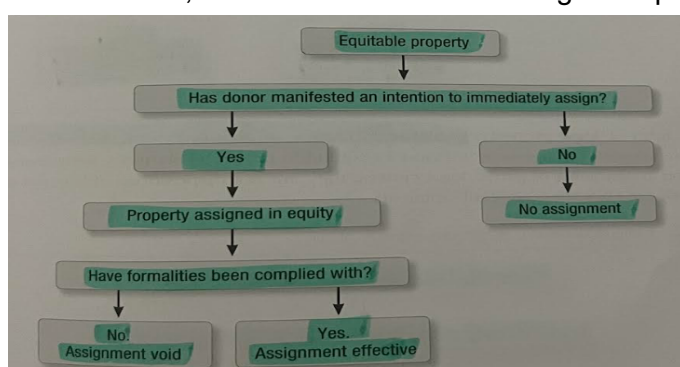
Conveyancing Act s 23C(1)(a) – interests in land must be in writing + signed by the assignor.

Equitable Assignment of Equitable Property

Property that is only recognised in equity can only be assigned in equity (*Norman*)

3 'i's (immediate, irrevocable, intention)

An assignment of equitable property is complete in equity when the assignor has manifested an immediate, irrevocable intention to assign that property in writing.



Conveyancing Act s 23C(1)(c) - Dispositions of an equitable interest must be in writing.

Assignments of Future Property

- Future property can only be assigned in equity- as the assignor has no title to assign.

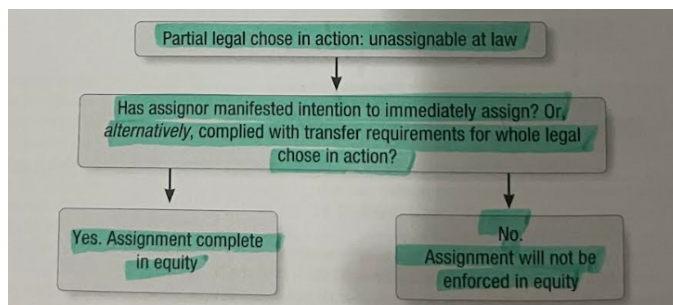
Income not yet produced -crucial to determine whether:

- The assignor is attempting to assign only the income not yet earned, which is future property (e.g. an unborn foal)
 - assignable in equity by consideration (valuable consideration – *Holroyd*)
- The assignor is trying to assign the underlying property that gives rise to the income which is currently existing property (e.g. horse pregnant with the foal)
 - assignable in equity by gift (*Shepherd*)

Assignment of Partial Chose in Action

The law does not allow partial assignment – however, equity may recognise it.

- It will be sufficient if there is a clear expression of an intention to make an immediate disposition of the part chose.



Express Trusts

An obligation enforceable in equity which rests on a person (**the trustee**) as **owner** of some specific property (the trust property) to **deal with that property for the benefit of** a certain person (**the beneficiary**).

Creating an Express Trust:

(A) Trust created by self-declaration

Requirement:

Declaration of trust – settlor to declare that it is no longer for her own benefit.

(if trust by declaration fails – the would-be settlor continues to hold the property on her own behalf)

(B) Trust created by transfer

Requirements:

1. Declaration of trust

- the declaration must provide that the recipient of property was intended to take the property in the capacity of trustee and not beneficially.

2. A valid transfer of the intended trust property to the intended trustee (*James*)

- rules of assignment

- *Conveyancing Act* s 23C(1)(b): writing + signature requirements.

(if trust by transfer fails but the property has been successfully transferred – the trustee will hold the property on resulting trust for the settlor, and must re-transfer it to the settlor)

Quistclose trust:

1. The money must be loaned for a specific purpose.

2. The purpose must fail.

3. The money must be held on trust for the lender.

Fixed Trust – the share of trust property is determined by the trust instrument.

Discretionary Trust – the trustee is given discretion to select which beneficiaries will receive the distribution.

Powers of appointment:

- General power of appointment – entitles the trustee to appoint property to anyone.
- Special power of appointment – entitles the trustee to make an appointment among a class of objects selected by the settlor.
- Hybrid or intermediate power of appointment – entitles the trustee to appoint to anyone except a specified class of persons.

Enforceability of trusts - Certainty

1. Certainty of intention

The settlor must have intended to create a trust of her property.

(a) Objective intention – would a reasonable person consider that in all the circumstances, the settlor intended to create a trust? (*Byrnes*)

- The settlor does not have to use the word 'trust'
- If a trust is the most appropriate mechanism for giving effect to the settlor's wishes, an inference will be drawn that the settlor intended to create a trust (*Armstrong*)

Trust created by contract – intention will be established if the contract expressly or by implication provides that T is to hold the benefit of the contract on trust for B (*Shortall*)

(b) Imposing an obligation – settlor must intend to impose an obligation to apply the property for the benefit of identified beneficiaries.

(c) Take effect immediately – settlor must intend to create a trust which takes effect immediately (*Harpur*)

2. Certainty of subject-matter

The subject-matter of the trust must be specified with reasonable certainty.

(a) The subject-matter of a trust must constitute legally recognised property.

- the settlor must also have present property rights.

(b) The quantum/amount of property to be held on trust must be clearly defined.

- ('bulk' of estate is not certain – *Palmer*)
- It is certain if the quantum is to be determined by the trustee, provided that the criteria applied by the trustee can be objectively assessed.
- percentage of shareholding is certain (specific number and company indicated) (*Moss*)

3. Certainty of objects

The beneficiaries of the trust must be sufficiently identifiable (*Morice*)

Fixed trusts: 'List of Certainty' (*Caldwell*)

- the trustee must be able to draw up a full list of the beneficiaries entitled to the trust property at the time of distribution.

Discretionary trusts: 2 types of discretionary trusts – trust power & mere power

Trust Power

- expressed in mandatory terms – 'T *must* distribute to whomever they choose'

'Criterion Certainty Test' (*McPhail*)

- the trustee must be able to say whether any given person is inside or outside of the class of beneficiaries.

AND

Administrative workability

- must be administratively workable
- will be unworkable where the class is so wide as to render it nothing like a class at all (*McPhail*)
- just because it is difficult to determine who is or is not in the class does not mean it is void for uncertainty- as long as possible to determine is certain enough (*Gulbenkian*)

Mere Power

- where T 'may distribute to whomever they choose'

'Criterion Certainty Test' (*McPhail*)

- the trustee must be able to say whether any given person is inside or outside of the class of beneficiaries.

AND

Administrative workability

- must be administratively workable
- will be unworkable where the class is so wide as to render it nothing like a class at all (*McPhail*)
- just because it is difficult to determine who is or is not in the class does not mean it is void for uncertainty- as long as possible to determine is certain enough (*Gulbenkian*)

AND

Not Capricious (*Manisty's Settlement*)

- a mere power will not be enforced if to do so would be capricious – in the sense that it would benefit an accidental conglomeration of persons with no link to the settlor.