ASSIGNMENTS

Answer structure

Legal chose in action or equitable chose in action?

(1) Legal chose in action

(a) Effected at Law? (i.e. assignable under statute)
- Must be an absolute assignment – i.e. not part only of a chose in action or assigned for a limited term
- Look to relevant statute requirements: Corps Act, s 199 PLA

- Formalities:
  - In writing
  - Signed by assignor
  - Express written notice to the obligor (debtor etc)
  - Must be an absolute assignment

- Consequences of valid assignment s 199(1) PLA – assigned chose in action is effective at law.

(b) Equitable chose in action

(i) Clear intention to assign
(ii) Assignment takes effect as an agreement to assign
(iii) Ability of the assignor to transfer the chose in action

(2) If statute applies, but is not complied with:

(a) Has it been effected in equity?
- (i) Formalities not complied with (2)(a)
  - Clear intention to assign; AND
  - Consideration has passed (Holroyd v Marshall), or by way of gift?
    - If gift (voluntary): equity will not complete the gift unless
    - (1) Whether donor has done all that is necessary to place vesting of legal title within control of donee
    - (2) And beyond the recall and intervention of the donor

- (b) Not assignable at law or in equity
- (c) Future property

Introduction

Assignment: an immediate transfer of existing property/proprietary right, vested or contingent, from the assignor to the assignee (Norman v FCT).

Chose in action: all personal rights of property, which can only be claimed or enforced by action (legal action), and not by taking physical possession (Torkington v Magee). Can be legal or equitable.

- Shares
- Money sums due and owing (debts)

Obligations – generally (unless parties mutually agree to transfer

Mortgagor’s equity of redemption

Beneficiary’s rights and interests under a trust

Legatee’s rights under un-administered will/estate (Schultz)

Choses not assignable at law or in equity

(1.) Purely personal rights (e.g. right to rescind K by purchaser)

(2.) Obligations – generally (unless parties mutually agree to transfer – novation)

(3.) Public pay by holder of public office (under most circumstances)

(4.) Bare rights of action

- Includes rights to sue in tort, sue for unliquidated damages for breach of K, sue in equity
- Not assignable for public policy considerations – assignment amounts to maintenance of champerty – incentive to maintain legal actions by a third person with no interest in the COA, just receives a part of any verdict upon completion of action

Gegg v Bromley:

Mrs G was suing Mr B in tort – tried to assign to husband ‘all that the interest sum of money or premises to which she is or may become entitled under or by virtue of . . . any verdict compromise or agreement which she may obtain or to which she may become a party in or consequent upon the said action [for slander against Bromley]. Held: rights to sue in tort not assignable, but principle in this case does not preclude assignment of the verdict (future property), i.e. the ‘fruits’ of the action – an assignment does not give the assignee any right to interfere in the proceedings of an action or insist that the action be carried on.

(1) Assignments of legal choses in action at law

Legislation requires assignment to be absolute – that is not in part only, subject to condition, in writing, signed by assignor and with express notice to the debtor.

S 199 Property Law Act

(1.) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debt

Trustee or other person from whom the assignor would have been entitled claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from date of such notice—

(a) the legal right to such debt or thing in action; and

(b) all legal and other remedies for the same; and

(c) the power to give a good discharge for the same without the concurrence of the assignor.

(2.) If the debtor, trustee or other person liable in respect of such debt or thing in action has notice—

(a) that the assignment is disputed by the assignor or any person claiming under the assignor; or

(b) of any other opposing or conflicting claims to such debt or thing in action;

the debtor may, if the debtor thinks fit, either call upon the persons mak claim to the debt or other thing in action to interplead concerning the said pay the debt or other thing in action into court under and in conformity the provisions of the Acts relating to relief of trustees.

Carob Industries v Simto: when its (legislative) requirements are fulfilled the statutory assignment effects a divesting of legal title correlative to the transfer of the right, so that if notice has been duly given, the debt or ch action no longer belongs to the assignor and he cannot take proceeding recover it.

Showa Shoji Australia v Oceanic Life: no special form of notice is necessary, and the notice need only convey the fact that the obligation has been transferred to an assignee. But the notice must do so expressly by definite and direct statement of the fact rather than by supplying materials from w/ the existence of the fact is to be inferred; and because the notice must be in writing the room for incorporation of surrounding events, even direct oral notice, is limited.

Sale of shares: Corps Act

- S 1071A: subdivision applies to shares in company, debentures company and interests in a registered scheme

- S 1070C – share certificate must state name of company, class shares and amount unpaid on shares.

- S 1071B(2): instrument of transfer, a company must only register instrument of transfer of securities if a proper instrument of transfer has been delivered to the company, despite anything in its constitution or anything in the deed relating to debentures

Note – if share certificate exists this must be lodged

- S 1072F: (1) a person transferring shares remains the holder un transfer is registered and the name of the person they are being
transferred to is entered into the register of members in respect of the shares.

(2) the directors not required to register transfer unless the transfer and any share certificate have been lodged at the registered office; (ii) any fee payable on registration of transfer has been paid; and (iii) the directors have been given any future information they reasonable require to establish the right of the person transferring the shares to make the transfer.

(3) may refuse to register a transfer if the share are not fully-paid, or if the company has a lien on the shares.

(2) Assignment of legal choses in action in equity

Assignment of a legal chose in action not assignable except by aid of equity – i.e. statutory requirements not met.

S 200 PLA: efficacy in equity of voluntary assignments

(1) A voluntary assignment of property shall be in equity be effective and complete when, as soon as after, the assignor has done everything to be done by the assignor that is necessary in order to transfer the property to the assignee

(a) even though anything remains to be done in order to transfer to the assignee complete and perfect title to the property; and

(b) provided that anything so remaining to be done is as may afterwards be done without intervention of or assistance from the assignor

(2) This section is without prejudice to any other mode of disposing of property, but applies subject to the provisions of this and of any other Act which i

(3) Assignment of equitable choses in action

Requirements

• Intention to assign and some act of assignment

S 11(1)(c) in the PLA: instruments required to be in writing

• Consideration not required for assignment of equitable choses in action

Formality requirements

S 11(1)(c) in the PLA: instruments required to be in writing

(1) Subject with this Act with respect to creation of interests in land by parol – a disposition of an equitable interest or trust subsisting at the time of the disposition, must be manifested and proved by some writing signed by the person disposing of the same, or by the person’s agent lawfully authorised in writing, or by will.

Note: ‘manifested and proved by some writing’ – can be proved by a combination of documents, can have an oral assignment that is subsequently proved by documents

• Oral assignments – take place at date of oral assignment not later documentation.

• – note the word ‘deed’ in exam means you can assume it is signed.

Case examples

Controller of Stamps (Vic) v Howard-Smith: a voluntary disposition of an equitable interest may take one of at least three forms: (i) expression or indication of intention on part of donor that he hold the equitable interest vested in him on trust for other persons (ii) expression of immediate intention to make over to persons intended to benefit the equitable interest vested in the donor, or some less interest carved out of it. In that case communication to the trustee or person in whom legal title is vested is not required in order to assign the equitable property. Notice to the trustee may be important to bind him to respect the assignment and in order to preserve priorities, but it is not a condition precedent to the operation of the expression of intention as an assignment. (iii) intending donor for whom property is held on trust may give his trustee a direction requiring him to hold property upon trust for the intended donee.

Norman v FCT (summary of rules)

Taxpayer purported to assign his wife, his right, title and interest in the following: (a) interest payable on a loan he had made to a partnership which was repayable at will; and (b) dividends payable from shares he was to receive from the distribution of two estates. Sought to assign this in 1956 by way of gift under a deed for the years 1957 and 1958 – in order to minimise his tax by reducing personal income. Issue: was he assigning current property or future property?

Held: In equity, a would-be-present assignment of something to be acquired in the future is, when made for value, construed as an agreement to assign the thing when it is acquired. A court of equity will ensure that the would-be assignor performs this agreement, his conscience being bound by the consideration. In equity, there is a valid gift of property transferrable at law if the donor, intending to make, then and there, a complete disposition and transfer to the donee, does all that on his part is necessary to give effect to his intentions and arms the donee with the means of completing the gift according to the requirements of law. If a man meaning to make an immediate gift of a chose in action that is his, executes an instrument that meets the requirements of the statute and delivers it to the donee, actually or constructively, he has put it out of his power to recall his gift.

Notice can be given by the donee.

Held majority 2-2: – assignment of the loan was future property not assignable by way of gift since no consideration had been given by wife – loan was repayable at will and therefore not a definite right that would exist for the 2 years he attempted to assign. Interest was a mere expectancy assigned ineffectively for lack of consideration.

Held 5-0: no assignment of dividends payable, there is no right to receive dividends from a company (no chose in action), there is only a future possibility that the company may declare dividends, one the dividend is declared then there is an obligation which is due and payable – no consideration given so assignment failed.

Shepherd v Commissioner of Taxation: taxpayer assigned to his wife by will of gift his right, title and interest to an amount equal to 90% of the periodic income from royalties, had a contract with a company that for every castor they made he would receive royalties as the patent owner. Held: valid assignment of chose in action – right to receive royalties was assignable. The tree, though not the fruit, existed at the date of the assignment as a propietary right.

Justice Kitto: distinction is between a tree and fruit from the tree, can assign the tree but cannot assign fruit immediately (not until you have harvested fruit and it becomes present property), if you assign tree the owner is entitled to any fruit.

Therefore question in Shepherd is one of intention – question of language and semantics, whether upon a true construction of the deed it purports to assign a part of a right to the royalties or a percentage of the royalties as after acquired property.

Corin v Patton (clarified rule in Milroy v Lord) Mrs and Mr P owned property as joint tenants, Mrs O wanted her share to go to her children, wanted to sever JT by assigning interest – executed 3 docs: memo of transfer to h brother subject to mortgage of bank which held CT; trust deed declaring brother held interest on trust; and a will leaving her estate to her children equal shares. At time of death her transfer to her brother had not been registered nor had any steps been taken to bank produce CT. Held legal assignment since transfer not registered, no equitable assignment no efforts had been made to produce CT. Two-step test: (1) has donor all that is necessary to place vesting of legal title within control of donee (2) beyond the recall and intervention of the donor. Once that stage is reached the gift is effective in equity – donor is bound in conscience to the property as trustee for the donee pending the vesting of legal title. ‘Everything necessary to be done’ means everything that the assignor must have done to put it beyond their recall.

Milroy v Lord: Medley signed a deed saying he wished to transfer $50 s in company to Lord to be held on trust for M’s niece Milroy, M died. No instrument of transfer signed before death so assignment not complete although L had share certificates. Note – if M had already signed instr of transfer the could have been completed by L registering the documents.

(1) Assignor must do all that is necessary to be done to transfer the property

(2) assignor must do all that is necessary to be done to render the assignment binding upon the assignor.

Dearie v Halls: notice is useful for priority, first to give notice is first to get priority. Property was left on trust to pay half of income to Brown, who mortgaged his interest in the fund to Dearie and another (S). Later he s interest in the fund to Hall who purchased without notice of the prior mortgages. Hall gave notice of his sale to the trustees. Several months D and S gave notice of their mortgages to trustees. Held – Hall took inte free of D and S’s interest as he had given notice first.

Hazard Systems v Car-tech Services: clause that assignor will assign invalid, must use language of immediacy rather than language of conti

(4) Future property

A promise to make a gift in the future is not binding without considerative promise to transfer something in the future with consideration is binding under contract law, whether or not you own the property at the time of tl agreement.

Consideration:

• Must be real or valuable

• Deal has to be a commercial reality – but doesn’t have to be of equal value to the chose in action being transferred

• Not nominal or token

Paletto Shoes v Krohn: once consideration has passed equity binds conscience of assignor. Future property is held on constructive trust on received for the assignee-equitable interest instantly arises once proper vests in assignor since the assignor’s conscience is bound in respect of property once consideration has passed. Equity fastens on the property and makes the assignor a trustee of the legal rights or ownership for the assignee. Where subject to be made over doesn’t exist, matter primarily in contract, but the prospective right in property w the assignee obtains higher right than the right to have specific performance of the K, and must survive the assignor’s bankruptcy.

FCT v Everett: partner in law firm sought to assign deed by 6/13 of his share in partnership to his wife including right to receive an appropriate of the profits for valuable consideration. Held: effective assignment,
assignment the right to receive income under the partnership agreement, which included a right to receive appropriate share of profits.

**Kelly v Commissioner of Inland Revenue:** two partners attempted to alienate their rights to partnership income to relatives of the other partner.

**Held:** invalid assignment, since assignment of future income of a partnership cannot exist independently of specified share in the partnership.

**Williams v IRC:** partner in law firm sought to assign his first 500 pounds of income he received as a partner in future years.

**Held:** invalid, assigning the fruit but husband gave consideration; therefore it was a valid assignment.

Note – couldn’t have assigned the tree since the right to sue in tort is a bare right, which is not assignable.

---

### EXPRESS TRUSTS

**Characteristics**

- Trustee is in a fiduciary relationship with beneficiary – duty to manage trust property for the exclusive benefit of beneficiary(ies) (who has standing to enforce in a court)
- Person can be a trustee and beneficiary, but cannot be sole trustee AND sole beneficiary of the same trust property, because then the legal and equitable title would merge meaning the arrangement no longer satisfies – definition of a trust (Re Heberley (dec’d))
- Two types: fixed (beneficiary holds a fixed entitlement to trust property – i.e. to all my children in equal shares) discretionary (beneficiary has mere expectancy that trustee will exercise discretion and make a distribution of trust property).
- Settlor = person setting up the trust
- Must satisfy three certainties

**Commissioner of ACT Revenue v Perpetual Trustee:** merger of legal and beneficial interests will not occur where the trustee is merely one of a number of beneficiaries, or where trustee hold the beneficial interest in a different capacity from capacity in w/ the legal interest is held.

**Three certainties:**

1. Certainty of intention
2. Certainty of subject matter
3. Certainty of objects

*Also consider formalities (for land) and illegality.

#### 1. Certainty of intention

Case law indicates don’t need specific words but the words used must be imperative or mandatory rather than precatory (hope, wish, belief, confidence etc.).

- Note: looking at the intention of the settler.

**Re Armstrong:** man with a number of children, wanted to invest 1500 pounds for each of them, but was going on a trip and didn’t want to leave any part of his estate invested in a term deposit.

- Mr Leach was a solicitor acting for Mr Y who wanted to purchase a piece of land, Mr Y
didn’t intend for her to be the absolute owner.

- Quoted **Re Williams** – if property left to a person in confidence that they will dispose of it in a particular way in which there is no ambiguity, such words are sufficient to impose an obligation.

**Re Australian Elizabethan Theatre Trust:** the relevant intention is to be inferred from the language used by the parties in question and to that end the court may also look to the nature of the transaction and the relevant circumstances attending the relationship between them.

**Walsh Bay Developments v FCT:** use of the words ‘on trust for’ do not necessarily create a trust since surrounding circumstances may dispel inference that a trust was intended.

### Intention to create trust v create other legal relationships

**Loans and debts**

- **Re Kayford Ltd (in liq.):** mail order company had financial difficulties, decided to establish a separate customer trust deposit account; customer ordering would send money to be put into separate account (was just an old account that was laying dormant). Company went into liquidation. If trust had been set up – customers yet to receive goods would have priority as creditors.

**Held:** trust created in favour of customers. Generally, sending money in exchange for goods is a creditor/debtor relationship. Here, because sec bank account been used specifically for this purpose it showed intention create the trust for the customers.

**Henry v Hammond:** if a person receives money and is bound to keep it separate… and to hand that money so kept as a separate fund to the person entitled to keep it, then he is a trustee of that money… If on the other hand is not bound to keep it separate, but is entitled to mix it with his own mone and deal with it as he pleases, and when called upon to hand over an equivalent sum of money then he is a mere debtor.

**Quistclose trusts**

Barclays Bank v Quistclose Investments: rolls razer wanted to decla dividend but didn’t have enough money, approached Q to borrow mone on proviso that it was for the purpose of paying the dividend and the money was to be paid into separate account. Before they could pay the dividend company went bankrupt. Other bank holding the account tried off amounts owed by RR against money in account.

**Held:** need to look at mutual intention of the parties (not just the settlor), since here ther a contractual relationship and from use of words ‘only’ and ‘exclusively’ could be inferred mutual intention was that the sum advanced should n become part of the assets of RR but should be used to pay dividends.

**Result:** two trusts established

1. Primary express trust established where RR was trustee and bene were the shareholders; and (if primary trust not fulfilled)
2. Second trust arises for benefit of Q (i.e. in favour of settlor) – then Q both settlor and beneficiary of secondary trust.

**Re Australian Elizabethan Theatre Trust:** number of gifts made to A generated but were expressed to be unconditional gifts (for tax implications) but we would have a preference for AETT to pass on the gift to a nominal arts organisation. Donations deposited into AETT’s general operating account, AETT went into liquidation.

**Held:** interpreted Quistclose situate a different way – one express trust created with a mandate (condition attached), if condition is fulfilled you go back to a debtor/creditor relation if not fulfilled then money is simply returned to the settlor. Ultimately neither created here – in all circumstances of the transaction words such as ‘unconditionally’, ‘it would be appreciated’ these were just precatory w/o Twinscort v Yardley, subjective intention of the settlor is irrelevant – i.e. long as they enter into arrangement, which has effect of creating a trust is all that is necessary – that they intended to enter into the transaction.

Mr Leach was a solicitor acting for Mr Y who wanted to purchase land, I needed to borrow 1 mill but lender (T) didn’t want to lend money unless there was a personal undertaking by L – didn’t want to do this. Mr Y approach second law firm who agreed to give undertaking so T released money to law firm who released it to Mr L on instructions of Mr Y. Y asked L to use m for a number of things, not just purchase of land. T not happy – sued bc firms, 2nd firm for breach of trust and L for being accessory to breach. H contrast to Quistclose, this was a purpose trust – and wasn’t charitable invalid. Lender paid money to borrow as a loan but didn’t part with ent of beneficial interest in the money – parts it with terms that don’t exh beneficial interest, means a resulting trust arises for lender from outset which the lender is the beneficiary.

**Stephens Travel Service International v Qantas Airways:** money not separate account i.e. not enough to be a separate fund in all circumstances of the transaction words such as ‘unconditionally’, ‘it would be appreciated’ these were just precatory w/o