



ANU LAW STUDENTS' SOCIETY

LAWS2205 Equity Semester 2, 2010

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LAWS2205 Equity
Semester 2, 2010
Q1A & 1B
Mark: 25/30 (83.3)

1A

Whether K has effectively transferred property to M depends on whether valid assignments have occurred. If so, a further issue arises as to whether K validly created a trust by way of transfer (through her letter), which would mean M holds property merely as a trustee subject to specific duties and would not enjoy beneficial title of the property. If a trust has not been validly created, then M holds the property on resulting trust in favour of K: *Westdeutsche*. [✓]

Valid Transfers?

(a) Half of the \$5,000 debt

Assignment of Existing Property?

An issue arises as to whether K intended to assign half of his right to the debt (an existing legal chose in action) or whether he was merely transferring [✓] half of the \$50,000 he is to be paid in the future under the debt (future property – mere expectancy). Future property cannot be the subject of a present disposition: *Norman's case* and equity would not intervene as there is no consideration: *Norman's case*. [✓]

This must be resolved by reference to K's intention as expressed in the purported assignment: *Shepherd*. The fact that K first referred to the "debt" suggests he was referring to the legal right, however later in the document he refers to "your half of the \$50,000" a reference to the money (or "fruit"). However as the document is a letter rather than a formal deed, it would have been unusual for K to have used phrases like "right, title and interest" (as in *Norman* and *Shepherd*, where the assignments were contained in formal documents prepared by lawyers). Accordingly, the Courts would be likely to find that K intended to assign his right to debt, particularly as it was a vested right to be paid \$50,000: *Shepherd* of a fixed clear amount, as distinguishable from the uncertain amount in *Norman*. [✓]

What assignment rules apply?

This is a legal chose in action, however it is not an absolute assignment (only half) thus cannot be assigned by statute (s12 CA 1919). [✓]

However the assignment will be valid in equity if the gift manifests the settlor's intention to make an immediate and irrevocable assignment: *Shepherd* [✓].

Here, the language "have" suggests an immediate and irrevocable assignment, despite the words "want", the fact that later instructions re: the debt were given suggest an intention for the right to the debt have been transferred to M. Although legal title has not passed, K holds it on constructive trust for M. [✓]

(b) The shares

This appears to be a present assignment of existing property in the form of shares, a legal chose in action. [✓]

What assignment rules apply?

i) Legal assignment?

Shares are transferable by law under s107A *Corporations Act* to be transferred as provided by Communications PL's constitution: s107A(1)(i).

This usually involves an executed transfer instrument signed by both parties lodged at the Co's registered office.

Clearly, no legal assignment has occurred as the transfer form has not been signed by M or registered. [✓]

ii) Will Equity intervene?

Equity will recognise the assignment if the settlor has done everything necessary to be done to transfer the property: *Milroy v Lord*, that is, everything necessary to be done by K alone: *Anning*. Here, although K has signed the transfer form and made it 'available', the docs are not yet in M's possession, held by K's solicitor, similar to the situation in *Corin v Paton* as arguably it would still be possible for K to withdraw her instructions to her solicitor and prevent the share transfer form from being released to M. [✓✓]. In the UK this has been held as sufficient as it would be unconscionable for K to change instructions: *Pennington* but the UK approach has not been followed in Australia. Thus, K has not done everything necessary to allow M to receive shares, unless she gave an irrevocable instruction to her solicitors to release form to M. [✓]

No valid transfer, even in equity, K remains legal and beneficial owner of shares.

Was a Trust created?

To be a valid trust there must be certainty of intention, object and subject matter: *Foreman*.

Certainty of intention?

No specific words or language of the trust is required: *Re Armstrong* and the Courts will consider the attributes of the settlor (here, not a lawyer): *Re Armstrong*. An issue arises as to the use of the words "I want" which may be merely precatory words: *Dean v Cole*, however she use the word "trust", although use of the word "on trust" may not be sufficient if circumstances displace inference that trust was intended: *Walsh Bay* [?]. The non-mandatory language of the other instructions ("you may"), ("I want"), may displace the inference of trust, considering the context of the document: *Paul v Constance*, *Dean v Cole*, and the fact that she said M could "have" half the debt, suggesting that M would also enjoy beneficial ownership. Accordingly, it is unclear whether sufficient certainty of intention is established despite use of the word ("on trust") [?].

Certainty of objects

There must be sufficiently certain objects of the trust: *Morice v Bishop of Duram*.

The distribution of income is a mere power ("you may") [✓] and the relevant test is criterion of certainty: *Re Gulbenkian*. The phrase "politically active" appears conceptually uncertain, as it may be referring to people who vote or who protest, etc. Likely fail for uncertainty of objects since not possible to determine who of ANU law students is or is not politically active. [✓]

Distribution of capital is fixed trust (to distribute in equal shares) and test is list certainty. May be possible to draw entire list: *Broadway Cottages*. “True”, red-head” and even “journalist” are all very uncertain and ambiguous terms.

∴ Trust failed – M holds property that was validly assigned (half debt) on resulting trust for K. **[Needs less on certainty of intention and more on objects].**

Q1B

Clause 3 is a negative stipulation in substance as it is possible for B to comply with it by doing nothing: *JC Williamson* **[authority circled by marker]**. Accordingly, J may attempt to seek a prohibitive injunction (PI) under equity’s auxiliary jurisdiction to seek enforcement of clause 3 as the contract between B & J is presumably for consideration: *Doherty v Allman*, as J has recognised legal rights (contractual) sufficient to ground on injunction: *Lenah Game Meats*. [✓]
Will J get a PI?

The granting of a PI is discretionary.

i) *Inadequacy of common law damages*

Even though equity is in it’s auxiliary jurisdiction, modern courts consider this a discretionary factor rather than jurisdictional limitation. **[Explain]:** *NAB v Bond Brewing*, considering whether J should be confined to damages: *Evans Marshall*. [✓]

Damages are likely to be inadequate due to unique nature of Bob’s “unusual expertise” and the difficulty of calculating damages if B were to provide services to someone else, particularly to business competitors which may cause significant loss. Further, hard to see whether B would have stayed in 3 years following contract, thus hard to calculate J’s loss.

ii) *Discretionary factors*

Courts will generally not grant PI for clauses in employment contracts where PI would have the effect of specific performance orders [✓] where specific performance would be available (such as this situation as it is a K for personal service) [✓].

However PI may be available in contracts for “special services” in appropriate circumstances within the *Lumley v Wagner* exception: *Curro*. [✓]

Does the L v W Exception Arise

i) *K for special services?*

This is clearly a K for special services given the uniqueness of “strategic advice” and B’s unusual expertise and experience. [✓]

ii) *Would Bob be compelled to perform?*

Arguably B may not be compelled to perform his K with J as he could return to work for the government (a non-profit making business) or go overseas. It doesn’t matter that this may be less profitable: *Warner Bros v Nelson*, [✓] but an issue arises as to whether having such little super and working on non-profit basis would leave B “destitute” in which case PI wouldn’t be available: *Curro, Nelson*. As a commentator however he is clearly intelligent and would have reasonable alternatives like working for a public university that would not breach clause 3 or leave him destitute and unemployed.

iii) *Timeframe*

Whether the term of the PI is long in the context is relevant: *Curro*. 5 years is probably too long, compared to 3 months (*L v W*) and 3 years (*Nelson*). PIs granted in other cases, more akin to the 4 year PI refused in *Page One*, particularly as being out of touch with environmental/social justice issues for 5 years could damage B's expertise greatly in the context. [✓]

Likely that PI only granted for the remainder of the contract.

[Assignment: 10

Trust: 6.5

Injunction: 8.5 – 25]