

EQUITY EXAM 2004 Q2
[High Distinction – 90%]

Blackacre – prior to the 1st of May, we can be sure that A was the holder of both legal and equitable title of Blackacre.

A's comment on 1st May is possibly a transfer and so will be looked at. A states that he/she will 'hold' Blackacre for B, indicating A intends to create a trust over Blackacre in which B is the beneficiary (it is not a *Corin v Patton* situation, which arises where a party is in the middle of transferring property).

Regarding this trust, though there are the requisite 3 certainties, this is not enough when the subject matter is Torrens System land. s.29(1)(b) of the LPA requires all declarations of trusts re land or interests in land to be in writing. This has not happened on 1st May, so at this point there is no trust, and B is not beneficially entitled to Blackacre.

On 2nd May then, the equitable mortgage that C is given includes only B's properties. An equitable mortgage means that if B fails to make correct payments, C may enforce a right to have the security (land) made available to him: *Nat Provincial & Union Bank of England v Charhley*. Without more detail, I'm assuming this is a valid equitable mortgage.

There is issue as to B's fiduciary duties to A. There is a presumed fiduciary relationship between a solicitor and client: *Farrington v Row McBride & Partner*. The point of fiduciaries is not to recover loss suffered, but rather hold a fiduciary to their duties: *Maguire v Makarone's*. Now that it is determined there is a fiduciary relationship, has it been breached? Yes, according to the 'no-profit' rule: *Chan v Zacharia (Deane J)*. It doesn't look like there is a conflict issue: *Boardman v Phipps*. The defence to a breach is fully informed consent from the principle, which is a question of fact: *Castleragh Motes Ltd v Davies Roe*. There is a requirement of 'full and frank' disclosure of all material facts: *NZ Netherlands Society v Rays*. This has not happened, A thinks B is broke. So, though A has G's advice, A's decision is not based on all material facts, so there is no fully informed consent. B's denial of anything to do with the matter is not a defence: see *Boardman v Phipps* where acting honestly was not a defence.

Okay, I've spoken about that on the assumption B actually did profit. Looking at 4th of May, it does look like A now holds on trust for B, as the necessary paper work is complete. So as of 4 May, A hold legal title, on trust for B.

The remedy for B's breach of fiduciary duties is not likely to be equitable compensation, as no losses apparent; nor account of profits (no \$ amount, just an interest) – probably rescission is the best option: *Maguire v Makaronis*. So – if this was followed through, where would be no trust.

Another aspect of B's behaviour may be unconscionability. There are 3 elements under *CBA v Amadio*: relationship of special disadvantage; knowledge of special disadvantage;

unconscionable exploitation. However, equity only steps in in extreme cases, and as fiduciaries probably cover the issue, and special disadvantage would be near impossible to show (*Blomley v Ryan*) this issue is not going to be further considered.

What about estoppel? 3 elements: representation; detrimental reliance; and unconscionability. B made a representation regarding current fact: *Legione v Hateley*. However, it is not relating to a contract, nor an encouragement that a promise will be performed: *Forbes v AYFI*. So, it focuses on a different area and is not relevant to A & B.

1st June – C's transfer of mortgage over B's property doesn't include Blackacre as mentioned before. So, the fate of Blackacre is, A holds on trust for B until contract is rescinded due to breach of fiduciary duty by B.

D Association.

C transfers mortgage over property to D, so D has been able to collect money. This was a transfer of an equitable chose – but is it future or vested? Looking at *Norman v FCT* and *Shepherd v FCT*, it seems that there is a right to collect loan monies, or else the ability to gain the legal title. So, I think this is a present right to future income: *Shepherd v FCT*. There would have been no issue had consideration been given!

So, is this a trust? I'm not sure... 3 certainties: intention; object; subject matter.

Object is of concern here – is D charitable purpose? (*Morice v Bishop of Durham*). Looking at the 'charitable purposes' in the preamble of the Elizabethian Statute of Charitable Uses 1601, 'war widows' aren't listed. So, probably not a charitable purpose – but there is public benefit: *Verge v Somerville*.

Charitable purpose considered because unincorp association have no legal personality so can't gift them.

Is it a gift to the members? This is the presumption, that may be rebutted: *Lahy v AG (NSW)*. Wording doesn't help with intention here, but may be able to infer he wanted to help D's work: *Bacon v Pianta*. In this case, D would hold on trust.

H looks like a *Re Gillingham's Bus Disaster Fund Case* – so 3 options:

- 1) cy pre's – this would be applied to give to WW2 widows – only applies if charitable: *AG NSW v Perpetual Trustee Co Ltd*. If it was charitable, then because intention not too specific as in *Re Good's Will Trust*, may be able to apply cy-pre's. It is the courts who apply it, not the trustee.
- 2) RT back to C's estate – possible in this case as no issue as to who settler was. So, automatic RT as per: *Re Vandervell's Trust (No 2)*.
- 3) bona vacantia

C's trust with E beneficiary. Note *Saunders v Vautier*, if valid trust, wife can call it in. C can create a trust by declaration, though will need to fulfil s29(1)(b) writing requirement – has done so because of deed. C legal owner – E beneficiary.

F's problem – may want to use estoppel. C has made a representation, and shown F his will – so clear and unequivocal: *Legione v Hately*. It is more than an expression of what may occur: *Wingcarribee Shire Council v Concrete Quarries*. There is also reliance – so can F show a sufficient link: *Wayling v Jones*. It is hard to say without more evidence if it is sufficient assuming so. Also, was the reliance reasonable? (*Austotel v Franklin*) – according to facts of each case, so may be reasonable for F but not necessarily for others. F can show detriment would be suffered – e.g. unable to pay mortgage etc: *Re Ferdinando* (on the reasonableness issue may be hard to show because is it really reasonable to buy a house based on money you may not get for a long time? How did she know C was close to death?).

C turned a blind eye – so maybe unconscionable: *Walton Stores*. So, if C was unconscionable, maybe purchase of house set aside? Not likely! Other remedies – maybe enforce the promise – fix detriment or fulfil expectations: *Cth v Vernayen*.

Maybe an RT issue for E – but not enough info to say whether she contributed to property with C.

CTs – do these fit in anywhere?
- no mutual will: *Birmingham v Renfrew*
- assignment?
- no contract for sale

Remedial?

- no one holds out to be trustee, no trustee de son tort
- *Barnes v Addy* – limb 1 – knowing receipt – F received TP, but at the time of receipt it is not TP, so can't be knowing receipt! Limb 2 – knowing assistance – not relevant here

E can't be guilty under *Barnes v Addy* either – as Os will – not trust property! And, didn't know anyway.