Equity law

Name

Institution

Date

a. Introduction

The maxim equity follows the law illustrates that the purpose of equity is not to contradict the statutory or the common law but to provide a complimentary relief where these two legal instruments fall short without contradiction.[1] In this scenario, Meg Mannion has found herself battling issues that are related to equity. In her lifetime, Meg had created an impressive portfolio following her investments in real estate which boosted her net asset value from $330,000 to $ 7.7 million from 1963 to 1978. Significantly, Meg got into a relationship with Tommy, that lasted for that period, and the latter has instituted legal proceedings to claim part of the $7.7 million in assets. Also, Meg unknowingly got involved into unscrupulous dealing with Capricorn Cash Counsellors Pty Ltd who in their bid to repay her exposed her to liability. Further, in an attempt to resolve her legal challenges, Meg consulted MacGaskill who later blackmailed her regarding her past tax issues.

b. Tommy's entitlement

i. Issue

Following their relationship and their past dealings, was Tommy entitled in equity for a portion of Meg Mannion assets?

ii. Legal Perspective and application

[1] Maurizio Lupoi, Trusts: *A Comparative Study* (Cambridge University Press, 2000) 57

To begin with, for one to bring an action in equitable trust there must be a validly constituted trust. A validly constituted consist of three elements namely; the certainty of intention, the certainty of subject matter and the objects or beneficiaries as illustrated in the case of *Knight v Knight* [1840] 49 ER 58 at 68.[2]The trust created must have been intended by the creator both through inference of words or conduct.[3] Markedly, Meg assigned Tommy a role of director in a number of her companies not as an equitable interest but to fulfil a legal requirement. Additionally, this role was assigned to Tommy without him making any contribution either pecuniary or otherwise. Equally, Tommy was paid significant amounts which did not commensurate with the services he rendered in these companies. Meg's intention was to relieve her from tax liability issues but not to compensate Tommy for the services rendered.[4] Likewise, Meg voluntarily without being paid valuable consideration transferred some assets to Tommy. However, the motive for the transfer of these assets was not for Tommy to acquire legal or equitable title but to serve as a conduit to where he can obtain some experiences in managing commercial undertakings and handling money. [5]Consequently, there was no explicit intention from the part of Meg to create any form of trust in as far as Tommy was involved.

[2] *Varma v Varma* [2010] NSWSC 786 at [474]; see also *Ying v Song* [2010] NSWSC 1500 at [239].
[3] *Registrar of the Accident Compensation Tribunal (Vic) v Federal Commissioner of Taxation* (1993) 178 CLR 145
[4] *Commissioner of Stamp Duties v Joliffe* (1920) 28 CLR 178
[5] *La Housse v Counsel* [2008] WASCA 207

In instances where the transfer of a given property must be made in writing, the certainty of intention will not suffice if such property has been deposited orally.[6] Identically, the document to be relied upon as conferring property by way of equitable interest must unequivocally express the intention of the transferor.[7] Equally important, the document in question must not be ambiguous in its expression of transferor's intention to transfer the property in question.[8] Certainly, there is no evidence that there was any written documentation to corroborate the fact that Meg had drafted documents to grant Tommy both legal and equitable interest in the assets presumably transferred to him. Even if there was such documentation in existence, it is unlikely that the expression of such intention was in an unambiguous manner.

Comparatively, intention alone is not enough in determining the availability of the trust.[9] The property or the subject matter must be identifiable and in existence.[10] This is in congruence with the equitable maxim that "equity strives to make that which is not certain to be certain." Moreover, subject matter that consists of potion will only be certain if the whole can be identified.[11] In this situation, Meg had allocated Tommy four home units. Two of those units named Arafura Shores were not yet built, and Tommy was to derive one-eighth of the

[6] *Boccalatte v Bushelle* [1980] Qd R 180
[7] *Star v Star* [1935] SASR 263
[8] *Lutheran Church of Australia v Farmers Cooperative Executors & Trustees Ltd* (1970) 121 CLR 628
[9] *Re Golay's Will Trusts* [1965] 2 All ER 660
[10] *Hunter v Moss* [1994] 3 All ER 215
[11] *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271

beneficiary interest in the trust. Firstly, the fact that Arafura Shores was not in existence per se makes the subject matter uncertain. Secondly, the trust benefit to be derived from Arafura Shores by Tommy was in the part where the whole could not be sufficiently established. Further, the other two units referred to as Kakadu Towers were allocated to Tommy in a similar fashion. Conversely, these units were later liquidated with Tommy retaining a large portion of the sale proceeds.

As a matter of fact, an equitable interest in the property can be derived from the constructive trust. This often arises if there is no written agreement conferring the subject matter to the object.[12] Mainly, a constructive trust is mainly derived if there is a common intention to share property as depicted in the case of *Pettit v Pettit* [1970] AC 777.[13] Comparatively, making a pecuniary contribution to a beneficial interest also amounts to the creation of a constructive trust as established in *Midland Bank v Cooke* [1995] 4 All ER 562. [14] However, indirect and non-pecuniary contributions such as homemaking are not automatically considered except when there is an explicit agreement to recognise them as demonstrated in *Fowler v Barron* [2008] EWCA Civ 377.[15] Contributions whether pecuniary or otherwise its superficial form does not amount to the creation of a constructive trust as the party intending to obtain remedy must demonstrate that these contributions were reliant

[12] Alastair Hudson, *Equity and Trusts* (Routledge, 2016) 42
[13]See also *Gissing v Gissing* [1971] AC 886; [1970] 2 All ER 780
[14]See also *Oxley v Hiscock* [2005] Fam 211
[15] *Allen v Snyder* (1977) 2 NSWLR 685

upon the agreement to have a beneficial interest.[16] Remarkably, Tommy was allocated the designation of a director for companies owned by Meg, but there was no contribution to the shares. His role to those companies was insignificant, and the amounts paid to him in the form of remunerations were significantly disproportionate to the services rendered. Additionally, the allocated units in Arafura Shores were intended for one-eighth of the beneficial interest. Notably, Meg's intention for allocating those units was not primarily to grant beneficial interest but to impact monetary experience in managing such commercial undertakings. Furthermore, Tommy's non-pecuniary contributions were not based on any agreement to obtain beneficial interest. Moreover, his pecuniary contributions were equally not motivated to gain equitable interest.

iii. Conclusion

Indeed, Tommy is not entitled in equity to derive any entitlement to the assets owned by Meg because there was no intention to create an equitable trust and the subject matter was not in existence when the claim was made. Moreover, there was no common intention to create such a beneficial interest as there was no significant pecuniary contribution from Tommy. Although there was a considerable non-pecuniary contribution from Tommy, there were no agreements as to

[16] Bill Atkin, 'The Legal World of Unmarried Couples: Reflections on "De Facto Relationships" In Recent New Zealand Legislation' (2008) 39 *VUWLR* 793,809

acquire beneficial interest nor were they made in anticipation of obtaining equitable, beneficial interests.

c. Meg liability in the Capricorn Cash Counsellors bank account controversy

i. Issue

Should Meg be held culpable for the $600,000 made to her by Community Legion Bank?

ii. Legal Perspective and application

If there is two or more inconsistent interest, then dispute becomes inevitable. In seeking to resolve such a dispute, the court must decide as to whether which interest holds a higher priority than the other. Firstly, the courts have to determine if there was sufficient notice which could have forestalled the conflict in the first place.[17] Notice exist in three forms; actual, constructive and imputed.[18] Where there are actual notice pertinent facts will have to be taken into consideration to ascertain if there was a subjective awareness that could have made them aware of the existence of a previously existing interest.[19] Actual notice can be determined through available documentation.[20] As it can be seen from this case, there was no way Meg could have reasonably known that there

[17] Samantha Hepburn, *Principles of Equity & Trusts (Aus) 2/e* (Routledge, 2013) 71
[18] Property Law Act 1958 (Vic) s 199
[19] Gary Watt, *Trusts and Equity* (Oxford University Press, 2016) 509
[20] Ibid

was another existing equitable interest that was in direct conflict with her interest.

In the constructive notice, the bearer of a subsequent equitable interest ought to have known the existence of prior existing equitable interest. [21]Thereupon, the conduct of the presumably liable party shall be taken into context to determine culpability. [22]Notably, for equitable interest inspection of relevant documentation is often taken as a way of ascertaining if the presumably culpable party should be liable. Forthwith, if a transacting party proceeds with a transaction without inspecting or failing to take cognizance of the existing equitable interest, he or she shall be held liable.[23] However, if the documents have been deliberately made inaccessible from the transacting party, then the transacting party shall not be held liable.[24] Reasonably, Meg could not have known of a conflicting equitable interest as Gael Lambing was a fraudster who was determined to conceal any documentation that could have alerted either Meg or John Monck. Additionally, the transaction between Meg and Gael went smoothly and as expected and there was no need for Meg to raise the alarm.

Conceptually, if there are two conflicting equitable interest with an equal standing, The earliest one in time shall prevail according to *Rice v Rice* [1854] 61 ER 646. As illustrated by *Rice v Rice* other circumstances of the

[21] Joseph Story, *Commentaries on Equity Jurisprudence* (Beard Books, 2000) 403
[22] Ibid
[23] *Jared v Clements* [1902] 2 Ch 399
[24] *Plicher v Rawlins* [1872] 7 Ch App 259

case must be taken into consideration as they have the potential of altering the intended result. Moreover, the conduct of the transacting parties cannot be ignored as they can vary the end result. According to this case, Meg was the initial depositor to Capricorn Cash Counsellors bank account. Logically, Meg and John Monck would have expected Capricorn Cash Counsellors to maintain separate bank accounts for each of their depositors. Uniquely, Meg's equitable interest is of great standing as that of John Monck, but since it came earlier in time, it should be accorded a higher priority than that of John Monck. Correspondingly, Gael Lambing is the fraudster, and there was no way Meg or John Monck could have known of Gael Lambing fraudulent intentions and transactions.

In principle, when ascertaining priority between conflicting equitable interests two factors have to be taken into account. To begin with, the deployment of notice as a test is both secernate and distinguishable and thus capable of postponement. This means that the holder of a later equitable interest who has sufficient notice of the first equitable interest will not obtain priority except when the holder of the former equitable interest carries out an act that is construed as a postponing conduct. Comparatively, a notice of a latter equitable interest is just one of those considerations that are applicable in ascertaining as to who holds a better equitable interest. According to the reasoning of Davies JA in *Platzer v Commonwealth Bank of Australia* [1997] 1 Qd R 266, 273which corroborates the position that the former holder of an equitable interest will always be granted priority over the former unless he decides to

engage in a postponing conduct. As explained by Lord Wright in *Abigail v Lapin* [1934] UKPC 33, the postponing conduct can assume the form of negligent act or estoppels. Further, in concurrence with the above dicta, Ormiston and Brooking JJA attempted to give the effect of the two rulings in the case of *Moffett v Dillon* [1999] 2 VR 480. In addition, the English tend to lean on merits of the equity[25] while the Australian focuses more on time. [26] Forthwith, as captured by this scenario Meg's equitable interest came prior to that of John, and she could not have known of the latter existing equitable interest. Therefore, she could not have logically engaged in any postponing conduct.

iii. Conclusion

As it has been noted, Meg is not culpable for the $600,000 made to her by Community Legion Bank from Capricorn Cash Counsellors Pty Ltd bank account because her equitable interest came earlier in time. Likewise, she could not have reasonably had notice of the existence of a conflicting equitable interest as Gael was a fraudster and would not have disclosed such pertinent information. Moreover, Meg held a better equitable interest in terms of merit as she did not engage in any form of postponing conduct such as negligence or estoppels.

d. Meg's equitable remedy to her tax disclosures

i. Issue

[25] Rice v Rice [1854] 61 ER 646
[26] *J & H Just Holdings Pty Ltd v Bank of New South Wales* [1972] 125 CLR 546, 554–5

Would it be possible for Meg to be granted an injunction for the use of her confidential documents by the Australian Tax Office (ATO)?

ii. Legal Perspective and application

Before the court can delve into granting or denying an injunction, it must satisfy itself that the plaintiff has articulated a prima facie case of a potential infringement of a right by the defendant as articulated by Lord Diplock in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at 407.[27] In a landmark case of *Australian Broadcasting Corp v O'Neill* [2006] 227 CLR 57 where Gummow and Hayne JJ affirmed as to what needs to be fulfilled for the applicant to be accorded an injunction on the basis of a *prima facie* case. It was determined that prima facie case is when there is a compelling allegation that should the evidence remain intact the plaintiff is likely to succeed. In the case pitting Meg and ATO the use of confidential information by the latter will be a breach of confidentiality. Taking cognizance of the prevailing evidence, Meg has a high probability of succeeding unless ATO mounts a serious rebuttal.[28]

Further, before the court can decide on denying or granting an injunction, it must decide on the balance of convenience. In this scenario, the court must rationalize as to which cause of action is unlikely to deny justice as the ultimate issue is still awaiting final deliberations. [29] Realistically, if the ATO are allowed to use the information as was provided to them by

[27] See also *Beecham Group Ltd v Bristol Laboratories Pty Ltd*(1968) 118 CLR 618 at 622-623
[28] *Kolback Securities Ltd v Epoch Mining NL*(1987) 8 NSWLR 533
[29] Ibid

MacGaskill, it would jeopardize the process. Moreover, the assistant commissioner at ATO is related to MacGaskill, and this could endanger the case due to conflict of interest.

Correspondingly, the court must also be able to have the foresight to determine if the plaintiff seeking the injunction would be adequately remedied if the case was to go to its full length. This position can assume two situations. Firstly, the kind of remedy available may not fully satisfy the plaintiff based on the type of damage caused.[30] Secondly, the defendant may not be able to pay the damages due to the potential size of the award[31] or by the fact that the defendant could be impecunious as illustrated in the case of *Paramount Design Group Pty Ltd v Awaba Group Pty Ltd* [2003] AIPC 91-905.[32] If ATO decides to institute proceedings against Meg based on the information provided by MacGaskill, there would be a high probability of Meg succeeding however it is unclear if the damage caused by ATO using the information would be sufficiently compensated by damages. Moreover, the instigator of the legal proceedings, MacGaskill, may not be able to pay damages should Meg decide to bring a suit against him either jointly with ATO or severally.

Uniquely, in instances where an injunction is being sought in relation to potential misuse of information, the court must ascertain if the information in question is confidential or privileged. This is because the

[30] *Penfolds Wines Limited v James Peter Elliott*(1946) 74 CLR 204
[31] *Patrick Stevedores Operations No2 Pty Ltd v Maritime Union of Australia* [No3](1998) 195 CLR 1
[32] See also *Sempra Metals & Concentrates Corp v Tritton Resources Ltd* [2006] NSWSC 1209

standard of protecting legally privileged information is lower than that classified as confidential as explained by Beazley JA in the case of *Richards v Kadian*(2005) 64 NSWLR 204; [2005] NSWCA 328 at [15]. Equally, as cited in the case of *Protec Pacific Pty Ltd v Cherry* [2008], VSC 76 at [43] information rendered for purposes of obtaining advice such as solicitor is considered confidential. Identically, the recipient of such confidential information must desist from using such information against the provider as stated in the case of Lord *Ashburton v Pape*[1913] 2 Ch 469 which established the principle.[33] Fundamentally, the information given to MacGaskill by Meg was solely for seeking advice and thus considered confidential information. Furthermore, it would be a breach of confidence for MacGaskill to give ATO such information as he is under obligation to maintain the integrity of such information. Uniquely, that information obtained by ATO from MacGaskill has been acquired illegally, and thus it would jeopardize the latter's case hence improving the chances of Meg succeeding in her case.[34] Not only has the information obtained illegally, but their use against Meg is also based on *mala fides* and frivolous claims.

iii. Conclusion

By and large, there is a high probability that the court shall grant Meg injunction to compel ATO to return these documents and desist from

[33] See also May LJ reasoning in *Goddard v Nationwide Building Society*[1987] QB 670 at 683 ; *AG Australia Holdings Ltd v Burton*(2002) 58 NSWLR 464; [2002] NSWSC170 at [135]

[34] Joachim Dietrich and Thomas Middleton, 'Statutory remedies and equitable remedies' (2006) 28 *AUSTRALIAN BAR REVIEW* 136, 145

reading, reviewing, using, copying or relying on her documents. This is because allowing ATO to proceed would infringe on her right, amount to irreparable damage and the information which is confidential was obtained illegally hence making ATO case hopeless.

e. General conclusion

All facts considered, we are able to conclude that Tommy does not have any entitlement of the assets owned by Meg at least on equity. Markedly, she is not liable for the $600,000 paid to her by Community Legion Bank from Capricorn Cash Counsellors Pty Ltd bank account due to her having a higher priority. Consequently, the court is inclined to grant her an injunction based on the strength of her claims.

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