

# Equity and Trusts

## Introduction to Equity

### What is Equity?

- The principles applied by judges where the law is deficient for some reason.
- **The emergence of institutional equity: medieval origins**
  - **14th century:** Some litigants who could not bring their complaint within the formula of the writ petitioned the king, who retained an overriding power to administer justice. The king investigated some of these complaints himself but increasingly adopted the practice of referring petitions to the Chancellor, who was the king's first minister and the head of the Chancery.
  - The real difference between the common law and equity in its formative stage concerns not substantive law but the procedures applied by chancellors to obtain evidence.
  - **15th century:** Chancellors enjoyed considerable discretion in making orders. Chancery was a court of conscience in which defendants could be compelled to do whatever conscience required.
- **Competition between common law and equity**
  - **16th century:** A particular grievance of common law judges was the Chancellor's power to grant an order known as a 'common injunction' to prevent the enforcement of a judgment obtained in a common law court.
  - **17th century:** The dispute culminated in Earl of Oxford's case, where the king ruled in favour of equity. This ruling was a landmark in the development of equity, because it established for the first time the supremacy of Chancery over the common law in cases of conflict between the jurisdictions.
  - By the end of the 18th century, equity was said to be a 'gloss' on the common law, modifying the common law where the enforcement of legal rights was harsh or oppressive, but not claiming to be a parallel or rival system of law.
- **Reform and the judicature legislation**
  - **Judicature Act 1873 (Imp)**
    - The old superior common law courts were abolished and replaced by divisions of a new High Court of Justice, including common law divisions, such as the Queen's Bench, as well as the Chancery Division.
    - A unified code of procedure applied to both common law and equitable claims.
    - Confirmed the supremacy of equity in the event of a conflict between common law and equity which was not otherwise resolved by the judicature legislation.
  - **In NSW: Judicature Act 1972**

### Jurisdiction

- **Exclusive jurisdiction:** consists of matters which prior to the judicature legislation could only be adjudicated upon by Chancery, and not by common law courts; e.g. enforcement of trusts and other fiduciary obligations, equitable obligations of confidence, the rescission of contracts on equitable grounds such as misrepresentation and unconscionable conduct. Only equitable remedies can be awarded when equity acts in its exclusive jurisdiction. Common law damages are not available.
- **Auxiliary jurisdiction:** when a tort or breach of contract has been committed and common law damages are an inadequate remedy for the plaintiff. Damages are inadequate if a money award will not enable the plaintiff to purchase a market substitute for the defendant's performance.

### Maxims of Equity

- He who seeks equity must do equity.
- He who comes to equity use come with clean hands.
- Equity looks to intent, rather than to form.
- Equity treats as done that which ought to be done.
- Equity acts in personam.
- Equity follows the law.
- Equity does not assist a volunteer.
- Delay defeats an equity.

## Equity and Contract Law

### Equity's intervention

- Equity enforces some promises that are unenforceable at common law.
- Equity intervenes where the contract is substantively unfair.
- Equity provides remedies unavailable at common law, which:
  - Enforce contracts (specific performance or injunction)

	<ul style="list-style-type: none"> <li>○ Set aside contracts where consent has been impaired or vitiated by factors such as mistake, misrepresentation, undue influence or unconscionability (rescission)</li> <li>○ Correct contracts where they do not reflect the mutual intention of the parties (rectification)</li> </ul>
<b>Estoppel and promise enforcement</b>	<ul style="list-style-type: none"> <li>• <b>Common law estoppel:</b> prevents a person who, by a representation of fact, has induced another to alter her position, from denying the fact as represented.</li> <li>• <b>Equitable (or promissory) estoppel:</b> applies where the representation made, or assumption created, relates to a future state of affairs and not existing fact, and a party relies on the representation or assumption to her detriment. <i>Walton Stores (Interstate) v Maher (1988) 164 CLR 387</i></li> <li>• <b>Facts:</b> Waltons demolished a building and started building a supermarket under assumption that contract of lease was going ahead. The Mahers informed them they would not lease the property until supermarket was 40% complete.</li> <li>• <b>Held:</b> Brennan J identified the criteria for a valid estoppel: <ul style="list-style-type: none"> <li>○ <b>Assumption:</b> the plaintiff assumes that a particular legal relationship exists between the plaintiff and the defendant or that a particular relationship will exist between them. The plaintiff must assume that the defendant is not free to withdraw from the expected legal relationship.</li> <li>○ <b>Inducement:</b> the defendant has induced the plaintiff to adopt that assumption or expectation.</li> <li>○ <b>Reliance:</b> the plaintiff acts or abstains from acting in reliance on the assumption or expectation.</li> <li>○ <b>Knowledge:</b> the defendant knew or intended him to act on the assumption.</li> <li>○ <b>Detriment:</b> the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled.</li> <li>○ <b>Failure to prevent detriment:</b> the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise.</li> </ul> </li> </ul> <hr/> <ul style="list-style-type: none"> <li>• The plaintiff's reliance on the assumption or expectation created must be reasonable: <i>Australian Security Commission v Marlborough Gold Mines (1993) 177 CLR 485</i>.</li> <li>• Where the basis of the assumption is that a particular legal relationship exists between the parties, detriment may be avoided by the party who creates the assumption giving reasonable notice of an intended departure from the assumption: <i>Commonwealth v Verwayen (1990) 170 CLR 394</i> (Commonwealth said it would not deny liability or rely on statute of limitations, but then changed its policy).</li> <li>• A promise will only be enforceable through estoppel to the extent that it prevents unconscionable conduct.</li> </ul> <hr/> <ul style="list-style-type: none"> <li>• <b>Proprietary estoppel:</b> prevent a holder of an interest in property from insisting upon his legal rights to property where he has encouraged another to act to her detriment on the faith of her belief that she had, or would be granted, some rights over the property in question.</li> <li>• <i>Dillwyn v Llewelyn (1862) 4 De GF&amp; J 517:</i> father conveyed property to son but transfer was defective. Son built house on it with father's knowledge and approval. On father's death land was conveyed to him as he had equitable interest in it.</li> </ul>
<b>Voidable transactions</b>	<ul style="list-style-type: none"> <li>• Equity sets aside transactions where consent has been vitiated by unilateral mistake, misrepresentation, duress, undue influence, unconscionability, principle of <i>Yerkey v Jones</i>, and breach of fiduciary duty.</li> <li>• The principal equitable remedy for setting aside vitiated transactions is rescission. The aim of rescission is restitution: both parties must be restored to their pre-transactional position. In some cases the court has ordered partial rescission as the best way of removing the vitiating factor from the transaction.</li> <li>• Unless the contract is executory, rescission will usually require the restoration of benefits conferred under the contract, or the value of the benefits, to both parties.</li> <li>• The vitiated transaction is voidable, not void. This means that the transaction is valid until the innocent party has elected to rescind and, in the case of a contract, rights accrued under the contract continue to be enforceable until the election to rescind has been made.</li> </ul> <hr/> <p><b>Undue influence</b></p> <ul style="list-style-type: none"> <li>• Looks to the quality of the consent or assent of the weaker party.</li> <li>• Undue influence can be: <ol style="list-style-type: none"> <li>1. <b>Actual:</b> the defendant must have a capacity to influence the plaintiff; influence must have been exercised; the influence must have been undue; and it must result in the plaintiff's entry into the transaction: <i>Johnson v Buttress (1936) 56 CLR 113</i>.</li> <li>2. <b>Presumed, in recognised relationships of risk:</b> where the relationships between the donor and donee is such as to raise a presumption that the donee has exercised undue influence over the donor. E.g. child-parent; disciple-religious advisor; client-solicitor; patient-doctor; fiancée-fiancé.</li> <li>3. <b>Presumed, in proven relationships of risk:</b> if the parties are not in a relationship where undue influence is presumed, the plaintiff can nonetheless show that the other party to a transaction occupied a position of ascendancy and influence over her.</li> </ol> </li> <li>• Rebutting the presumption of undue influence <ul style="list-style-type: none"> <li>○ An undue influence claim will be defeated by proof that the plaintiff was emancipated from undue influence at the time of the transaction. Independent advice remains the best proof. Proof that the donor received independent legal advice will defeat the undue influence claim, provided that the nature and effect of the transaction were so fully explained to the donor that the court will be satisfied that she was acting independently. Purely formal consultation with a solicitor will</li> </ul> </li> </ul>

not constitute independent legal advice for this purpose.

### Unconscientious conduct

Equity will intervene where following conditions are met:

1. One party to the transaction is under a special disability when compared with the other party.
  - Relative disadvantage can arise from poverty or need, sickness, age, sex, infirmities, drunkenness, illiteracy, lack of education, or lack of assistance and explanation where those were needed: *Blomley v Ryan* (1956) 99 CLR 362.
  - The claimed disadvantage or disability must be 'special'. It must seriously affect the ability of the person subject to it to make sensible decisions in her own best interests.
2. The special disability is sufficiently obvious to the other party;
  - The defendant must have actual knowledge, or be in the position where he ought to have known of the disability.
3. The other party takes unconscientious advantage of the first party's special disability in procuring the transaction.
  - Once the plaintiff establishes that a special disability was known to the defendant, an inference arises that the defendant has unconscientiously exploited that disability in transacting. It is then up to the defendant to show that no advantage was taken.

### The rule in *Yerkey v Jones and Garcia* case

- Special conditions arise for wives seeking to be relieved of surety obligations incurred to support their husbands' borrowings.
- It is unconscionable for a lender to attempt to rely on a security where:
  - The wife is a volunteer: i.e. she takes no benefit from the transaction.
  - The wife executes a security as a result of actual undue influence, or did not understand the effect of the security
  - The lender knows of the wife and borrower's relationship, and is taken to understand that the borrower may not have accurately explained the transaction; and
  - The lender has not taken 'sufficient steps' to explain the security to the wife, or does not reasonably believe they have been explained to her independently.

## The penalties doctrine

- If a clause specifying payment of agreed amount of damages in case of breach is not a genuine pre-estimate of the loss suffered it will be unenforceable as a penalty.
- **Principles:** *Dunlop Pneumatic Tyres v New Garage & Motor* [1915] AC 79
  - The language used in the contract is not conclusive.
  - The essence of a penalty clause is to deter a breach of contract whereas the essence of liquidated damages is a genuine pre-estimate of damage.
  - Whether a clause is penalty must be determined at the time of the contract and not at the time of breach.
  - The sum will be held to be a penalty if it is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.
  - A sum will be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is greater than the sum which ought to have been paid under the contract.
  - There is a presumption that the sum is a penalty if it is a single lump sum payable on the occurrence of one or more of several events, some of which may occasion serious damage and others of which may occasion trivial damage.
  - Precise pre-estimation is not necessary.

## Relief against forfeiture

Prevents the unconscientious enforcement of legal rights, especially where a proprietary interest in land or a chattel has been forfeited as a result of failure to perform a term in the contract.

# Equitable Proprietary Interests

## Recognition of property rights

- Equity recognises and enforces interests in property which are not recognised or enforced at common law, such as.
  - A beneficiary's interest under a fixed trust
  - A partner's interest in the partnership
  - Proprietary interests that are counterparts to common law interests, such as the equitable fee simple and the equitable lease.
    - Equitable lease exists where everyone proceeded under the assumption that lease was valid but had technical problem that makes it invalid under the common law, but would be unconscionable to ignore the lease.
  - Equitable security interests, such as the equitable mortgage
    - Equitable mortgage exists where it is unconscionable to dismiss agreement to give mortgage because of a technicality that render the agreement invalid at common law.
  - Equitable rights over land such as the equitable easement or restrictive covenant over land

	<ul style="list-style-type: none"> <li>Equitable interests in property can come about in three ways: <ul style="list-style-type: none"> <li><b>By agreement</b>; e.g. agreement to lend money for mortgage</li> <li><b>By express trust</b>; deliberately intended to set up a trust</li> <li><b>By court order or operation of law</b> <ul style="list-style-type: none"> <li><b>Constructive trust</b>: derives its efficacy from a court order and not from a settlor's expression of intention</li> <li><b>Equitable lien</b>: court-ordered security interest imposed over the defendant's property, e.g. to secure repayment of sums defendant owes plaintiff</li> </ul> </li> </ul> </li> </ul> <p>Equitable interests in or over property are binding on all persons except a good faith purchaser for value of the legal estate in the property without notice of the equitable interest. The good faith purchaser defence destroys the equitable interest involved. It cannot be revived even against a subsequent purchaser who has notice of the equitable interest. Notice can be actual, constructive or imputed</p>
<b>Indication of equitable proprietary interest</b>	<p><i>National Provincial Bank v Ainsworth</i> [1965]:</p> <ul style="list-style-type: none"> <li><b>Facts</b>: Husband owned house, lived in it with wife and children. They divorced and husband moved out. Husband needed to borrow money for his business, so he went to the bank and used house as security. Husband could not repay debt and bank took steps to sell the house to recover the money. The wife refused to move out. Did wife have proprietary right against the bank?</li> <li><b>Held</b>: wife had right against husband alone—personal rights, not rights in rem: “Before a right or interest can be admitted to the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.”</li> <li>If you can transfer or assign or sell the right to someone else, it is usually a property right.</li> </ul>
<b>The nature of equitable ownership</b>	<ul style="list-style-type: none"> <li>Equitable interest comes into existence only when they are needed, and cease to exist when they are no longer needed. An absolute owner of property does not hold two estates, one legal and the other equitable. She holds only the legal interest in property.</li> <li>An owner cannot reserve equitable title in the property to herself while transferring legal title to another. She transfers the full beneficial ownership in the trust property to the receiver.</li> </ul>
<b>Equity vs. equitable interest</b>	<p>If property has been transferred under a contract or as a gift which is voidable in equity, the party entitled to set aside the transaction has an ‘equity’, sometimes described as ‘mere’ or ‘personal’ equity, to have the transaction rescinded and the property returned to her. This ‘equity’ is weaker than an actual equitable interest. A third party who has an equitable interest in property (such as equitable mortgage or equitable lease) without notice of the plaintiff's equity, has priority over the equity</p>
<b>Equitable Assignment</b>	
<b>Assignment and equity</b>	<ul style="list-style-type: none"> <li>Assignments are transfers of property either for consideration or as gifts.</li> <li>Equity may regard a transfer of property as complete in equity even though the law would regard the transfer as incomplete.</li> <li>Equity may regard a transfer as effective even though the property is not transmissible at common law.</li> <li>Equity adopts a wider definition of property for the purpose of recognising and enforcing the transfer of property.</li> <li>Equity steps in when the assignor's conscience ought to be bound by the assignment</li> </ul>
<b>Assignment of legal property</b>	<p><b>Legally ineffective assignments</b></p> <ul style="list-style-type: none"> <li>Even though an assignment of legal property is legally ineffective, equity may regard the transfer as complete and make orders giving effect to it. This depends on whether equity regards the assignor's conscience as bound by the transaction.</li> <li>There are two situations to consider: <ol style="list-style-type: none"> <li><b>Where the assignee has given consideration</b> <ul style="list-style-type: none"> <li>Common law regards the receipt of consideration as a valid reason for assigning property. Nevertheless, unless all relevant steps to complete the transfer at law are taken, the common law would not regard the transfer as complete. Equity assists an assignee who has given consideration in such cases.</li> <li>Consideration is equity's cue to attempt to do whatever may be requested to enforce the transaction, so long as the contract can be specifically performed. Equity regards the assignor's conscience as ‘bound’ by the receipt of consideration. This is the converse of the maxim ‘equity will not assist a volunteer’.</li> </ul> </li> <li><b>Where the transaction is a gift</b> <ul style="list-style-type: none"> <li>In the absence of consideration, equity regards the donor's conscience as bound when the donor has done all that she alone must do to make the assignment effective. The transferee must be in a position to complete any outstanding steps for legal assignment without the assistance of the transferor or the court.</li> </ul> </li> </ol> </li> </ul> <p><i>Milroy v Lord</i> (1862) 4 De G F &amp; J 264</p>

	<ul style="list-style-type: none"> <li>• <b>Facts:</b> Milroy wanted to assign shares to his young niece. He set up a trust, transferred shares into the trust, and assigned the to Lord as a trustee. At law, transfer of shares was not effective until the assignment was recorded in the company books. This failure was not discovered until Milroy died.</li> <li>• <b>Held:</b> It was held that he had not done enough. The test was said to be whether the assignor had done ‘everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding on him’.</li> </ul> <p><i>Corin v Patton</i> (1990) 169 CLR 540</p> <ul style="list-style-type: none"> <li>• <b>Facts:</b> Corin was terminally ill. She lived as a joint tenant with her husband, and she tried to assign her half-share of the house into a trust for the benefit of her children. Trustee was her brother Patton. The title deed of the house was with the bank who held a mortgage over the house. Corin died without giving her brother a copy of the title deed, making the transfer defective at law.</li> <li>• <b>Held:</b> equity regarded the assignment as complete when the donor had taken all the steps that she alone had to take to ensure the effectiveness of the transaction. As long as the donee could complete any remaining steps without the assistance of the court, equity could regard the transfer as binding. This would have required Corin to have executed all necessary transfer forms and arranged for the production of the title for registration, or at least armed her brother with authority to request production of the title from the mortgagee</li> <li>• If the solicitor is holding the documents for assignor, transfer is not effective until it is given to the assignee. If the solicitor happens to act for both assignor and assignee, the solicitor would not hold the transfer documents on behalf of the transferee until he had the transferor’s authority to treat them as the property of the transferee: <i>Marchesi v Apostolou</i> [2007] FCA 986</li> </ul>
<p style="text-align: center;"><b>Assignment of equitable property</b></p>	<ul style="list-style-type: none"> <li>• Property that is only recognised in equity can only be assigned in equity.</li> <li>• There are no formalities beyond the need to show a definite and immediate intention to make the assignee the owner in assignor’s place. Future assignment (such as assignment starting from next week) is not assignment as during that time the property may be affected or the assignor can change their minds.</li> <li>• A gift of equitable property is complete in equity when the assignor has manifested an immediate, irrevocable intention to assign that property. At that point, equity regards the assignor’s conscience as bound by the gift. The transaction, however, is still subject to statutory requirements concerning the need for writing.</li> <li>• Rights that affect third parties when assigned must be notified</li> </ul> <p><i>William v Krimrisch</i></p> <ul style="list-style-type: none"> <li>• K borrowed money from W, on condition that every time K sold tyres to Dunlop, K must assign right to payment to W. In accordance to the condition, Dunlop was told to pay W, not K when buying tyres. Dunlop accidentally paid K, who then went bankrupt. W asked Dunlop for money and Dunlop had to pay a second time to discharge the debt</li> <li>• For assignment at equity: <ul style="list-style-type: none"> <li>○ The right must be assignable;</li> <li>○ The assignment must be immediate, not an undertaking to assign in future;</li> <li>○ The assignor must express clear intention to make the assignee the owner;</li> <li>○ If there is a debt, debtor must be notified of the new creditor; and</li> <li>○ If there are any statutory formalities, they must be observed</li> </ul> </li> </ul>
<p style="text-align: center;"><b>Non-assignable rights</b></p>	<ul style="list-style-type: none"> <li>• Some assets or rights cannot be assigned at law or equity. <ul style="list-style-type: none"> <li>○ <b>Contract of personal nature;</b> e.g. employment: the benefit of contracts of personal service cannot be assigned because the identity of the person for whom the service is to be performed may matter to the person who has to perform it.</li> <li>○ <b>Rights in statute;</b> e.g. driving licence</li> <li>○ <b>Bare right to litigate:</b> public policy dictates that most assignments of bare rights of action are void unless the assignee has a genuine interest in the litigation, to prevent champerty and maintenance.</li> <li>○ <b>Future property/rights:</b> property that does not exist at all but may exist later; or property that exists, but is not yet owned. E.g. apples on apple tree for next winter—may never exist, but is an expectation/hope that they will exist. This cannot be assigned because there is no right to transfer.</li> <li>○ Equity will not assist in assignment of future property to a volunteer unless the assignor has received consideration.</li> </ul> </li> </ul>
<p style="text-align: center;"><b>Future property</b></p>	<ul style="list-style-type: none"> <li>• <b>At common law:</b> Future property cannot be assigned at common law because the assignor has no title to assign.</li> <li>• <b>In Equity:</b> Future property cannot be effectively assigned without consideration in equity. Thus the absence of consideration renders an assignment of future property entirely ineffectual.</li> <li>• Property can be future in two senses: <ul style="list-style-type: none"> <li>○ The property may presently exist, but not yet be owned by the would-be assignor</li> <li>○ The property may not yet be in existence</li> </ul> </li> </ul>