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Topic 2 – Equitable Estates & Interests

Equity acts *in personam* – TXT37

See Topic 1 (p17-18)

"*in personam*" = directed toward a particular person

Although equity acts *in personam*, equity nevertheless recognises rights of a proprietary nature

Proprietary interest = the rights of that person in respect of that property (not the prop itself)

Types of Equitable Rights – SG20 & TXT53-55 & TXT62-65 & Activity 2.1

There are 3 different types of equitable rights:-

- **Equitable interests & estates;**
 - This is the strongest interest you can have in equity
 - Where interest is in land = equitable estate
 - This is called having a recognised 'equitable proprietary right'
 - *Dickinson v Burrell* (1866) LR 1 Eq 337
- **Mere equities** (an equitable chose of action);
 - Middle of the scale
 - A mere equity does not link thru to physical property like an equitable interest
 - But it is a right that itself is capable of being transferred & (as a result) is considered proprietary in nature
 - A mere equity is recognised where a person is in a position to make a claim to a court of equity which (if successful) will entitle them to an equitable interest (Young, Croft & Smith, *On Equity* (2009) p577)
 - *Latec Investments v Hotel Terrigal*
- **Personal equities**
 - This is the weakest interest you can have in equity
 - This is called having a 'personal right to obtain relief from a particular person'
 - Non-proprietary = personal obligations
 - It is a right of access to a court of equity & is nothing more than a right to seek equitable remedies
 - Such a right is personal & cannot be assigned
 - A personal equity does not attach to property: *National Provincial Bank Ltd v Ainsworth* at AC 1238; All ER at 488
 - *Gross v Lewis Hillman Ltd* (1970) Ch 445; (1969) All ER 1476

Commissioner of State Revenue v Serana Pty Ltd (2008) 36 WAR 251 – "...a beneficial interest in property usually denotes a proprietary interest held for the benefit of another or others." Per Buss JA at 285

DKLR Holdings Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW) (1982) 149 CLR 463; 40 ALR 1

- if 1 person has both the legal estate & the entire beneficial interest in the land then he holds an entire & unqualified legal interest & not 2 separate interests
- he is the absolute owner of an estate in fee simple because his equitable interest merges into the legal estate interest to comprise a single absolute interest in the land

Re Transphere Pty Ltd (1984) 5 NSWLR 309 – "...where a legal owner holds property on trust for another, he has at law all the rights of an absolute owner but the beneficiary has the right to compel him to hold & use those rights which the law gives him in accordance which equity has imposed on him by virtue of the existence of the trust." Per McLelland J at 311

- SO – although the beneficiary has an interest in the trust property, the content of that interest is essentially a right to compel the trustee to hold and use his legal rights in accordance with the terms of the trust

Equitable Interests – SG21 & TXT8 & TXT10 & TXT11 & TXT55 & TXT57

Dickinson v Burrell (1866) LR 1 Eq 337 – in order to give effect to the doctrine of undue influence, it is necessary to hold that the interest A has is an equitable interest

- A made a transfer of property to B as a result of undue influence
- A then assigns or devises the right to rescind the transaction to C
- C can seek equity's assistance to rescind the transaction & have the property reconveyed to C
- Because A's right can be enforced by C against B, it is more than merely a personal right against B
- It is an equitable proprietary right that, when assigned or devised to C can be enforced by C against B

Other examples of equitable interests include:-

- The rights of a beneficiary under a trust
- equitable mortgages
- the interest of a partner in partnership assets: *Fazio v Fazio* (2012) WASCA 72 at 58 – TXT63
- a vendor's lien
- restrictive covenants over land

The types of interests that have already been classified by the courts are:-

- Uses/trusts
 - Used to avoid death duties by placing property on trust with at least 2 trustees to be held on trust for the original grantor for their life & disposing of it in their will in the same way (A transfers to B for the benefit of A during their lifetime)
 - Also used to enable ppl like women & Franciscan monks to have an interest in land (A transfers to B for the benefit of C – the most common type of trust today)
- The role equity played in the trust was recognising where the true beneficial interest in the property lay

- Bare trust – a trust where the trustee/s hold property without any legal interest other than that existing by reason of the office & legal title as trustee & without any duty or further duty to perform except to convey it upon demand to the beneficiary/ies or as directed by them: *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271 at 281 per Gummow

DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (1980) 1 NSWLR 510 NSWCA – CB34

- An absolute owner in fee simple does not hold 2 estates – only a legal estate with all rights & incidents that attach
 - "A man cannot be a trustee for himself": *Goodright v Wells* (1781) 2 Doug 771 at 778
 - Where the trustee is the owner of the legal fee simple, the right of the beneficiary is a right to compel the legal owner to hold and use the rights which the law gave him in accordance with the obligations which equity has imposed upon him
-

Reading 2 – *CTP Custodian Pty Ltd v Commissioner of State Revenue* (2005) HCA 53; (2005) 224 CLR 98; (2005) 221 ALR 196; (2005) 79 ALJR 1724 (28 September 2005)

FACTS

- The VIC Commissioner of State Revenue assessed land tax against the unit holders in a number of unit trusts that held shopping centres
- The taxpayers held 100% of the units in some trust & less than 100% in others
- One company (CPT) in particular held all of the issued units of a unit trust
- It was held in the lower court that CPT was in a position to bring an end to the unit trust (applying *Saunders v Vautier* (1841) 49 ER 282)
- CPT challenged this proposition

ISSUE

Whether the unit holders were “owners” of the land under a portion of the definition of that term that included every person entitled to any land for any estate of freehold in possession

HELD

- The Court (in distinguishing *Charles v FCT* (1954) 90 CLR 598), held that the entitlements of the unit holders in terms of its trust deed did not confer proprietary interest in the underlying land and did not make the unit holders owners for the land tax purposes
- The rule in *Saunders v Vautier* did not apply to constitute a single unit holder with 100% of the units the owner of the trust fund
- Note, the modern formulation of *Saunders v Vautier* is as follows:

“An adult beneficiary (or a number of adult beneficiaries acting together) who has (or between them have) an absolute, vested and indefeasible interest in the capital and income of property may at any time require the transfer of the property to him (or them) and may terminate any accumulation”
- These stipulations made the Trustee and the Manager interested in due administration of the trusts of the Deed
- This meant that the unit holders were not the persons in whose favour alone the trust property might be applied by the trustee

- In the trust deed, the manager covenanted with the trustee to ensure that there were at all times sufficient readily realisable assets of the Trust available for the Trustee to raise the fees to which the Manager and the Trustee were entitled under the Deed
- It was impossible to say what the trust fund in question was until satisfaction of the rights of recoupment or exoneration, as the unsatisfied trustee's right of indemnity was expressed as an actual liability in the accounts of the trust
- The modern consideration of *Saunders v Vautier* did not give consideration of this right

PRINCIPLE

The rule in *Saunders v Vautier* does not apply to a situation where the trustee's right of indemnity (reimbursement or exoneration) has yet to be satisfied. In such an instance, the trustee has a lien on the trust property, such that the beneficiaries do not have an absolute interest in the trust property.

This case was concerned with whether or not there was ownership.

There was no ownership for two reasons.

Firstly - the beneficiaries had no interest in any specific asset; and

Secondly - because of the provisions in the trust deed that gave rights to the trustee and manager.

The lack of an interest in any specific underlying asset would not exclude ownership if the beneficiary or beneficiaries were otherwise entitled to rely upon the principle in *Saunders v Vautier* and terminate the accumulation.

Mere Equities – SG22 & TXT62-63 & TXT58-61 & CB36

Examples of Mere Equities include:-

- The right to claim an interest in property pursuant to proprietary estoppel principles
- The right to obtain enforcement of an oral mortgage pursuant to the doctrine of part performance: *Double Bay Newspapers Pty Ltd v AW Holdings Pty Ltd* (1996) 42 NSWLR 409
- The right to the re-transfer of land where (as a result of a unilateral mistake by a vendor) the area of land transferred exceeded the area stipulated in the contract of sale: *Tutt v Doyle* (1997) 42 NSWLR 10 at 15
- The right to a constructive trust pursuant to principles laid down by HCA in *Muschinski v Dodds* (1985) 160 CLR 583 & *Baumgartner v Baumgartner* (1987) 164 CLR 137; 76 ALR 75
- The rights of a beneficiary under a discretionary trust
 - Discretionary trust = where A transfers property to B (not for benefit of any particular person, but for the benefit of a group of ppl in whatever proportions B thinks fit) – B has the discretion as to which group of benefs will receive a benefit from the trust property & in what proportion (obviously does not have an equitable interest)
 - Unlike a benef under a regular trust who has a set proportion of the trust property, a benef under a discretionary trust has only an expectancy of receiving property or income under the trust in the future & a right to call for the trustee to administer the trust property in accordance with its terms
 - The courts have held the benefs rights against the trustee to ensure the trustee duly administers the trust does amount to property
 - It is an expectancy that can be transferred by the benef to another person

- Accordingly – what the benef has under a discretionary trust is a mere equity or an equitable chose in action
- The rights of a beneficiary in an unadministered estate: *Commissioner of Stamp Duties (QLD) v Livingston* (TXT4.24)
 - In an unadministered estate – legal title in the decd's estate has passed to the executor
 - The benef has a right against the executor to ensure the executor administers the estate in accordance with the will

Latec Investments v Hotel Terrigal (in liq) (1965) 113 CLR 265, HCA – TXT64

– the right to set aside a fraudulent mortgagee sale was held to be a mere equity

- Hotel Terrigal was the owner of a hotel which was mortgaged to Latec
- Latec defaulted on their mortgage obligations
- Latec exercised its power of sale under the mortgage
- Latec sold the property to Southern Hotels which was a totally owned subsidiary of Latec (thus the mortgage was fraudulent)
- Latec sought to have the fraudulent mortgage sale to Southern Hotels set aside following a default of Southern Hotels to MLC in which the floating charge crystallised
- In the priority dispute btw Hotel Terrigal & MLC, HCA unanimously ruled in favour of MLC
- In separate judgements, Kitto & Menzies JJ effectively ruled that Hotel Terrigal's right to set aside the fraudulent mortgagee sale was not an equitable interest, but only a mere equity that could not prevail against MLC's equitable interest
- General principles:-
 - The maxim *qui prior est tempore potior est jure* (he who is earlier in time is stronger in law)
 - If merits are equal, priority in time of creation is considered to give the better equity (*Rice v Rice* (1853) 2 Drew 73 – in this case the priority in time was considered as a last resort in determining priorities but the practice is to use the "first time in" as a starting point)
 - Menzies J also looked at the nature of Hotel's Terrigal's right in the context of transmission by will & referred to the following authorities:
 - *Phillip v Phillip* (1861) 45 ER 1164 – the right to seek rescission or rectification for fraud or mistake is distinguished with the equitable interests of a proprietary nature – the holder of such right does not have an equitable interest in the subject property – the right is mere equity
 - *Stump v Gaby* (1852) 2 De G M & G 623 - "when a decree is made for setting aside a conveyance it relates back, and the grantee is to be treated as having been, from the first, a trustee for the grantor, who therefore has an equitable estate, not mere right of suit."

CB36 – *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306

- Testatrix left her house & contents etc to her exec on trust for the respondent
- At the time of her death, respondent was an undischarged bankrupt
- The testatrix's husband made a successful testator's family maintenance application which awarded him the house & contents & R&R was to go to the respondent
- The administration of the estate was incomplete at all times

- The issue was whether the Official Receiver could claim the respondent's interest in remainder as part of the respondent's estate
- This required the court to consider the nature of the benef's interest in the unadministered estate
- Legal and equitable ownership of the property does NOT vest in the named benef at the time of death: *Commissioner of Stamp Duties (QLD) v Livingston* (1965) AC 694
 - This is because prior to the administration of the estate, there is no specific property capable of constituting the subject property of any trust in favour of the benef
- So it was held the benef does not have a proprietary interest in each of the assets which are the subject of the devise or bequest
- The benefs as a class may have an interest in the entire estate BUT it does not follow that each piece of property which goes to make up the whole estate is held on a particular trust for the benef named as its intended recipient upon completion of administration: *Horton v Jones* (1935) 53 CLR 475 at 486
- Mrs Shultz acquired upon the death of the testatrix a right to have the estate administered in accordance with the duties of the execs
- Though not a legal or equitable owner of the assets which were subject to the devise & bequest in her favour, she had, by virtue of the chose in action created by that devise/bequest, an expectation that the assets would pass to her upon completion of the administration
- Mrs Shultz's right to due administration arose from clause 3(a) & (g) in the will & that right vested in the Official Receiver as soon as it vested in Mrs Shultz, since it was clearly "property" as defined in s5(1) of the *Bankruptcy Act*

Personal Equities – SG22 & TXT55 & TXT62

An example of a personal equity is the right to rescind a contract for fraudulent misrepresentation on behalf of D

Gross v Lewis Hillman Ltd – such a right was considered a personal equity because the right to rescind is not something that satisfies any of the indicia set out above

(ie. It cannot be transferred, recovered or traced through to the hands of a 3rd party & there is no possibility of a priority dispute)

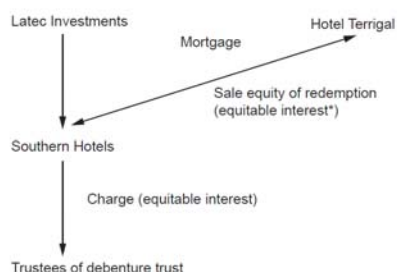
- If A is induced to purchase a property from B as a result of fraudulent misrepresentation & then transfers the property to C, C cannot assert against B the right to rescind that A had against B
- Because C is denied the remedy of rescission in this situation, the right of A must be seen as purely personal and not proprietary
- "Here, the assignee is not claiming to recover an equitable interest in property previously conveyed away by his assignor, but is claiming to throw back the property assigned to him not on his immediate assignor but on the party who sold it to his assignor"

Multiple Classifications of Equitable Rights – SG23 & TXT63 & PP

Commissioner of State Taxation of SA v Cyril Henschke (2010) – an interest of a partner in a partnership is more than mere equity & is sufficiently proprietary in nature to maintain priority over a subsequent equitable charge BUT this is not decisive of its nature in other contexts

Latec Investments v Hotel Terrigal (above at p23) – a right to set aside a fraudulent exercise of a mortgagee's power of sale was a mere equity for the purposes of priority in this case (no notice) but it is an equitable interest for the purposes of transmission by will

- As we can see from this case, a proprietary interest may have 1 classification for 1 purpose & a different classification for another



- Hotel Terrigal argued that the equitable interest originally held under the equity of redemption in its mortgage to Latec maintained the status of an equitable interest against Southern Hotels as purchaser of the property from Latec AND against the trustees of the debenture trust to whom Southern Hotels had granted an equitable charge (even though Hotel Terrigal took 5yrs to exercise its rights under the equity of redemption)
- Under the first-in-time priority rule, Hotel Terrigal's equitable interest, having been created first, took priority
- However the court held that due to Hotel Terrigal's delay & the fact the trustee who had lent money to Southern Hotels in return for the equitable charge was essentially a bona fide purchaser for value without notice, Hotel Terrigal's interest could only be classified as a mere equity for the purposes of the first-in-time rule
- As a result – the trustee's equitable interest took priority over Hotel Terrigal's mere equity
- **The lesson from this case is that** – in a priority dispute – the classification of a proprietary interest might change & steps should be taken to protect the proprietary interest asap & preferably before a priority dispute

Swanston Mortgage v Trepan Investments Pty Ltd (1994) 1 VR 672 – the facts were whether the right to set aside a mortgagee sale of Torrens title land in circumstances where the mortgagee breached its duties in exercising its power of sale, gave the mortgagor an interest in the land sufficient to lodge a caveat to prevent the sale being registered

- It was held the mortgagor held no caveatable interest
- Subsequent cases criticise this decision & has not been followed in a number of cases (*Patmore v Upton* (2004) 13 Tas R 95 at 106-113; *Capital Finance Australia Ltd v Bayblu Holdings Pty Ltd* (2011) NSWSC 24 at 23-24; *Stone v Leonardis* (2011) SASC 153 at 40-50)

Indicia of Proprietary Interest – SG20 & TXT56

National Provincial Bank Ltd v Ainsworth (1965) AC 1175 – "Before a right or interest can be admitted into a category of property or of a right affecting property, it must be definable, identifiable by 3rd parties, capable in its nature of assumption by 3rd parties & have some degree of permanence or stability" (at 1247-8 per Lord Wilberforce)

- Equitable interests do not have a set of attributes which is common to all of them
- At best one can merely list what attributes any particular equitable interest has & compare & contrast that list with the attributes of other equitable interests

Burns Philp Trustee Co Ltd v Viney – "...The approach traditionally adopted by equity has been to retain flexibility so as to accommodate the multitudinous instances in which fundamental equitable rules fail to be applied." (at 223-4 per Kearney J)

Meagher, Heydon & Leeming suggest that the proprietary nature of any equitable interest can be **measured** by reference to the following **4 criteria**:- (TXT56)

1. The power to recover the property the subject of the interest or the income thereof as compared with the recovery of compensation from the D payable from no specific fund
2. The power to transfer the benefit of the interest to another
3. The persistence of remedies in respect of the interest against 3rd parties assuming the burden thereof
4. The extent to which the interest may be displaced in favour of competing dealings by the grantor or others with interests in the subject matter.

*A right that does not satisfy all the above criteria may still be recognised as an equitable interest