

# JURD7285: EQUITY & TRUSTS (S2 2017)

## Table of Contents

1.1 INTRODUCTION TO EQUITY & TRUSTS .....	3
INTRODUCITON TO EQUITY .....	ERROR! BOOKMARK NOT DEFINED.
MAXIMS OF EQUITY .....	4
PRINCIPLES OF EQUITABLE REMEDIES .....	4
TRUSTS .....	6
EQUITABLE PROPRIETARY RIGHTS .....	7
THE INTERACTION b/w CONTRACT & EQUITY .....	9
2. FIDUCIARY OBLIGATIONS .....	13
FIDUCIARY RELATIONSHIPS.....	13
IDENTIFYING FIDUCIARY RELATIONSHIPS.....	13
SCOPE OF FIDUCIARY RELATIONSHIPS .....	16
FIDUCIARY OBLIGATIONS.....	17
4.1 EQUITABLE ASSIGNMENT – PART 1.....	22
TERMINOLOGY .....	22
ASSIGNMENT OF LEGAL PROPERTY.....	22
NON-ASSIGNABLE RIGHTS.....	24
ASSIGNMENT OF ‘EQUITABLE’ PROPERTY.....	25
STATUTORY ASSIGNMENT .....	25
4.2 EQUITABLE ASSIGNMENT – PART 2.....	27
STATUTORY FORMALITIES .....	27
5.1 EXPRESS TRUSTS – INTRODUCTION & CREATION .....	30
INTRODUCTON.....	30
CREATING AN EXPRESS TRUST.....	32
USE OF TRUSTS IN THE MODERN WORLD.....	34
5.2 EXPRESS TRUSTS - CERTAINTIES .....	35
CERTAINTY REQUIREMENTS .....	35
6.2 EXPRESS TRUSTS – TRUSTEE DUTIES.....	41
TRUSTEES DUTIES AND POWERS.....	41
DUTIES ON ASSUMPTION OF TRUSTEESHIP.....	44
ONGOING MANAGEMENT DUTIES .....	45
DUTIES OF PERFORMANCE.....	51
7.1 BENEFICIARY RIGHTS AND REMEDIES .....	57
TRUSTEES’ LIABILITIES .....	57
REMEDIES .....	60
7.2 TRACING .....	63
TRACING .....	63
8.2 PRIORITIES .....	70
PRIORITY DISPUTES .....	70
RULES.....	71
EQUITABLE INTERESTS.....	72
DOCTRINE OF NOTICE .....	74

<b>10.1 PERSONAL LIABILITY OF ACCESSORIES/RECIPIENTS .....</b>	<b>76</b>
ACCESSORIAL LIABILITY.....	76
THIRD PARTY LIABILITY: RULE IN <b>BARNES V ADDY</b> .....	76
OTHER FORMS OF PARTICIPATORY LIABILITY.....	79
<b>10.2 REMEDIES: COMPULSION.....</b>	<b>81</b>
REMEDIES .....	81
SPECIFIC PERFORMANCE .....	81
INJUNCTIONS .....	85
EQUITABLE DAMAGES .....	86
<b>11.1 REMEDIES: EQUITABLE COMPENSATION AND ACCOUNT OF PROFITS.....</b>	<b>87</b>
ACCOUNT OF PROFITS .....	87
EQUITABLE COMPENSATION.....	88
<b>11.2 NON-CONSENSUAL TRUSTS: RESULTING TRUSTS .....</b>	<b>91</b>
RESULTING TRUSTS.....	91
VOLUNTARY TRANSFERS OF PROPERTY .....	94
RESULTING TRUSTS ARISING ON FAILURE OF AN EXPRESS TRUST.....	95
RESULTING TRUSTS ARISING IN OTHER CASES OF FAILURE OF BASIS: THE QUITSCLOSE TRUST .....	95
<b>12.1 CONSTRUCTIVE TRUSTS.....</b>	<b>97</b>
CONSTRUCTIVE TRUST.....	97
THE BAUMGARTNER CONSTRUCTIVE TRUST.....	99
CONSTRUCTIVE TRUST AS A REMEDY FOR ESTOPPEL .....	101
CONSTRUCTIVE TRUSTS FOR BREACH OF FIDUCIARY OBLIGATION .....	101
CONSTRUCTIVE TRUST IMPOSED OVER STOLEN MONEY & PROCEEDS .....	102
THE CONSTRUCTIVE TRUST AS A RESTITUTIONARY REMEDY FOR UNJUST ENRICHMENT .....	102
DOCTRINE OF MUTUAL WILLS .....	103
<b>12.2 GENERAL BARS TO RELIEF .....</b>	<b>104</b>
BARS TO RELIEF .....	104

# 1.1 Introduction to Equity & Trusts

---

## INTRODUCTION TO EQUITY

### HISTORY OF EQUITY

- 1100's - Plea rolls – record of the judgments; copies were written by monks
- 1268 – Yearbooks – reported the reasons for judgments, creates precedent, principles of *stare decisis*; legal system developed by way of the common law.
- The Seven Writs – sale; lease etc. If case did not fit into the seven writs, there was no case to be heard.
- Petitioning the King – individuals would submit a petition when the writ was not applicable. The King's had the Chancellors who were educated in religion and the law. The Chancellor would review the writ and decide on the King's behalf when there was 'unconscionability.' Chancellor had fear and superstition because the Church was the centre of people's lives.
- Specific performance
- Equity developed three kinds of jurisdiction
  - Exclusive jurisdiction – Trusts only
  - Concurrent jurisdiction – both common law and equity could provide
  - Auxiliary jurisdiction
- John Seldon's article – in Imperial metrics, "equity is as long as the Chancellor's foot"
- In Australia, the colonies were independent British colonies which adopted English common law and equity; but not English statute. When the *Judicature Act* was enacted in Britain, it did not apply in Australian colonies. Each colony adopted the *Judicature Acts*; in 1972, NSW adopted the *Judicature Act*.
- Equity developed institutions in law that are similar to the common law
  - Same powers as the common law courts – but a court of fairness, but must not interfere with innocent people's rights. If somebody else has rights, their rights will not be interfered with – a ***bona fide purchaser who has paid for something without notice***.

### PURPOSE OF EQUITY

- The purpose of the law of equity is to prevent unconscionable conduct –
  - Conduct that people of good conscience would think to be wrong.
  - Prevents people acting unconsciously, wrongly, unfairly.
- Parallel system – doesn't infringe the common law.
- Remedies
  - Specific performance
  - Unjust enrichment
  - Injunctions

### HOW TRUSTS CAME ABOUT – 'USE'

- Prima jus – if owner of property during their lifetime, transferred it to someone else who agreed to hold it for the benefit of their family. When they die, it cannot go to the King.
- King publishes the Statute of Uses – non-uses.
- Lawyers devise a scheme which is the definition of a 'use upon a use' – A gives property to B for the benefit of C.
- Monks were not allowed to hold any property – a gift of property to the Church.

### DEFINITION

- Equity in law means to apply conscience or principles of natural justice to the settlement of controversies. Equitable rules supplement and remedy the limitations and inflexibility of common law.
- Equitable right or claim.
- Aristotle and Lord Ellesmere justified equity on the ground that it modifies the law where the inflexible application of legal rules causes injustice in individual cases.

### REFORM AND RENEWAL

- Rules of equity prevail – *Judicature Act 1873* (Imp), s 25(11); *Law Reform (Law and Equity) Act 1972* (NSW), s 5.
- Law and equity are administered concurrently in the Supreme Court of NSW – *Supreme Court Act 1970*, s 57.

## MAXIMS OF EQUITY

- (a) A litigant who seeks equity must do equity
- (b) A litigant who comes in equity must come with clean hands
- (c) Equity looks to intent, rather than to form
- (d) Equity treats as done that which ought to be done
- (e) Equity acts *in personam*
- (f) Equity follows the law
- (g) Equity does not assist a volunteer
- (h) Equity will not perfect an imperfect gift
- (i) Delay defeats an equity

## PRINCIPLES OF EQUITABLE REMEDIES

### REMEDIAL SYSTEMS

- Aim to put both parties in positions that reflect the merits of the case, circumstances of the parties and third parties.
- [McKenzie v McDonald \[1927\]](#) – real estate agent was a fiduciary for Mrs McKenzie and convinced her to sell the farm to him in exchange for his suburban shop of a lesser value. Equitable remedy awarded of compensation, or restoration of the shop plus compensation.

<u>Nelson v Nelson [1995]</u>	
Facts	<ul style="list-style-type: none"> <li>• Nelson and Husband had two children. Mr Nelson was a merchant sailor in WWII was entitled to a loan from the Military Housing Act at a rate lower than the market. Mr Nelson died and the widow was entitled to the loan. The loan could not be accessed if the borrower already had a property in their name; she transferred the property to her children's name to satisfy the loan requirement. Mrs Nelson was approved for the loan and purchased a property in Petersham. Elizabeth and John sold the Petersham house. Mrs Nelson gave property to her children – presumption of advancement applies (mother to children) – ie. outright gift to children.</li> </ul>
Held	<ul style="list-style-type: none"> <li>• HCA held Mrs Nelson was not debarred by her own illegal conduct from claiming the proceeds of the first house, based on her provision of purchase money and absence of intention to gift the house to her children. If she did not repay the amount of benefit to the Commonwealth, the proceeds should be held on trust for her daughter and the balance to Mrs Nelson. She could not use equitable principles of resulting trusts to obtain advantage from her illegal conduct.</li> </ul>

### SPECIFIC PERFORMANCE

- Two criteria must be satisfied for an order for specific performance:
  - Damages must be an adequate remedy
  - There must be no bars to specific performance

### INADEQUACY OF DAMAGES

#### Contracts for sale of land

- [Loan Investment Corporation of Australasia v Bonner \[1970\]](#) – purchaser was not entitled to specific performance because:
  - The contract comprised a contract for the sale of land combined with a contract for the loan of money without security for a term of 10 years with 7.5% interest.
  - The composite contract includes a long-term unsecured loan, which ought not to be treated as something different simply by being connected w/ the sale of land for specific performance.
  - Specific performance is a discretionary remedy – mere contract for loan of money will not be specifically enforced.
  - Granting specific performance for an unsecured loan creates a one-sided operation and a position of inequality.
  - The provision for a loan is a principal transaction, not ancillary. Damages are a sufficient and suitable remedy.

## INJUNCTIONS

### General principles

- Court power to issue injunction is not at large; can only be awarded in support of an established legal, equitable or statutory right.
- [ABC v Lenah Game Meats Pty Ltd \[2001\] 208 CLR 199](#) – HCA held plaintiff not entitled to injunction because no legal or equitable right had been asserted which could be enforced by an injunction, where trespassers secretly filmed possum killing and passed the film to the ABC for broadcasting.

### Distinction between mandatory and prohibitory injunctions

- (a) [Morris v Redland Bricks Ltd \[1970\] AC 652](#) – HOL discharged mandatory injunction on ground that it imposed an absolute obligation on the defendant without indicating how the work has to be done.
- (b) **Mandatory injunction** can only be granted where:
  - (a) Plaintiff shows very strong probability upon the facts that grave damage will accrue
  - (b) Damages will not be a sufficient or adequate remedy
  - (c) Cost to defendant to prevent the likelihood of future apprehended wrong must be taken into account:
    - Where D acted without regard to P's rights; if acted unreasonably may be ordered to restore the status quo even if out of all proportion to advantage accrued by P.
    - But where D acted reasonably but wrongly, cost of remedy by positive action is important as no legal wrong has occurred, P has an action at law.
    - Amount expended under mandatory order must be balanced w/ these considerations against anticipated possible damage to P.
- (c) **Prohibitive injunction** is granted to prevent the continuance or recurrence of a wrongful act.

### Social considerations

- [Miller v Jackson \[1977\] 1 QB 966](#) – COA held P's not entitled to an injunction but awarded £400 damage to cover past or future damage. Injunction is a discretionary remedy. Conflicting interests between public at large to continue to allow cricket club to continue playing cricket on the ground and private interest of individual's damage to property from balls being hit onto their houses.

### Preventing breaches of contract by injunction

- [Curro v Beyond Production Pty Ltd \(1993\) 30 NSWLR 337](#) – NSWCA upheld an injunction preventing Curro from breaking her contract to present a television program three months before it was due to expire so she could work for a rival TV company. Factors:
  - Injunction would not force her into destitution because she had skills and intelligence which could be employed outside TV industry
  - Short duration – 3 months
  - Defendant's breach 'flagrant and opportunistic'

## RESCISSION

### Total and partial rescission

- [Vadasz v Pioneer Concrete \(SA\) Pty Ltd \(1995\) 184 CLR 102](#) – HCA held supplier's misrepresentation justified partial rescission of the guarantee. Since the director agreed to guarantee the future indebtedness of the company, rescission should be confined to setting aside the obligation to guarantee the company's past indebtedness. Practical justice between the parties to restore them to the status quo.

### Election

- [Daly v Sydney Stock Exchange \(1986\) 160 CLR 371](#) – HCA held stockbroking firm acted in breach of fiduciary duty in failing to disclose its financial position to the investor. However, the investor had not elected to rescind before the firm went into liquidation and therefore was not the beneficiary of a trust for the purpose of obtaining compensation.

### The restoration process

- [Alati v Kruger \(1955\) 94 CLR 216](#) – HCA held P validly rescinded the contract of sale of the fruit business for fraudulent misrepresentation. Rescission was granted on varied terms. Since lease cannot be re-assigned, and other property (ie. stock-in-trade) cannot be returned, and chattels not available for redelivery. P ordered to return

- to D chattels able to be returned, D to repay P the balance of purchase money and interests less the value at date of contract of scheduled chattels that P cannot return, value of stock-in-trade received.
- [Maguire v Makaronis \[1997\] 188 CLR 449](#) – HCA held rescission conditional on D repaying P the outstanding amount of the loan with interest at commercial rates applicable to the loan (22% at time loan was made, though commercial rates later fell).

## RECTIFICATION

- [Commissioner of Stamp Duties \(NSW\) v Carlenka \(1995\) \(unreported\)](#)– NSWCA held that deed could be rectified because its effect did not reflect the intention of the parties executing it. Where parties intended to amend a trust deed but due to solicitor error, the amendment had unintended effect of making the company a capital beneficiary which would have made it liable to pay stamp duty.

# TRUSTS

## DEFINITIONS

Term	Description
<b>Bankruptcy</b>	<ul style="list-style-type: none"> <li>• Where people can't pay their debts, there needs to be a fair and equal system to deal with the situation for creditors.</li> <li>• Where a person cannot pay debts as and when they fall due = bankruptcy</li> <li>• When a company can't pay its debts = insolvency</li> <li>• When the court declares a person / company bankrupt or insolvent – trustee (in bankruptcy) / liquidator is appointment to distribute the estate for the benefit of the creditors. <ul style="list-style-type: none"> <li>◦ Takes over all available assets and liabilities. Individual allowed to keep certain necessities of life, tools of his trade.</li> <li>◦ Allows creditors to submit their claim – eg. copies of contracts, delivery notes etc</li> <li>◦ Liquidates the assets and distribute under the principle of <i>pari passu</i> (pro rata) <ul style="list-style-type: none"> <li>▪ Dividend = eg. 0.08/1</li> <li>▪ Everyone will lose 20% of claim</li> </ul> </li> <li>◦ Proceeds in trust are held for the beneficiary. If a beneficiary could establish that a trustee was holding assets in trust, the beneficiary can assume the whole asset.</li> </ul> </li> <li>• A bankrupt person's financial life starts again – normally bankruptcy lasts 3 years, after which it comes to an end</li> <li>• Implications <ul style="list-style-type: none"> <li>◦ Post-bankruptcy – a person is registered for life.</li> <li>◦ Restricted credit – not approved credit cards &gt; \$504, must disclose bankruptcy to protect other parties.</li> </ul> </li> </ul>
<b>Trust</b>	<ul style="list-style-type: none"> <li>• Example – if an auction house sold a painting on behalf of you, the money for the painting sold is held in trust. Belong to the beneficiary in full.</li> <li>• Two kinds of creditors <ul style="list-style-type: none"> <li>◦ Secured – has security for a claim which is arranged and organised at the time the debt arises. <ul style="list-style-type: none"> <li>▪ Agreement - alienation</li> <li>▪ Perfection – perfect the security by registering it under the PPSA. <ul style="list-style-type: none"> <li>• Where property is used more than once as security, it must be registered under the Personal Property Security Act (PPSA).</li> <li>• Bailment – handing over possession of the security</li> </ul> </li> <li>▪ Most common security – mortgage bond, real property (land or buildings)</li> </ul> </li> <li>◦ Unsecured creditors</li> </ul> </li> </ul>
<b>Mortgages</b>	<ul style="list-style-type: none"> <li>• Security = land, building</li> <li>• If the mortgagee seeks refinancing and a new bank agrees to take <ul style="list-style-type: none"> <li>◦ If the mortgagee defaults on the repayments, and the bank forecloses the mortgage, there is a right of redemption.</li> <li>◦ As long as the mortgagee repays the total amount owed, they have the right of redemption. (eg. refinance or borrow money from family / friends).</li> <li>◦ <b>Right of redemption</b> – equitable right to get the house back up to the moment the house is sold to a third party.</li> </ul> </li> </ul>