

An Overview of Equity and Equitable Remedies Summary

An Overview of Equity

What is equity?

- Definition:
 - Meaning is fairness and justice.
 - Decisions will inevitably reflect the subjective beliefs and values of the adjudicator as to what is fair.
 - Judges do not assess what is equitable without reference to some standard or benchmark.
 - Refers to the principles applied by judges where the law is deficient for some reason.
 - Equity corrects, or supplements the law but does not replace it.
 - Some equitable doctrines can be explained in terms of the dilemma of 'universality in the law': a soundly based legal rule of general application can on occasions be exploited for improper purposes.
- Institutional Equity:
 - The creation of a special court, distinct from the courts administering the general law having the power to modify or correct the general law.
 - In England that court was the Court of Chancery until the enactment of the mid-nineteenth-century judicature legislation.
 - In Australia, it is the several courts – which include the High Court, the Federal Court, the Supreme Court of every State and Territory, and numerous inferior courts – which have inherited the jurisdiction of the Court of Chancery.
 - The emergence of institutional equity: medieval origins:
 - Medieval common law was a highly centralised system of justice, with processes initiated by the issue of a writ by Chancery, which functioned principally as the royal secretariat.
 - ❖ The issue of writs was the basis of the formulary system of law claims could only be brought before a common law court if the facts fitted within the formula, or wording, of a writ issued by Chancery.
 - ❖ Once a writ had been issued, the complaint would be heard by jury trial.
 - The strictness of the formulary system meant that not all complainants could obtain a writ giving them access to the common law courts. 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.
- Competition between common law and equity:
 - 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.
- Reform and the judicature legislation:
 - In the early nineteenth century, the Chancery court attracted criticism, principally on account of its delays in hearing and disposing of cases.
 - Caseload of Chancery was too heavy to be carried by a single judge.
 - One defect was that claimants might have to bring more than one set of proceedings in order to obtain the relief they wanted.
 - A plaintiff who wanted to obtain an order of specific performance of a contract would have to sue in a common law court in order to establish the validity of the contract, unless its validity was conceded, and then obtain an order of specific performance in Chancery.

- The enactment of the judicature legislation is a landmark in equity, but the limits of the legislation need to be kept clearly in mind. The legislation was never intended to fuse or integrate legal and equitable rights.
- The reception of equity in Australia:
 - The immediate need of the earliest British settlers in Australia was to establish a stable legal order.
 - The identification of a judge as the Primary Judge in Equity (later the Chief Justice in Equity) encouraged the growth of an equity Bar specialising in matters coming within the judge's jurisdiction, just as Chancery in England stimulated the creation of a Chancery Bar.
 - The Supreme Court structure created by other States required judges to administer both common law and equity: however, this did not mean that the common law and equity were fused procedurally or in substance.
- The judicature legislation in Australia:
 - Adoption of English style judicature legislation in all States except New South Wales.
 - In New South Wales the system of separate equity, administered in a court applying special equity procedures, continued until 1972.
 - Judicature legislation was eventually enacted in 1970 and 1972.
- The place of equity in the modern law:
 - The subject-matter of equity can only be determined by reference to legal history. It cannot be logically deduced from general propositions.
 - The existence of a separate body of equitable principles means that much of Australian private law exhibits a dual character.

A Map of Equity:

- Equitable remedies:
 - Equitable claims are remedy driven, in the sense that attempts are sometimes made to characterise defendants as equitable wrongdoers for the purpose of obtaining a distinctive equitable remedy such as an account of profits or a constructive trust.
 - A fundamental distinction is made between the exclusive jurisdiction and the auxiliary jurisdiction of equity
 - The exclusive jurisdiction of equity consists of matters which prior to the judicature legislation could only be adjudicated upon by Chancery, and not by common law courts.
 - ❖ They include the enforcement of trusts and other fiduciary obligations, equitable obligations of confidence, and 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, although equitable compensation – a monetary remedy compensating for financial loss caused by a breach of equitable obligation – can be ordered.
 - Equity acts in its auxiliary jurisdiction when a tort or breach of contract has been committed and common law damages are an inadequate remedy for the plaintiff.
 - ❖ The plaintiff's legal rights are then enforced by the award of an equitable remedy.
 - ❖ The remedy of specific performance will be granted.
 - Only equitable remedies can be awarded in the exclusive jurisdiction; common law damages are never available.
 - ❖ In the auxiliary jurisdiction, however, a court considers whether damages will adequately compensate for the plaintiff's loss, and only if that remedy is not adequate will the award of an equitable remedy be considered.

- Contract:
 - The common law determines the existence of a contract, and the rights and obligations of the contracting parties, but equity modifies contractual obligations and provides relief both for breach and where the plaintiff's consent to the agreement has been vitiated.
 - Principal areas of equitable intervention:
 - The creation and modification of enforceable promissory obligations.
 - ❖ The common law rules of offer and acceptance, consideration and intention to create legal relations determine which promises are legally enforceable.
 - ❖ The equitable doctrine of estoppel prevents the enforcement of some promises which would otherwise give rise to legal obligations, and sometimes enforces promises which the common law does not recognise.
 - Setting aside contracts on the ground that a party's consent was vitiated by fraud, duress, unconscionable conduct, undue influence, mistake, misrepresentation and in some cases where a guarantee is entered into without a full understanding of its nature and effect.
 - Rectification of the terms of a written contract where they do not conform to the agreement the parties made.
 - Assigning the benefit of the performance of contractual obligations in equity.
 - Preventing disproportionate relief of a plaintiff as a result of the defendant's breach of contract.
 - Enforcement of the contract or of its particular provisions.
- Property:
 - Equity's principal contribution to property law is the trust, which imposes obligations on a titleholder of property to manage the property for the benefit for other individuals or for legally approved purposes, such as charitable purposes.
 - Apart from the trust, equitable intervention includes:
 - The recognition and enforcement of equitable titles to property.
 - Equity also recognises and enforces new interests in property which have no common law counterpart. One example is the mortgagee's equity of redemption which not only entitles a mortgagor to redeem a mortgage after the legal date for repaying the mortgage debt has passed but also constitutes a marketable property interest.
 - The creation of special rules governing the assignment of property interests. An assignment is the immediate transfer of an interest in property. Property, for this purpose, includes intangible property, such as a chose in action, for example the right to enforce a contract.
 - The recognition and enforcement of proprietary interests by application of the doctrine of equitable estoppel. Suppose that D promises P that he will grant P an interest in his (D's) property if P builds on D's land, P takes D at his word and builds a house on D's land. If D refuses to give P any interest in the property, equity will grant P equitable relief. This can include awarding P an interest in D's land. The nature of P's interest will, like all equitable relief, be determined by the exercise of equitable discretion.
 - The application of special rules, known as tracing rules, to identify a claimant's property. If P's property has been mixed with D's, or with the property of a third party, before being given to D, then P can only recover the property, or a share of it, if she can show that it is hers.
 - Equitable intervention in the law of deceased estates.
- Civil wrongs:
 - Equity also relieves against the consequences of some forms of wrongdoing.
 - The principal equitable wrongs are:
 - Breach of fiduciary obligation. Suppose that a solicitor, S, misappropriates money belonging to a client, C, and pays it into his personal bank account. Our first response is that S will be criminally liable for theft and, depending on the facts, other offences such as obtaining a financial advantage by deception. He will also have acted in breach of professional disciplinary rules. The

civil (i.e. non-criminal) wrong that S will have committed, however, is a breach of fiduciary duty. He has betrayed the trust the client placed in him. He must of course compensate C for any loss caused by the misappropriation.

- Equitable relief is not limited to the fiduciary who has committed the breach of obligation. Secondary parties, such as those who receive the proceeds of fiduciary wrongdoing, or who assist in the breach, confidential information to D. D then passes on the information, without authority or justification, to X. D will be liable to P in equity for breach of confidence; X will also be liable once he becomes aware that the information had initially been disclosed in confidence. In some cases, D will be subject to a contractual obligation of confidence; the unauthorised disclosure will then be a breach of contractual obligation of confidence. Suppose that P discloses a trade secret or other confidence also be held liable to make restitution of benefits received or to compensate for loss.

- Civil procedure:

- Equity's regulation of civil litigation.
- The principal applications are:
 - Contribution. Equity, operating in conjunction with the common law and statute, provides that two or more persons who are liable for a loss are rateably (in other words, proportionately) liable to compensate the plaintiff for that loss.
 - Subrogation. Where legal rights are taken over by one person from another by operation of the law, the transferee is said to be subrogated to the rights of the transferor.
 - Marshalling. This doctrine regulates the enforcement of securities against a debtor where a creditor is entitled to enforce his security against more than one asset of the debtor.

Maxims of Equity:

- He who seeks equity must do equity.
 - A plaintiff cannot seek equitable relief if they have not already fulfilled their own obligations in both law and equity.
- He who comes to equity must come with clean hands.
 - Any improper conduct by the plaintiff that is connected to the particular circumstances will deny equitable relief.
- Equity looks to intent, rather than to form.
 - Equity will focus on substantive matters rather than the technicalities of procedural requirements.
- Equity treats as done that which ought to be done.
 - Equity may act on the conscience of the party to give effect to those obligations that will later arise.
 - A good example would be contractual disputes where future obligations are concerned, such as the doctrine of estoppel.
- Equity acts in personam.
 - Historically equity acted on the conscience of the person (in personam) rather than property (in rem).
- Equity follows the law.
 - The need to consider the matter first at common law, then in equity.
- Equity does not assist a volunteer.
 - Equity only acts on the conscience. A voluntary promise that is made in the absence of valuable consideration does not constitute a legal obligation or contract.
- Delay defeats an equity.
 - A plaintiff seeking equitable relief must act promptly and without delay.
- Equity will not suffer a wrong to be without a remedy.
 - Attention is focused on technical or procedural requirements, but it does not guarantee that relief will always be available.

- Where the equities are equal, the first in time prevails.
 - The law of priorities where competing interests arise concerning particular property.
 - Two equitable interests: if the nature of the equitable interest is the same, then whichever was created first will take priority.
 - Prior equitable interest and a later legal interest: if the party who acquired the legal interest took their title for value and without notice of the equitable interest then their interest prevails.
 - Prior legal interest and a later equitable interest: the legal interest is stronger and takes priority. Attention should focus on how the later equitable interest came into existence as this may affect the legal interest.
- Equity is equality.
 - This maxim refers to the proportionate distribution of losses according to liability.
- Equity imputes an intention to fulfill an obligation.
- Equity will not perfect an imperfect gift.

Introduction to Equitable Remedies

Personal and Proprietary Remedies:

- Personal remedies:
 - A personal remedy is simply an order directed to the person of the defendant.
 - The defendant must comply with the order, or else be in contempt of court.
 - The award of a personal remedy has no direct impact on the defendant's property.
 - An award of damages for tort or breach of contract is an example of a personal remedy. Equity also has personal remedies such as equitable compensation, account of profits, and injunction.
- Proprietary remedies:
 - A proprietary remedy is directed to property to which the defendant holds title.
 - The order may declare that identified property belongs to the plaintiff in equity as constructive trust orders do.
 - Alternatively, the court can direct the sale of that property in order to satisfy the plaintiff's judgment, unless the defendant satisfies the judgment out of other resources he possesses. This is the consequence of imposing an equitable lien over the defendant's property.
 - Types of proprietary remedies:
 - The constructive trust: This is an order that the defendant hold identified property on trust for the plaintiff. The plaintiff will be entitled to the property in equity, or to a proportionate interest in that property assessed by the court.
 - ❖ If the property appreciates in value, the plaintiff will be entitled to the benefit of the appreciation.
 - ❖ Conversely, the plaintiff carries the risk of any depreciation.
 - ❖ A constructive trust is not a general remedy available whenever justice and fairness requires. It is imposed in carefully defined situations
 - The equitable lien (or charge): The lien is a security interest over property.
 - ❖ Although it attaches to particular property, the plaintiff does not obtain a share of the property, as is the case with a constructive trust. Instead, the lien acts similarly to a mortgage, to secure a debt.
 - ❖ If the defendant does not discharge the debt to the plaintiff out of other funds, the property in question will eventually be sold, and the plaintiff paid out of its proceeds. Some liens, such as the trustee's lien over trust property to secure repayment of trust expense[^] arise automatically.
 - ❖ However, liens can also be judicially imposed in support of personal remedies.
- Comparing proprietary remedies and personal remedies:
 - Proprietary remedies enjoy important advantages over personal remedies.
 - The principal advantage is that a plaintiff can make a claim to the property that is the subject-matter of a proprietary' remedy.
 - ❖ The property will vest in the plaintiff rather than the trustee in bankruptcy or liquidator, and therefore the defendant's unsecured creditors will not have access to it.
 - ❖ In contrast, the award of a personal remedy entitles the plaintiff only to the status of an unsecured judgment creditor in the defendant's insolvency.
 - They are enforceable against third parties who have received the property in question from the defendant.
 - ❖ The only limitation on the right to recover property from third parties is that they are not enforceable against a good faith purchaser of the property without notice of the plaintiffs' rights.
 - ❖ In contrast, a personal remedy is enforceable only against the party against whom the remedy was ordered.
 - Proprietary remedies entitle the plaintiff to claim specific property to which she attaches special value, for which money cannot provide adequate compensation.
 - ❖ A personal remedy will only entitle the plaintiff to the assessment of a sum of money representing the value of the property (including, where an account of profits is

ordered, profits generated from the use of the property).

- Limitations to proprietary remedies:
 - The remedy cannot be awarded if the defendant no longer has property over which it can be imposed.

The objectives of equitable remedies:

- Coercion:
 - Some equitable remedies are coercive, compelling the defendant to behave in a certain way.
 - Specific performance, requiring the defendant to perform his contractual obligations according to the terms of the contract, is coercive.
 - Injunctions are also coercive, either requiring the defendant to act, or cease acting, as ordered.
- Compensation:
 - Common law damages compensate the plaintiff for loss caused by the commission of a wrong, such as a tort or a breach of contract.
 - The equitable counterpart is equitable compensation which compensates a plaintiff for loss caused by the commission of an equitable wrong, such as a breach of trust.
- Disgorgement:
 - Equity requires a wrongdoer who has made a profit from breach of an equitable obligation, such as a breach of confidence or fiduciary obligation, to disgorge those profits to the plaintiff.
 - Disgorgement, or profit-stripping, can be achieved in a number of ways.
 - The defendant can be ordered to account for the profits. This is a personal remedy, discussed in chapter 1. If the profit is identifiable, for example as money in a bank account or land, the award of a constructive trust over the property also achieves disgorgement.
 - Alternatively, disgorgement can be effected by the award of an account of profits secured by the imposition of an equitable lien over property purchased with the plaintiff's money.
- Restitution:
 - A trustee who has misappropriated trust moneys will be ordered to make restitution to the trust fund.
 - Unless the trustee still holds the original money, the remedy which effects restitution will be equitable compensation.
 - A second, and nowadays more common, meaning of restitution is that of restoration. The defendant must restore to the plaintiff property which ought to belong to her.
- Nullification:
 - Equitable remedies will sometimes nullify the legal consequences of a transaction, without otherwise imposing obligations on the parties.
 - Where equity orders rescission of a contract which has not been executed by either party, the contract is nullified, and the parties have no further obligations to perform under the contract.
 - Equitable relief for breach of confidence sometimes includes directions that documents containing confidential information, and property manufactured by unauthorised use of the information, be delivered up and destroyed. This is another example of equity nullifying the effects of equitable wrongdoing.
- Reformation:
 - The equitable remedy of rectification, reforms a legal document so that it reflects the objectively ascertained agreement of the parties.
- Vindication:
 - Some equitable remedies serve the function of validating the plaintiff's rights.