

## 1 – Equitable Maxims and Principles

- **Maxim** - General statements which encapsulate the basic equitable principles and precepts upon which the doctrines of equity are founded
  - Although they exemplify the approach taken by equity in resolving disputes, **they are not "specific rules or principles of law"**. It is a summary statement of a broad theme which underlines equitable concepts and principles" (*Corin v Patton (1990)*)
  - Some may also be raised as defences **e.g.** Clean hands maxim

### Equitable Maxims:

- **Equity will not suffer a wrong to be without a remedy -**
  - Reflects auxiliary jurisdiction
  - Not as important since development of precedent in equity and reluctance of courts to create new equitable rights and remedies
- **Equity follows the law -**
  - Equity recognises legal rights, titles and instruments and has developed its own doctrines by analogy with those of the common law
  - However, many of the remedies are designed to correct defects in the law
  - **e.g.** Where a trustee holds legal title to property, equity recognises the trustee as the owner in the legal sense, but will nevertheless enforce the equitable rights of the beneficiaries over the trust estate
  - Equity imposes on the legal owner certain obligations that require that those legal rights are exercised in a particular way for the benefit of the beneficiaries (*DKLR Holdings Co (No 2) v Commissioner of Stamp Duties [1980]*)
  - **Where there is a conflict between equity and law, equity will prevail** (*Earl of Oxford's Case [1615]*)
- **He who seeks equity must do equity -**
  - **Important maxim**
  - Those seeking equitable relief must do so on the condition that they fulfil the legal and equitable obligations imposed on them in the circumstances of the dispute
  - Plaintiff must act in a conscientious, reasonable and fair manner in all matters related to the issue before the court
    - If not, a court of equity may refuse to consider a claim
  - **e.g.** A plaintiff seeking specific performance (Equitable remedy) -
    - Must be ready, willing and able to perform their obligations under the contract, if the remedy is to be granted and
    - Must not have engaged in any form of conduct which breaches equitable principles, including unconscientious conduct
- **He who comes to equity must come with clean hands -**
  - **Important maxim - Similar to previous maxim**
  - If a plaintiff has acted wrongfully in regard to the matter before the court, court will refuse to provide a remedy
  - The 'unclean conduct' must bear some relationship or establish sufficient connection to the dispute, although it need not amount to something legally wrong
    - Plaintiff is guilty of some 'impropriety' - In the legal sense, not the moral sense, but does not need to be illegal
  - **Harrigan v Brown [1967]** -
    - Plaintiff was the manager of a musical group and sought an injunction to restrain the group from employing a rival manager
    - Injunctive relief was refused, as the plaintiff had failed to keep the accounting books to a good standard, contrary to the agreement with the group
    - However, the breach of contract by the manager was not sufficient to amount to a repudiation of contract
  - A plaintiff who has once been guilty of 'unclean hands' is **not permanently barred from equitable relief**
    - **Plaintiffs may 'wash their hands'** by showing the misconduct either -
      - Ceased well before the suit was brought to court or
      - It occurred by accident and will not reoccur
  - **Rhodes v Badenach [2000]** -
  - **Facts -**
    - Plaintiff lived in a cottage on part of the deceased's land for 15 years
    - During this time, made improvements to the cottage and land, acting in the belief that the deceased would devise the cottage to him
    - At the same time, plaintiff was fraudulently receiving unemployment benefits
    - The owner of the land died without leaving the cottage to the plaintiff

- Plaintiff sued for equitable compensation
  - **Findings -**
    - Held that the plaintiff was entitled to an amount of compensation, but was conditional on him repaying all the money fraudulently received
- **Equity aids the diligent and not the tardy -**
  - **Goes hand in hand with maxim - Delay defeats equity**
  - Emphasises that equity gives assistance to those who act promptly and diligently, within a reasonable time
  - Relief will be denied when there is undue or unexplained delay, rather than mere delay, since the court may hold that failure to act promptly indicated to the defendant that the plaintiff acquiesced to the situation
  - Gave rise to defence of laches and acquiescence
- **Equity is equality -**
  - Provides proportional equality/fairness
  - Aims to ensure that if a plaintiff is awarded equitable compensation, it is fair and just compensation for both plaintiff and defendant
  - **Equity does not seek to punish, merely to achieve justice between the parties**
  - **Hemmes; Cameron v Mead [2018] -**
    - Court awarded the ex-nuptial son of the deceased a portion of their estate, even though -
      - There was no testamentary disposition for the plaintiff in the will
      - The fund was the only liquid asset in the estate
      - The deceased had refused to have contact with the plaintiff
    - On the basis that the plaintiff's half-siblings had received a financial gift prior to the deceased's death and the plaintiff had tried repeatedly to see the deceased before his death and had financial needs
- **Equity will not assist a volunteer -**
  - Equity will not make its remedies available to a plaintiff who has not given consideration/value
  - **e.g.** A plaintiff will not be granted specific performance of a promise, for which no consideration has been paid
    - "Equity will not give something for nothing"
  - Consideration does not need to be money, but may take the form of services, goods or even a signature on a deed
- **Equity will not perfect an imperfect gift -**
  - Closely related to the volunteer maxim
  - Where a donor has made a gift which fails at law or in equity, equity will not render the gift effective unless the rule in **Milroy v Lord (1862)** can be applied
    - **Where the donor has done everything that is within their power to assign legal property and the assignment fails at law, equity will complete the gift**
- **Equity looks to the intent, rather than the form -**
  - Courts of equity make a distinction between matters of substance and matters of form
    - **Substance** - The intentions of the parties in regard to those rights and obligations
    - **Form** - Formal statement of the parties' rights and obligations as set out in a document
  - If a court finds that insistence on the form (Contract) will defeat the substance (Intentions of the parties), then equity will not allow a party to insist on the rights set out in the document
  - **e.g.** Where a vendor fails to complete on the day fixed for completion, at common law the vendor would be in breach of contract, but in equity, it will suffice if the vendor is ready to complete within a reasonable time after such day (**Solomons v Halloran (1906)**)
  - However, this is limited - In the interpretation of a trust instrument, the court may only make a decision based upon what the document states and cannot take into consideration surrounding circumstances or intentions of the parties (**Byrnes v Kendle (2011)**)
  - No general equitable jurisdiction to construe contracts so as to give effect to the intention of the parties if it is clear that the parties agreed on the form of the contract
- **Equity looks on that as done which ought to be done -**
  - **e.g.** Where a contract requires something to be done, equity will proceed as if the thing were already done, in order to prevent injustice to one of the parties
  - Where A has agreed to take a lease for valuable consideration and the consideration has been paid, if the other party, B, refuses to complete the lease, equity will treat A as if he were a lessee (**Walsh v Lonsdale (1882)**)
  - Applicability is limited to circumstances where that which ought to be done can actually be done
  - Volunteers are unable to take advantage of such maxim
- **Equity acts in personam -**
  - At common law, a person who holds legal title to property has rights in relation to that property against the whole world
  - In equity, **equitable rights are only enforceable against a particular person (In personam)**

- **e.g.** Because the proprietary rights of a beneficiary under a trust were not recognised under common law, the only person against whom the beneficiary can take action in regard to an infringement of these rights is the trustee
- **Who is first in time takes precedence -**
  - **Goes hand in hand with maxim - Where the equities are equal, the law prevails**
  - Determining priorities when there are competing interests
  - Where equitable interests are equal, the first in time will take precedence
  - Where the merits of competing legal and equitable interests are the same, then the legal interest will prevail, but only if the legal interest was acquired bona fide for good value and without notice of prior equitable interest

#### Equitable Fraud:

- Common law fraud requires proof of conscious dishonesty (Mens rea)
- However, equitable fraud includes not only unconscionable conduct, but also any behaviour which is unjust, unfair and which breaches equitable principles
- **Lord Haldane** - "No actual intention to cheat need be proven. It was sufficient if a person misconceived the extent of an obligation imposed on him or her by a court of equity, the fault being that that person violated, however innocently, an obligation which he or she must be taken by the court to have known" (**Nocton v Ashburton [1914]**)

#### Unconscionability:

- Equity's role to act as the conscience of the law and prevent injustice by providing remedies unavailable at common law
- Used to describe a situation in which **a party derives a benefit at the expense of another**
  - **e.g.** A and B live together in B's house (B holds legal title)
    - A spends decent money on renovating a room
    - A and B then separate and B refuses to recognise A's contribution to the increase in the value of the house
    - In equitable terms, it would be unconscionable to allow B to retain the benefit of A's contribution
- Also used to describe a **certain type of behaviour which is not only 'against conscience', but results in the wrongdoer gaining an advantage**
  - **'Unconscionable transaction'**
  - **e.g.** A is elderly and frail and is cared full-time by B
    - B uses her influence over A to persuade her to assign her house to B
    - A complies and legal title to her house is assigned to B
    - At common law, the transaction could not be set aside, provided all of the legal requirements were complied with
    - In equity, B's use of her power over A is against conscience and wrongful and so, the transaction can be set aside
- However, unconscionability is not a cause of action itself, but is the basis of a number of causes of actions **e.g.** Undue influence and unconscionable conduct

## 2 - Fiduciary Relationships

**Fiduciary** - The party in whom trust and confidence is reposed

- **Principal** - The person relying upon the fiduciary, the 'object of the duty'
- "Those in a fiduciary position who enter into transactions with those to whom they owe fiduciary duties labour under a heavy duty to show the righteousness of the transaction" (*Maguire v Makaronis* (1997))
- **Mason J** - "The fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense" (*Hospital Products Ltd v United States Surgical Corporation* (1984))
- Certain relationships in which **fiduciary duties are presumed** -
  - Trustee/beneficiary
  - Solicitor/client
  - Directors/company
  - Partners in a business
- Court may find a fiduciary relationship exists in other situations - Relations usually involve financial advice, management of property and one party acting on behalf of another
  - Key issue - **Whether one party is acting on behalf of, for or in the best interests of another**

**Nature of Fiduciary Obligations:**

- Moral and ethical standpoint - A person in a fiduciary position must not place themselves in a situation in which their personal interests conflict with their duty to another
- **Strict liability** - The intention of the fiduciary in performing the impugned act is irrelevant
  - Even a fiduciary who acts in what they believe to be in the best interests of the object may be in breach of their duty (*Boardman v Phipps* [1967])
  - Often said to be a 'negative' duty - It is a duty to avoid certain conduct, not a positive duty to act in a particular way
  - **Lord Cranworth** - "A fiduciary will not be permitted to enter into engagements in which he has or can have a personal interest conflicting with the interests of those to whom he is bound to protect" (*Aberdeen Railway Co v Blaikie Brothers* [1854])
- Must not derive a benefit from their position as a fiduciary
  - If a disclosure is made to the trustees and **consent** is obtained from all such trustees, there is no breach/liability
- **Keech v Sandford** [1726] EWHC J76:
  - X held a lease on trust for Y
  - When the landlord refused to renew the lease for the benefit of Y, X renewed the lease for his own benefit
  - House of Lords held that, even though the trust of the lease had ended, X held the new lease on constructive trust for Y on the same terms
  - Conflict of interest between X's duty to renew the lease for Y and his own personal interests
  - The trustee of a tenancy (Lease) who obtains a right to renew the tenancy holds the legal right to renew on constructive trust for the beneficiaries
    - Trustee cannot renew lease for his own benefit
    - This is due to an arising conflict between the duty to do his best to obtain a renewal for the beneficiary and his own interest, therefore trustee held the new lease on trust for the beneficiary
    - **Absolute rule for the protection of beneficiaries**
  - Rule extends to all classes of fiduciary relations
- However, the rule of **Keech v Sandford** is an "irrebuttable presumption for trustee fiduciaries, but a **rebuttable presumption of fact for non-trustee fiduciaries**" e.g. Business partners (*Chan v Zacharia* (1984))
- In the case of a **commercial agreement** between two commercial parties, the court holds expectation that they will protect their own interests with intention for both to make a profit and therefore, it would be inappropriate to place fiduciary obligations on parties in such context

**Chan v Zacharia (1984):**

- **Facts** -
  - Parties were in a partnership and held a lease for a three year term at a premises for the practice
  - At the end of the term, the partnership had been wound up
  - Appellant sought a renewal on the lease for himself, of which the lessor granted on payment of a premium
- **Findings** -
  - HC held that the appellant was bound to account in the winding up of the partnership, as a constructive trustee, for any benefit he received from the new lease

- **Deane J** - "There is no suggestion in the present case that the partnership was insolvent. That being so, both before and upon its dissolution, each of the two doctors had an undivided beneficial interest in the totality of the general assets of the partnership"
- "Each of Dr Chan's roles of trustee and former partner was a fiduciary one with fiduciary obligations. Each role complemented and reinforced the fiduciary relationship involved in the other. In particular, each role involved the fiduciary obligation to act"
- Any benefit is held by the fiduciary as a constructive trustee - "That constructive trust arises from the fact that a personal benefit or gain has been so obtained or received and it is immaterial that there was no absence of good faith or damage to the person to whom the fiduciary obligation was owed"
- **Two aspects of the fiduciary obligation -**
  - The fiduciary is not to get in a situation where his personal interest conflicts with the fiduciary obligation
  - The fiduciary must account for any profit obtained by use of his fiduciary position or knowledge

#### Scope and Content of Fiduciary Relationship:

- Relationship between the parties must be examined to ascertain the scope of the fiduciary obligation owed by the fiduciary
- The existence of a fiduciary obligation does not determine the relationship completely
- **Company directors -**
  - All company directors owe fiduciary obligations to their companies and under certain, very limited circumstances, to the shareholders
  - Enshrined in the **Corporations Act 2001**
  - **Regal (Hastings) Ltd v Gulliver [1967]** -
  - **Facts -**
    - Company unable to take advantage of an opportunity due to insufficient funds to do so
    - The directors of the company decided to form subsidiary, intending that the company hold all shares in it and the subsidiary to acquire a lease of two estates in town
    - Directors made a profit from the shares issued personally to them
    - Company was taken over and the new controllers argued that the old directors had breached their fiduciary obligations by acquiring shares personally
  - **Findings -**
    - Held by the House of Lords unanimously that irrespective of whether or not the company could have purchased the shares, the directors were liable to the company for the profit they made
    - "Being directors of the company and therefore in a fiduciary relation to it, they entered in a course of their management into a transaction in which they utilised the position and knowledge possessed by them in virtue of their office as directors and that the transaction resulted in a profit for themselves"
    - Even though they were acting bona fide and in the interests of the company, they were still in breach of fiduciary duty
    - Shares were held on trust for the company
- **Transactions with principal -**
  - General principle that "a fiduciary may not deal with those to whom he owes duty, except in cases of informed consent" (**McKenzie v McDonald [1927]**)
  - "The rule against a fiduciary allowing a person interest to conflict with the fiduciary duty applies, except if the person to whom duty is owed consents" (**Boardman v Phipps [1966]**)
    - Must be **fully informed consent**

#### Rule of Barnes v Addy:

- If a third party has purchased legal title to the property for good value, bona fide and without notice of the interest of the beneficiary or principal, there is no liability
- However, when the third party has been involved in some way in the fiduciary's breach, either through receipt of the property or by assisting, it is complex
- **A third party does not owe a fiduciary duty to the beneficiary or principal**
- **The third party has not taken on any obligations of the trust or the fiduciary, nor has the beneficiary or principal placed any trust, confidence or dependence on such third party**
- Concepts of 'notice' and 'knowledge' differentiate -
  - **Knowledge** - Involves some want of probity e.g. Shutting one's eyes to the obvious or wilfully/recklessly failing to make such inquiries as an honest, reasonable person would make
  - **Notice** - Involves merely having a suspicion
- Rule also applies to dealings by third parties with fiduciaries in breach of their duty

### **Barnes v Addy (1874):**

- Rule enables the person owed a fiduciary duty to claim against a third party who has assisted a fiduciary to breach their duty - Applies where third party has received a benefit
- **Does not apply where a third party has no knowledge of such fiduciary relations**
- Third party must know that they are -
  - Receiving property which has been acquired by the fiduciary in breach of duty and/or
  - Assisting the fiduciary, who is breaching their duty
- **Lord Selborne** - "The responsibility of a trustee may no doubt be extended to others who are not properly trustees, if they are found either making themselves trustees de son tort or actually participating in any fraudulent conduct. But strangers are not to be made constructive trustees merely because they act as agents in transactions within their legal powers, unless those agents receive and become chargeable with some part of the trust property or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees"
- **Baden Delvaux v Societe Generale [1992]** -
  - **Gibson J** set out categories of **what constitutes knowledge** -
    1. Actual knowledge of breach
    2. Willfully ignoring breach/signs that a breach may be taking place
    3. Willfully or recklessly failing to make enquiries an honest and reasonable person would make in the circumstances
    4. Knowledge of circumstances which would indicate the facts to a reasonable person
    5. Knowledge of circumstances which would prompt enquiry
- **Two limbs of principle** -
  - **Knowing receipt** -
    - Strangers who receive some part of trust property become chargeable with that property if it was received with knowledge that the property had been transferred in breach of trust
    - Plaintiff/beneficiary must prove that the defendant -
      - Has received the trust property
      - Knew that it was trust property and
      - Knew of circumstances which made the transfer of the trust property in breach of trust
    - Issue of what degree of knowledge is necessary for liability -
      - The weight of authority is that actual or constructive knowledge will suffice to establish liability (**Consul Development Pty Ltd v DPC Estates Pty Ltd (1975) 132 CLR 373**)
      - **Gibbs J** - "It does not seem to be necessary to prove that a stranger who participated in a breach of trust or fiduciary duty with knowledge of all the circumstances did so actually knowing that what he was doing was improper. For 'knowing assistance', what is required is actual knowledge of the breach of trust, or wilful shutting of one's eyes to the obvious, not constructive knowledge. Thus, actively participating in fraudulent conduct, or being actively involved in setting up the machinery attracts liability, but merely failing to stop someone or standing by is not assistance"
      - **The Bell Group (In Liq) v Westpac Banking Corp (No 9) (2009) 70 ASCR 1** -
        - Held that Westpac was liable under the first limb of the rule because it had required a restructuring of loans on harsh terms with knowledge that the directors would be in breach of their fiduciary duty by agreeing to the terms
      - In Australia, categories 1-4 are sufficient to establish liability of a third party
    - **Knowing assistance** -
      - Essential elements of liability -
        - Existence of a fiduciary duty
        - A dishonest and fraudulent design by the fiduciary/trustee
        - Assistance by the third party in that design
        - Assistance in the design with knowledge that a dishonest and fraudulent design is being implemented
      - As well as Baden categories, Privy Council has held that a person who dishonestly procures or assists in a breach of trust or fiduciary obligation is liable in equity to make good any resulting loss (**Royal Brunei Airlines v Tan [1995] 2 AC 378**)
      - If, without the acts of the third party, the breach of duty by the fiduciary could not have occurred -
        - Assistance may be essential action or simply part of a chain of events
        - There is no need to inevitably lead to loss
        - It is irrelevant if it is done with intention to make a profit, if in fact it involves a breach of duty
      - In Australia, only categories 1-3 apply, but must be proven that the third party was an active participant in the practice of breach