

Introduction to equity

What is equity

- Why we need equity to correct specific injustice instead of simply inviting legislatures to modify the law?
 - *Aristotelian terms of equity*
 - Equity corrects or supplements but does not replace it.
 - A soundly based legal rule of general application can on occasions be exploited for improper purpose.
 - Institutional equity

History

- The reason of exploitation of petitions in the late 14th is
 1. Because the demand for the enforcement of trusts.
 - In effect, to make a will, given the historical lack of testamentary power in feudal society, a lot of will cannot be enforced in court of common law because the lack of valuable consideration.
 2. And the common law uses jury system and it is very costly and difficult to convince the jury to get a favorable verdict
- The conflict between common law and equity: the common injunction
 1. Common injunctions restraining the execution of judgements obtained in fraud or in breach of trust
 2. Litigants who put such judgments into force were sent to prison
 - They were then released by common law judges
 - Dispute arose during James I between Lord Chancellor Ellesmere and Coke CJ, and ultimately James I resolved the dispute in favor of the equity
 - The reason that the resolution is in favor of equity is because at that time equity is still important to carry out the maxims applied in the equity and if equity perishes, people will still make the use of common law to unjustly enrich themselves.
 3. However, common injunction does not claim that the judgement obtained in common law is wrong, it says: "for reasons personal to yourself it will be inequitable for you to enforce that judgement, and that you are not to enforce it."

The maxims of equity

- The maxims are not rules, but they conveniently summarise some equitable principles.
- There is no authoritative list, but some commonly cited and applied are:
 - A litigant who seeks equity must do equity
 - A litigant who comes to equity must 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
 - Equity will not perfect an imperfect gift
 - Delay defeats an equity

Corin v Patton

- **Fact:**
 - Mrs Patton, who was terminally ill, intended to leave her share of the property to the plaintiff. A memorandum of transfer was executed but not registered, so the transfer of ownership has not yet been completed. Also, Mrs Patton executed a will leaving her estate to her children. The certificate of title of the property was held by a bank, and Mrs Patton took no step to procure production of the certificate of title from the bank so as to complete the transfer.
- **Mason CJ and McHugh J**
 - Maxims is not a specific rule or principle of law; it is a summary statement of a broad theme which underlies equitable concepts and principles
 - Maxims is subject to certain clearly established exceptions; thus maxims do not enunciate an inflexible or universal rule.
 - The maxims 'equity does not assist a volunteer' and 'equity will not perfect an imperfect gift' are associated with the rule that 'a voluntary covenant is not enforceable in equity'.
 - Thus, a volunteer who is the object of an intended trust will only succeed if the trust has been completely constituted.
- **Some terminology:**
 - **Certificate of title:**
 - A legal document issued by the Department of Lands identifying the

- Particulars of the title
- Ownership of the property
- Any Encumbrance
- Any registered Dealings

If the vendor has a Mortgage attached to the property, the Mortgage or Financial Institution will hold the document in safe keeping until the loan has been repaid in full by the vendor.

- **Memorandum of transfer:**
 - A legal document showing the property's title particulars which is produced by the Purchaser's Conveyancer/Solicitor which both the Purchaser and Vendor execute in order for the ownership of the property to be transferred.
 - The transfer of ownership to the Purchaser is complete when the Memorandum of Transfer is registered at the Department of Lands.

X v Twitter Inc

- Fact: the plaintiff corporate sought order to remove anonymous tweets from the Twitter platform. The defendants are Twitter Inc and Twitter International Company.
- Issue:
 - Whether maxims 'Equity acts in personam' has operation here and thus equity has no jurisdiction
- Pembroke J:
 - Proof of the means of ensuring compliance in foreign jurisdictions as a pre-requisite to the grant of the injunctions.

Some examples of equitable remedies

- ***Giumelli v Giumelli***
 - **Fact:** Plaintiff relying on the promise of his father, continuing to work on the land of his father, who promised to subdivide the land and to create a lot which will be transferred to the plaintiff. Later, Plaintiff had an disagreement with his father about marriage affairs and left the house. After his departure, his brother lived elsewhere on the same lot. Several years later, plaintiff returned and claimed the title of the lot.
 - **Issue:** should the plaintiff be remedied with the same thing as promised or equivalent monetary compensation?
 - **Reasoning:**
 - *Glesson Cj, McHugh, Gummow and Cllinan JJ*

- When deciding an remedy, the court is obliged to consider all the circumstances of the case. In current situation, it includes the still pending partnership action, the improvements to the Promised Lot by family members other than plaintiff, the breakdown in family relationships and the continued residence on the Promised Lot of Steven and his family.
- A remedy should avoid injustice to others, particularly Steven and his family and to avoid relief which went beyond what was required for conscientious conduct.
- Therefore, money sum is more appropriate than conveyance of title.
- **McKenize v McDonald**
 - **Fact:** The defendant is estate agent of McDonald, who sold the farm for her. The defendant deliberately suggested a lower price of the farm and proposed an exchange with his own suburban shop, which he deliberately lowered up the price. After the exchange, the defendant resold the farm to a third party and the transfer has been completed.
 - **Issue:** What remedy should the plaintiff be given.
- **Nelson v Nelson**

Week2 Class1-- Equitable interest

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The nature of equitable property

- Three thesis of the nature of equitable property right:
 1. An equitable property right is a right against right. (cf. right against a person(*equitable personal right*) and right against a thing(*property right recognized in common law*))
 2. Whenever a party(B) has a right against a right of another(A), B's right is prima facie binding on anyone who acquires a right that derives from A's right.
 - However, the right against a third party who derives his right from A is not the same as a right against a thing. The latter has universal exigibility: it is against the rest of world. The former is only persistence; it is against A and any successors of A's right. (unless the right has been destroyed by other claims)

3. B will acquire such a persistent right whenever A is under a duty to hold a specific claim-right or power, in a particular way, for B.
 - This is consistent with the fact that there is a closed list for the right against a thing while there is no such limit to the content of rights against right.
- An example of why equitable property right is neither a right against a thing or a right against a person.
 1. A has title to the car, who holds trust for B. If X steals the car from A, because X acquires the car without A's disobedience with the trust, B cannot directly sue X. But if A failed to sue X to reacquire the car, B can sue A and compel him to sue X. In this sense, equitable property right *is not a right against a thing*.
 2. A has title to the car, who holds trust for B. If A gift the car to C, because C acquires the car due to A's disobedience with the trust, B can directly sue C. In this sense, equitable property is *not a right against a person*.
- Only when A's right has following characteristics can B have a equitable property right against A:
 1. A's right must be such that A can come under a duty to B in relation to the right.
 - Some rights are of such important that the law does not allow us to come under a duty to another in relation to those rights. For example, the freedom of residence and the freedom of movement.
 - However, the limit on the content of equitable property rights is not a result of the fact that certain rights cannot be transferred. I.e. the prohibition on the transfer of the right did not prevent A coming under a duty to B in relation to that right.
 2. A's right must be specific and distinct
 3. A's right must be a claim-right or a power.
 - For example, the liberty to read a book etc.

DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties --- A case about 'Retention fallacy'

- **Issue:** what was the nature of the property conveyed by the transfer.
- **Reasoning (Hope JA):**
 - The interest of trust is an interest in property.
 - Trustees has obligation *in personam*, but the obligation is also annexed to the property so that the equitable interest resembles

a right *in rem*. i.e. Trustees' obligation is not sufficient unless it is annexed to property. (vice versa)

- An absolute owner in fee simple hold one absolute estate, not two separate namely one legal and one equitable. The trustee is the absolute owner of the fee simple and owns at law all the rights of the absolute owner, but in law he is not free to use those rights for his own benefit.
- The correct description of a transfer for the purpose of trust between plaintiff and 29 Macquarie is as following:
 - Before the transfer, 29 Macquarie is the absolute owner of the fee simple.
 - 29 Macquarie transfer all its legal rights to the plaintiff.
 - The intention of the transfer and the declaration of trust creates an equitable interest/equitable estate in 29 Macquarie, which entitles him to direct the plaintiff to exercise plaintiff's rights in a way 29 Macquarie favors.
 - In another way, the declaration of trust impose a beneficiary's interest on the holder of the legal title (plaintiff) and the content of the beneficiary's interest is a right to compel the plaintiff to adhere to the terms of the trust.

Mere equities and equitable interest

- Equities, or 'mere equities', are ***rights recognised by the courts in order to prevent unfairness***. An equity is a right to bring an action for equitable remedies. (not the remedy itself, ***Latec Investment v Hotel Terrigal***)
- An equity may be classified as a personal right or a personal proprietary right.

Latec investment Ltd v Hotel Terrigal Pty Ltd

- **Fact:**
 - Latec (the lender/mortgagee), holds a mortgage over the Hotel Terrigal ('Terrigal'). Terrigal soon defaults on the mortgage. Thus, in 1958, Latec purports to exercise its power of sale to realise the security. Latec sells the hotel to its wholly owned subsidiary (Southern Hotels). It does so in such a way that may be readily characterised as fraudulent because Latec makes no attempt to find a purchaser since it wants to sell the Hotel to a subsidiary of itself: same board of directors, wholly owned.
 - The sale took place after an auction which was scheduled on an unfavourable day: Friday afternoon (instead of Wednesday);

was not well advertised; had an unreasonably high reserve price (\$85 000)

- Subsidiary becomes registered as the registered proprietor of the hotel. The title cannot be impeached, not subject to prior equitable interests (with some exceptions, including fraud).
- The subsidiary knew that the sale was fraudulent, but still grants an equitable security over the land to a new mortgagee, MLC Nominees.
- Although Terrigal has an equity to set aside the sale on the basis of fraud, it does nothing
- Five years after the sale, the trustee in bankruptcy of the original owner (i.e. Hotel Terrigal) seeks to have the sale to the subsidiary set aside on the basis of fraud. Terrigal is in liquidation, which is why the trustee in bankruptcy brings the action
- Terrigal argues that the power of sale had been exercised fraudulently, giving rise to an equity to set aside the transaction
- **Issue:**
 - How is Terrigal's interest to be characterised?
 - Does it take priority over that of MLC Nominees?
- **Reasoning:**
 - All judges agreed that if the sale was set aside, the Terrigal would have the equity of redemption (the right of a mortgagor to recover seized property upon repayment of a debt, an equitable interest.)
 - Judges held different ways to characterize the right at that point Terrigal held.
 - ***Kitto J (Applying Philips v Philips)***.
 - The equity to have the transaction set aside for fraud is equivalent to an equity of redemption. Thus, if the equity can be made good, Terrigal would have held full equitable interest.
 - However, until the equity is asserted, what Terrigal had was a mere equity, and the notice rule applied. In conclusion, ***Kitto J*** though there is a two-step process.
 - An equity arises and
 - An equity is satisfied, equitable interest forms.
 - ***Taylor J (Applying Stump v Gaby)***
 - The right to set aside the transaction is a full equitable interest, characterization does not require the equity being satisfied.

- However, equities are not equal because Terrigal's equitable interest requires the assistance of the court to be asserted.
- In such cases, the notice rule applies.
- In conclusion, *Taylor J* thought Terrigal continues to have a full equitable interest *subject to the need to have the court set aside the impediment to asserting the interest*.
- *Menzies J*:
 - Trying to reconcile the judgment of *Kitto J* and *Taylor J*:
 - Whether the right is a mere equity depends on who is asking (i.e. against whom the disputed right is being asserted)
 - In the circumstance of a will, *Stump v Gaby* applies and the right is a full equitable interest.
 - In the circumstance of a priority dispute, *Philips* applies and the right is a mere equity until it is being made good.

Personal right

National Provincial Bank v Ainsworth

- **Fact:** The respondent was deserted by her husband, but she continued to live in that property. Later her husband took a mortgage over the property and later went into liquidation. The bank, as a mortgagee, took over the property.
- **Issue:** Whether the deserted wife has an equitable interest against a third party claiming in good faith.
- **Reasoning (Lord Wilberforce):**
 - The common law gives to the wife no interest or participation in her husband's property, and equity followed this.
 - Equity provided the wife with the right of cohabitation and the right to support. She may bring action against her husband, seeking an order for restitution of conjugal rights. But the order was the provision of a suitable dwelling-house and maintenance coupled with the obligation of the husband to live with her, which is purely **personal right**.
 - In considering whether the husband should be given possession of property of his, the court will have regard to the duty of the spouses to each other and the matrimonial circumstances:
 - Whether the husband can provide alternative accommodation and if so whether such accommodation is suitable having regard to the estate and condition of the spouses
 - Whether the husband's conduct amounts to desertion

- Whether the conduct of the wife has been such as to deprive her of any of her rights against the husband
- Before a right or an interest can be admitted into 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.**

Contractual Right

Beconwood Securities v ANZ

- **Fact:** The plaintiff entered into a security lending agreement with OPS, who later collapsed and the securities was obtained by OPS's mortgagee, ANZ. *Beconwood* wants to redeem that securities by repaying the money to OPS, claiming that they still hold equitable interest in that securities.
- **Issue:**
 - Whether the SLA can be characterised as a mortgage
 - Whether the SLA can be characterised as an equitable charge
- **Reasoning:**
 - The character of the SLA must be determined from its language and a commercial contract should be construed having regard to its purpose.
 - SLA has express terms:
 - to transfer unencumbered title to each other in both lent securities and collateral.
 - When the transaction comes to an end, there is no obligation to hand back in specie the securities initially lent, nor is there an obligation to return the collateral actually provided. **The obligation is to deliver the same number and type of securities.**
 - This is contrasted with the mortgage situation in which the mortgagee must transfer the same collateral. Also the mortgagee cannot do anything with collateral whereas in current case the mortgagee can do anything he wants in relation to the collateral. In current case, it has no need to be the same. Equivalent is sufficient.
 - Of netting and set off provisions, which proves that both parties did not intend there to be any equitable property rights retained over lent securities or collateral.
 - *Beconwood* argues that SLA has different meaning since it was entered in a different market (retail market comparing with institutional market). Not agreed, because the judge think they

are essentially the same market, namely the market for providing funding to intending share purchasers. And even if they be different market, that would not be good reason for giving a different meaning to the same agreement because the share lending agreement's meaning is not dependent upon the subjective motivations.

Security interest

- Three types of security:
 - Possession:
 - Ownership:
 - Encumbrance: