

LAWS2385/JURD7285

Equity and Trusts 2020 T3

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Introduction to Equity, Trusts and Equitable Remedies

- **Equity** (*Macquarie Dictionary and Thesaurus Online*)
 - (1) Quality of being fair or impartial
 - (2) Fair and just
 - (3) *Law*
 - (a) The application of the dictates of conscience or the principles of natural justice to the settlement of controversies.
 - (b) A system of jurisprudence or a book of doctrines and rules developed in England and followed in other common law countries, serving to supplement and remedy the limitations and the inflexibility of the common law.
 - (c) An equitable right or claim

Conflict between common law and equity

Common injunctions which forbade plaintiffs from pursuing unconscionable claims in the common law courts. When common lawyers refused to admit the broadest range of factual evidence into deliberations, and then to develop legal tests and principles to sift such an expanded admission of evidence and guide the jury, they thereby ensured the survival and growth of the Chancery jurisdiction.

- **The Earl of Oxford's Case (1615)**
In late 16th century chancellors began issuing common injunctions to restrain plaintiffs from executing a judgment obtained at common law where it had been obtained unconscionably.

FACTS

Land owned by Magdalene College, Cambridge was initially sold to Queen Elizabeth I and leased to Warren. The College took the view that the original sale was void under the Ecclesiastical Leases Act 1571 and instead leased the land to Smith. Warren brought an action of ejectment at common law to evict Smith.

Coke CJ held that the original transfer of land was void and Smith could not be evicted.

The Earl of Oxford, claiming to be the owner of the land following a resale by Elizabeth I, later reopened the case in Chancery. Smith refused to respond to the equity suit and was committed to prison for contempt of court. At the same time **Lord Ellesmere** granted a common injunction against enforcement of judgment to release Smith from prison.

HELD

The case in the Court of Chancery should not be abandoned/perished.

- In **McLaughlin v Fosbery (1904)**, the HC refused to overturn an order of the NSW CJ in Equity staying all proceedings on an action for damages for assault and false imprisonment.
 - The dispute related to the confinement of a lunatic...
 - The HC held that the SC ought to have stayed proceedings in the exercise of its inherent jurisdiction to stay vexatious actions, ie, reliant on the exercise of common law jurisdiction.
 - Therefore, it was an error that the stay of the common law action had been granted by the CJ in Equity in reliance on Equity lunacy jurisdiction.
 - However, since the Full Court of the SC had power on appeal to disregard formal irregularities in proceedings, the HC decided by majority to do the same. Appeal dismissed.

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Equitable proprietary interests

Proprietary interest: interest of beneficiary in the trust property

- A beneficiary under an **express trust** will not always have a proprietary interest in the trust property.
- A beneficiary under a **fixed trust** has a proprietary interest in the subject-matter of the trust.
- A beneficiary under a **discretionary trust**, however ('object' of the trust) only has a personal right to enforce the trustee's obligations.
 - Nevertheless, there are circumstances, such as when the trust is terminated, when the beneficiary will be entitled to a share of the trust property.

Other equitable proprietary interests

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Doctrine of proprietary estoppel

- Enables creation of proprietary interests in certain circumstances where a party has relied to her detriment on assumption that she will be granted an interest in the property, to which the party inducing the assumption holds title.

[Equitable proprietary interests are protected and enforced by equitable remedies. VS equitable discretion and bars to relief]

The nature of equitable ownership

DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW) (1982) 149 CLR 431

FACTS

- Land was to be conveyed by 29 Macquarie (No 14) Pty Ltd to DKLR to be held on trust.
- The resolution provided that DKLR was only to hold the legal estate in the land, 'there being no intention on the part of [29 Macquarie] to part with beneficial ownership of land'.

ISSUE

Whether stamp duty was payable in respect of the instrument creating the trust

HELD

Stamp duty payable on the instrument declaring the trust.

Aickin J:

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Beaconwood Securities v ANZ [2008] FCA 594 (up to [58]).

Beaconwood Securities v ANZ [2008] FCA 594

FACTS

- Beaconwood entered into a securities lending arrangement with Opes Prime.
- Under the contract, Beaconwood supplied securities to Opes Prime, in return for money. Opes Prime supplied Beaconwood with equivalent securities when Beaconwood repaid the “loan”.
- Opes Prime then supplied Beaconwood’s securities to ANZ, under a separate securities lending arrangement.
- Opes Prime collapsed and went into voluntary administration. Beaconwood wanted to regain possession of its securities, however the title to the securities were now passed to ANZ.
- Beaconwood began legal proceedings to recover the securities from ANZ.

ISSUE

Legal effect of the securities lending arrangement

HELD

The securities lending agreement was a legal transfer of property, not a mortgage.

The lender of securities ‘loaned’ to a borrower under the agreement does **not** have an equity of redemption or other equitable estate/interest in those securities after the ‘loan’.

Beaconwood’s argument:

- Claimed that the agreement was a legal mortgage pursuant to which it borrowed money from Opes Prime and provided its shares as security.
- Under a legal mortgage, property in the security passes to the lender, but the borrower retains an equity of redemption (right to regain title upon repayment of loan).

Finkelstein J:

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What is Express Trust and the Requirements

The existence of trust obligations

Existence of express trust may not be clear. Trustee trying to establish existence of trust:

- **Re Scott [1948]**
A testator bequeathed her residuary estate to the General Assembly of a church for charitable purposes. The General Assembly received payment of the bequest, but applied to the Court under Administration and Probate Act 1919 (SA) s 69 for advice. Only if the GA could establish it was trustee of the property could it secure access to the court's guidance this way.
HELD
That the GA was a trustee within the meaning of that section and therefore entitled to apply for advice.

Beneficiaries attempting to assert claim on property that has priority over personal creditors of the trustee, eg, if the trustee files for bankruptcy/insolvency:

- **Barclays Bank Ltd v Quistclose Investments Ltd [1970]**

Quarantining assets from creditors of the 'trustee'

Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567

FACTS

- Rolls Razor Ltd borrowed money from QI Ltd in order to pay a dividend to its shareholders.
- At the time RR was indebted to Barclays Bank.
- A new account was opened at Barclays to hold the money.
- The bank had notice of the arrangement between RR and Barclays.
- RR went into liquidation before it could pay the dividend.
- Barclays attempted to exercise its right to combine both accounts and set off the money in the QI account against other overdrawn accounts.
- QI argued that the money it had was provided for a specific purpose and, that purpose having been frustrated, the amounts were impressed with a trust in its favour.

HELD

The arrangement between QI and RR created a trust in favour of QI when it became impossible to pay the dividend, and Barclays, having notice of the trust, could not apply the money to reduce RR's debt.

Lord Wilberforce:

- The loan was made to enable RR to pay the dividend and for no other purpose.
- **Mutual intention** of the respondents was that the sum advanced should not become party of the assets of RR, but to be used exclusively for payment of the dividend.

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3 Certainties

1. Certainty of intention

- Settlor must have intended to create a trust of her property, as opposed to making a gift or loan.
- The word 'trust' need not be used, an inference may be drawn.

Objective or subjective intention?

- Determined by reference to settlor's **objective** intention – would a reasonable person consider that in all the circumstances, the settlor intended to create a trust?
- *Byrnes v Kendel [2011]* – HC held that the defendant manifested an **objective** intention to create a trust and that his mental reservations were irrelevant in construing the document the parties had signed.
- Only where the alleged trust is a sham, or voidable for mistake, misrepresentation, duress, undue influence or unconscionability, or where rectification of the trust instrument is sought on ground that it doesn't represent the parties' actual intention, will the settlor's **subjective** intention be relevant. (subjective intention not relevant)

Sham trusts

- Trust may be created for the purpose of avoiding potential claims of creditors, ATO or Centrelink.
- Upon execution of the trust deed the settlor may insist he no longer beneficially owns the property, so it is not available for repayment to his creditors or that it does not form part of his taxable assets.
- A trust is a sham where the settlor deals with property otherwise than in accordance with the terms of the trust he created, with intention of deceiving 3rd parties as to his real interests in the property.

What intention has to be proved?

- An intention to create a trust is an intention to impose on a property owner an obligation to apply the property for the benefit of identified beneficiaries/for charitable purposes.
- There must be evidence that the owner was under an obligation with respect to the property, and thus not entitled to deal with it as absolute owner.
- *Obligation* to be contrasted with *discretion* to apply property for another (which is insufficient to create a trust)

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