

LAW340 – Equity and Trusts study notes

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2. Equitable interests arising by implication by law

The law can recognise an equitable interest to give effect to what could be construed as the implied intention of the parties in relation to the relevant transaction. This can occur when it lies outside the personal property regime under the *Personal Property Securities Act 2009* (Cth) by reason of the fact that it is expressed not to apply to a 'lien, charge, or any other interest in personal property, that is created, arises or is provided for by operation of the general law.'³²

Resulting trusts

Resulting trusts arise where one person (settlor) confers legal title to property to another person but is presumed to retain equitable ownership of the property, in whole or in part. Therefore, the resulting trust is created as a remedy pursuant not to the settlor's actual intention but rather to the intention the law presumes in light of the form of transaction effected.

These are commonly divided into two categories:

(1) Where the settlor has failed to dispose the entire equitable interest in the property, the equitable interest remaining undisposed is said to 'result' to the settlor to fill the gap in equitable ownership.

(2) A resulting trust may arise where legal title to property is transferred by the transferor is presumed by law not to have intended to dispose of their equitable interest in the property.

Contractual dealings in property giving rise to equitable lien

An equitable lien may arise by implication to secure the discharge of actual or potential indebtedness. For example, a vendor's lien to secure unpaid purchase moneys which arises independently of any implied agreement between the parties.³³

The lien secures the vendor's right to the purchase money in circumstances where the vendor has parted with legal title without receiving the full purchase price on the basis that 'a person having received the estate of another, shall not, as between them, keep it, and not pay the consideration'.³⁴

Equitable interest protecting agreements that do not meet statutory formalities

Equity recognises that a statutory form of documentation requisite to the passing of an interest in land under Torrens system of land registration may give rise to an equitable interest in that land until the registration supervenes.³⁵

³² *Personal Property Securities Act 2009* (Cth) s 8(1)(c).

³³ *Kettlewell v Watson* (1884) 26 Ch D 501, 507 (Lindley LJ).

³⁴ *Mackreth v Symmons* (1808) 15 Ves 329, 340.

³⁵ *Abigail v Lapin* [1934] AC 491, 500 (Lord Wright).

Enforceability of an incompletely constituted trust by way of contract

The intended trustee or beneficiary of an incompletely constituted trust can enforce the trust only if they have given consideration to the settlor or otherwise it will fall within the maxim 'equity will not assist a volunteer'.

If a settlor promises to create a trust, the enforceability of this promise rests on the law of contract. In line with the latter, a party (whether trustee or beneficiary) who has given consideration may enforce the promise as a contract.¹¹³ However, the trust that is created as the result of the contract is only enforceable as a trust once it is completely constituted. At this point, trust law will apply and the question of consideration becomes irrelevant because the trust will be enforced in equity.

Settlor's promise to intended beneficiary

Where a settlor promises to create a trust and the beneficiary is a party to the promise and provides valuable consideration, the beneficiary is generally entitled to specific performance of the promise which will compel the settlor to create the trust. Valuable consideration is something actually given or intended to be forborne.¹¹⁴

Settlor's promise to intended trustee

A settlor may deed (which does not require consideration) or for consideration promise to transfer property to a trustee to be held on trust for a beneficiary. In this case, the trustee is the party to the settlor's promise, and so it is the trustee who has contractual rights against the settlor.

Therefore, a trustee who has given consideration is generally entitled to specific performance of the promise.¹¹⁵ If the trustee gives no valuable consideration but the promise is contained in a deed, the trustee may obtain damages.

¹¹³ *Federal Commissioner of Taxation v Clarke* (1927) 40 CLR 246, 283-4 (Higgins J).

¹¹⁴ *Lee v Lee* (1876) 4 Ch D 175.

¹¹⁵ *Colyear v Lady Mulgrave* (1836) 2 Keen 81.