LPAB 07 – Equity

Contents

Week 1: Introduction to Equity, The History of Equity; The Nature of Equity; The Relationship between Law and Equity

History of Equity

This topic details the necessary historical background that explains the emergence of equitable principles and their place in our legal system.

- Textbook – Chapter 1
- St Germain, 'What is Equytie' – Casebook p 4
- Avini, 'The Waqf and the Trust' - Casebook p 6
- Stebbings, 'The Trust in Victorian England' - Casebook p 9
- Auchmuty, 'Equity "Looking After" Women' - Casebook p 12
- Dickens, 'In Chancery' - Casebook p 14
- Mason, 'Variety and Stages of Fusion' - Casebook p 18
- McPherson, 'Judicial Reception of Equity' - Casebook p 21

Introduction to Equity

- A body of law, distinct from the common law
- Focus is on a just outcome in the circumstances (matters of conscience)
- Distinct from the strict insistence on legal rights found in the common law

The History of Equity

- Reign of Henry II [1154-1189]: King's Council (Curia regis) responsible for all arms of government (legislature, executive and judiciary)
- Reign of Edward I ('Longhshanks') [1272-1307]: Common law courts developed:
    - King's Bench – Crime
    - Common Pleas – Civil
    - Exchequer – Revenue
- Problems with the common law:
    - Bureaucracy & lack of recorded decisions
    - Focus on technicality and procedure (system of writs)
    - No remedies to enforce contracts where otherwise unenforceable at law
    - No remedies to prevent someone enforcing their strict legal rights where it would be unconscionable to do so
    - No remedies for weaker parties who have been unconscientiously taken advantage of
- Reign of Edward III [1327-1337]: Private petitions sent to the King (King's Council)
    - Eventually handled by the Lord Chancellor due to volume of petitions (Chief Legal Officer on behalf of the King)
- Court of Chancery developed [14th – 17th Century]
    - No binding precedent – each case decided on its merits
    - Chancery became the "court of conscience"
    - Two streams of law developed – common law & equity (separate jurisdictions)
    - Equity allowed the development of law relating to trusts & fiduciary obligations (eg. land transfer and ownership)
    - Equity also allowed remedies such as injunctions (to prevent the enforcement of strict common law rights) and specific performance (to force someone to complete an obligation where it would be unconscionable to not do so)
    - Earl of Oxford's Case (1615) 21 ER 85 (equity prevails)
        - "The Office of the Chancellor is to correct Men's consciences for Frauds, Breach of Trusts, Wrongs and oppressions, of what Nature soever they be, and to soften and

mollify the Extremity of the Law ... [W]hen a Judgment is obtained by Oppression, Wrong and a hard Conscience, the Chancellor will frustrate and set it aside, not for any error or Defect in the Judgment, but for the hard Conscience of the Party...”

  - Eventually, Chancery became overwhelmed & under-staffed
  - Accusations that equity was arbitrary and discretionary
  - Equity depended on “the length of the Lord Chancellor’s foot” (ie. uncertain and inconsistent decisions)
  - Poor administration and lengthy delays
  - Separate claims could be made in common law to defeat equitable claims
- Judicature Act 1873 (UK)
  - Attempt to establish one Supreme Court of Judicature in England
  - Supreme Court was divided into 2 parts - High Court of Justice and the Court of Appeal
  - Separate courts of common law & equity were abolished (“fusion fallacy”)
  - Common law & equity operated as two distinct streams of jurisdiction, running side by side in the same channel
  - The Act established the principle that equity prevails over the common law
- Supreme Court of Judicature:
  - Divisions
    - High Court of Justice (Queen’s/King’s Bench & Chancery divisions)
    - Court of Appeal (House of Lords, dealing with appeals from the High Court of Justice)
    - Common law and equitable principles were meant to be exercised in all divisions
- Fusion fallacy
  - *Walsh v Lonsdale (1882) 21 Ch D 9*
    - Dispute between landlord & tenant
    - Written agreement to lease a weaving shed for 7 yrs – common law required a deed, however no deed was prepared, therefore lease not recognized at common law
    - Agreement allowed the landlord to demand 1 yrs rent in advance – tenant refused & landlord seized tenant’s goods. Tenant sued for damages
    - English Court of Appeal dismissed tenant’s claim: ordered specific performance of the lease based on equitable principles
  - Sir George Jessel MR talked about the “fusion” of common law & equity as a result of the Judicature Act, however this was not entirely correct
  - *Harris v Digital Pulse Pty Ltd [2003] 56 NSWLR 298*
    - In breach of his employment contract, an employee established himself as a competitor of his employer, benefitting from his position
    - Employee was sacked and employer sought exemplary damages and an account of profits (granted by the Supreme Court)
    - On appeal, the Court held exemplary damages are not available for equitable wrongs

Relationship between law and equity

This topic details the effect of the judicature system which abolished the former separate courts of common law and equity and replaced them with a single court that exercised jurisdiction in relation to both the common law and equity.

It also explores the relationship between the common law and equity and whether further development of one of these systems of law can or should be influenced by the other.

- Textbook Chapter 3
- Harris v Digital Pulse Pty Ltd
- Walsh v Lonsdale

Topic 3: Dispositions of Equitable Interests; Property with a Limited Capability of Being Assigned

Assignment **at law**

- Alice owes Bill a **debt** of $100. Bill wants assign the debt to Chris
- At law, Bill can assign the debt to Chris, but only if there has been compliance with Conveyancing Act 1919, s 12: Assignment of *debts* and *choses in action*:
  - Assignment must be in writing
  - Notice of the assignment must have been given to the person affected by the assignment – i.e. the debtor (Alice)

Assignment **in equity**

- Alice owes Bill a **debt** of $100. Bill wants to assign the debt to Chris. There has been no compliance with s 12.
- In equity, Bill can still assign the debt to Chris, but only if these conditions are met*:
  - An intention to assign the debt from Bill to Chris
  - Consideration has passed from Chris to Bill
  - Bill did all that was necessary to be done to give effect to the assignment (rule in Milroy v Lord)
- Assignment may also be effective **in equity** if Bill induced Chris to act to Chris' prejudice in the belief the assignment was legally enforceable

Presently existing legal property

- Alice owns land at Whiteacre (legal property). Alice wants to assign her legal interest in Whiteacre to Bill.
- In equity, Alice can assign her legal interest in Whiteacre to Bill in one of 2 situations:
  - If consideration has passed from Bill to Alice:
    - Compliance with s 23C(1)(a) - disposal of *interests in land* must be in writing
  - If no consideration has passed (voluntary assignment):
    - Rule in *Milroy v Lord* (Alice did all that was necessary to be done)
- *Corin v Patton (1990)*
  - Facts: Mr. Patton and Mrs. Patton were registered joint tenants of land. Mrs. Patton fell ill and decided to sever the joint tenancy and transfer her beneficial interest to her brother to hold on trust for her children. A solicitor drew up the relevant paperwork, and Mrs. Patton signed a transfer deed. However, Mrs. Patton passed away before she was able to procure the certificate of title for the property.

Overview

This topic is primarily concerned with the requirements for the assignment (i.e. transfer) of property pursuant to equitable principles.

The rules of assignment in equity may arise because:

- the property has not been assigned at law; or
- it is equitable property; or
- the assignment of the property is only enforced in equity.

To determine if an assignment of legal property has not been assigned at law, requires knowledge of the requirements for a valid assignment of that property at law.

Therefore, some attention will be given to the requirements for the assignment of legal interests in property at law, especially in the case of debts and other choses in action.

- Austino Wentworthville Pty Ltd v Metroland Australia Ltd
- Controller of Stamps (Victoria) v Howard-Smith
- Norman v Federal Commissioner of Taxation
- Shepherd v Commissioner of Taxation
- Re Lind, Industrials Finance Syndicate Ltd v Lind
- Corin v Patton

Topic 8: Resulting Trusts

Resulting trusts

- Although property may be legally owned by person A, in some situations equity will recognize another person's beneficial interest by means of a resulting trust
- Implied by law (**presumption of resulting trust**)
- Presumption can be rebutted by evidence or displaced by the operation of the law (legal doctrine)
- Onus on the party to rely on the legal title (i.e. the party seeking to rebut the presumption of resulting trust)
- Two categories:
    1. Incomplete disposition of a beneficial interest ('**automatic**'); and
    2. Resulting trusts presumed in property transfers ('**presumed'**)
- In either case, evidence can be adduced to rebut or displace the presumption of resulting trust. E.g. evidence of the actual intention of the creator of the trust, or evidence that the presumption is displaced by a different legal doctrine

Overview

This topic deals with trusts that arise pursuant to an implication, which are said to reflect the intention of the creator of the trust. Such trusts fall into one of two categories:

1. the so-called 'automatic resulting trust' and
2. the 'presumed resulting trust'.

The presumption of resulting trust in the latter variety ('presumed resulting trust') may be rebutted by:

- evidence of a contrary intention; or
- pursuant to the presumption of advancement.

Textbook – Chapter 25
Re Gillingham Bus Disaster Fund
Calverley v Green
Anderson v Anderson (No 2)
Trustees of the Property of Cummins (a bankrupt) v Cummins
Bosanac v Commissioner of Taxation [2022] HCA 34

When do they arise?

- The two categories apply to these situations:
    - When an express trust fails or there is a *surplus* of trust property after a trust comes to an end; or
    - When *contributions* have been made to the purchase of property but the contributor has not been given a legal title equivalent to their *contribution*

Automatic resulting trusts

Failure of an express trust

- When an express trust fails, equity will recognise a resulting trust whereby the trust property reverts (i.e. 'results') back to the creator of the trust
- For this type, intention on the part of the creator does not always need to be shown
- E.g.: A trust does not satisfy the three certainties (intention, subject matter, object) OR the purpose of a trust cannot be fulfilled, and the trust deed contains no terms dealing with this situation
- *Vandervell v Inland Revenue Commissioners [1967] AC 291*
    - Oral direction by beneficiary to trustee to transfer everything to third party; later, written documentation.
    - ISSUE: Is oral direction effective?
    - Held: Oral direction is ok. Section 23C(1)(c) is only effective when it deals only with the subsisting equitable interest, not also the legal interest. NB: Does not apply to land which requires writing: 23C(1)(a)
    - BUT!!! Whether a direction lapses on death if nothing has been done by trustee is the subject of conflicting views in Vandervell (says still property still passes) and *Parker & Parker v*

Ledsham (says direction lapses).

Surplus of trust property

- When there is a **surplus** remaining after the purpose of a trust has been fulfilled, equity will recognise a resulting trust whereby the surplus property reverts ('results') back to the contributor/s of the property
- Egs: beneficiaries of a fixed trust have taken all their entitlements under the trust, OR the beneficiaries have dies
- The remaining trust property is held on resulting trust for the creator of the trust because its presumed the creator intended to receive any leftover beneficial interest *Smith v Cooke (1891)*
- If NO general charitable intention, held on resulting trust for the creator or surrendered to the Crown *Re Abbott Fund Trusts (1900), Re Gillingham Bus Disaster Fund (1958)*

Relevance of 'intention'

- Equity can automatically impose a trust <u>without reference to intention</u>
- *Re Vandervell's Trusts (No 2) [1974] EWCA Civ 7*
    - Owner of shares in Vandervell Products Ltd – transferred shares to Royal College of Surgeons with an option to buy the shares back at any time for £5,000
    - Vandervell's intention was for the College to hold the shares on trust for the benefit of either his kids, or else for his employees
    - Given the terms of the trust were uncertain (beneficiaries not be properly identified), Court determined the shares were held on resulting trust for the benefit of Vandervell himself

Presumed resulting trusts

Contributions towards purchase of property

- *Calverley v Green (1984),* per Gibbs J at 245:
  "... if two persons have contributed the purchase money in unequal shares, and the property is purchased in their joint names, there is ... in the absence of a relationship that gives rise to a presumption of advancement, a presumption that the property is held by the purchasers on trust for themselves as tenants in common in the proportions in which they contributed the purchase money..."

Relevance of intention

- Equity can give legal recognition to a trust based on <u>common intention</u>
- *Calverley v Green (1984)*
    - De facto couple (Mr Calverley and Ms Green) purchased a house with both registered as joint proprietors
    - Mr Calverley paid the deposit. Although jointly & severally liable for repayment of the mortgage, they both agreed that only Mr Calverley would make the loan repayments
    - Although she paid no money, Ms Green's shared liability under the mortgage indicated a common intention by the couple to create a resulting trust in her favour (ie. Her contribution was her liability under the mortgage when the finance was provided to them on a joint basis)

"Contributions"

- Contributions must go towards the **purchase price** of the property **at the date of purchase** and can include:

- Direct payment towards the purchase price to the vendor
- Joint mortgage liability counts as a contribution (see *Cavlerley v Green*), unless a contrary intention can be shown (see *Thornton v Hyde [2004] NSWSC 125*)
- Where unequal contributions are made towards the purchase price, the beneficial interests under a resulting trust will be determined on a pro-rata basis (see *Dinsdale v Arthur [2006] NSWSC 809*)
- Legal fees, stamp duty and incidental costs associated with the costs of acquisition will count as contributions to the purchase price (see *Ryan v Dries [2002] NSWCA 3*)

- Contributions towards mortgage repayments
  - Where both parties contribute to mortgage repayments, the Court will need to examine the common intention of the parties at the time the property was acquired – ie. did they intend that the payments would be proportionately reflected in the beneficial interests to be acquired?
  - Common intention can either be proven by reference to an agreement or arrangement OR can be inferred from the conduct of the parties at the time of purchase
  - If the evidence shows that the payments were really in the nature of rent, they will not be considered as 'contributions towards the purchase price' (see *Savage v Dunningham (1974)*)

Contributions made after purchase of property

- Where contributions have been made towards costs incurred after purchase of the property, no presumption of resulting trust arises
- Examples:
  - Payments towards maintenance or upkeep of the property
  - Payments towards the mortgage not referrable to any common intention
  - These are not considered to be contributions towards the 'purchase price' (see *Patrick Jones Photographic Studios Pty Ltd v Catt [1999] NSWSC 421*)

Contributions towards purchase, development of land

- Where parties make contributions towards the purchase of undeveloped land and the land is later developed, the Court will look at the whole of these events as one single transaction when determining the extent of each party's share of interest in a resulting trust
- IF undeveloped land is bought and then built upon, the contribution
- would include payments for both even if it was in stages *Trustees of the Property of Cummins (a bankrupt) v Cummins (2006) 227 CLR 278*

Loan of purchase monies as a 'contribution'

- Where a loan has been made by a party claiming contribution towards purchase price, no resulting trust will be found if the only purpose of providing the loan was for a general commercial purpose
- The burden of proof is on the plaintiff to establish that the money was lent rather than given *Heydon v Perpetual Executors & Agency Co (WA) Ltd (1930) 45 CLR 111*
- However, equity *may* recognize a resulting trust where the lender advances a loan for the specific purpose of assisting the purchaser to acquire the property
- *Re RMATA Cutelli Pty Ltd (in liq) [2018] NSWSC 382*

Voluntary transfers of real property

- In NSW, where one party makes a transfer of property to another party for no consideration (ie. a voluntary transfer), a presumption of resulting trust will not arise
- Relevant legislation: Conveyancing Act 1919, s 44(1)

44 No use to result from absence of consideration

Topic 13: Equitable Estoppel

- A type of **discretionary order** made in the Court's inherent equitable jurisdiction
- Purpose = to prevent a party from asserting a fact or claim that is inconsistent with a position they've previously taken (Seven Network (Operations) Ltd v Warburton (No 2) [2011])
- The remedy is designed to protect an affected party from detriment flowing from the other party's change of position (Commonwealth v Verwayen (1990))
- In equity, availability of the remedy arises in circumstances where the other party's reliance on their changed position would be **unconscionable**

Equitable estoppel

This topic deals with equitable estoppel. It is a principle that denies a defendant the right to go back on his or her promise or representation if it would be, in all of the circumstances, unconscientious to do so.

Equitable estoppel has two species, namely:

- promissory estoppel; and
- proprietary estoppel

- Waltons Stores (Interstate) Ltd v Maher
- Commonwealth v Verwayen -
- Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd
- Sidhu v Van Dyke
- Giumelli v Giumelli
- Delaforce v Simpson-Cook

Common law estoppel

- Generally requires the affected party to show that:
    - In the context of an existing legal relationship (eg. a contract, deed, or legal proceedings), the other party made a representation of existing fact or conducted themselves in accordance with a mutually assumed state of affairs;
      And
    - The affected party has acted (or omitted to act) in reliance on the previous position; **and**
    - The affected party has (or will) suffer some material disadvantage as a result of the other party resiling from the former representation or state of affairs
- Commonly pleaded as a defence (shield) where the other party wants to assert a fact or state of affairs inconsistent with their previous position
- Cannot arise in relation to unenforceable contracts or future acts (eg. not supported by consideration)
- Equitable estoppel developed to deal with the problem of the common law's inability to provide a remedy for **non-existing/unenforceable contracts** and representations as to **future facts**
- Prior to equitable estoppel, two strands of estoppel arose in equity:
    - **Promissory estoppel**: Representations of a promissory nature made by one party to another in the context of a present (or anticipated) legal relationship where the other party acts in reliance on the representations to their detriment
    - **Proprietary estoppel**: Representations made by a property owner as to another party's present (or *future*) interest in the property, and the other party changes their position in reliance on the representation
- Each strand focused on the promisor's **unconscionability** in resiling from a promise or representation and the need to protect the promisee from the **detriment** they will suffer (or have suffered) as a result of their reliance on the promise or representation

Promissory Estoppel

- **Elements**
  - One party (**relying party**) assumes (or expects) a legal relationship with the other
  - The other party (**inducing party**) induces the first to adopt the assumption
  - The relying party acts (or refrains from acting) in reliance on the assumption;
  - The inducing party intended for the relying party to act (or refrain from acting) on the assumption;
  - The relying party suffered detriment as a result of their action/inaction; and
  - The inducing party failed to act to prevent the detriment to the relying party
  - The promise or representation must be reasonably clear and unambiguous (cf. proprietary estoppel)
- Waltons Stores (Interstate) Ltd v Maher (1988)
  - Facts: Maher owned property and entered into negotiations with Waltons Stores for a lease. Both parties agreed that Maher would demolish an existing building and construct a new one for Waltons to occupy. Although the terms were agreed upon, no formal contract was signed. Maher, relying on the agreement, began the demolition and construction work. However, Waltons later decided not to proceed with the lease and did not inform Maher promptly.
  - Key Points of the Case
    - **Promise and Reliance**: Maher relied on Waltons' promise and began significant construction work.
    - **Detrimental Reliance**: Maher suffered a detriment by acting on the assumption that the lease would be finalized.
    - **Promissory Estoppel:** The High Court held that **promissory estoppel** could be used as a cause of action in Australia. This means that a party can be prevented (estopped) from going back on a promise, even if a formal contract does not exist, if:
      - A promise was made.
      - The promisee relied on that promise to their detriment.
      - It would be unconscionable for the promisor to renege on the promise.

Varieties of common law estoppel
- **Estoppel by deed:** prevents a party from disputing a fact made in a contract or deed
- **Estoppel by conduct:** prevents a party, who has induced another to adopt and act upon an assumption of fact thereby suffering detriment, from acting inconsistently with that fact
- **Estoppel by representation:** prevents a person from denying a representation of fact* that has led another to alter their position
- **Estoppel by judgment:** prevents a party from denying or attempting to re-litigate an issue or claim in circumstances where a judgment has already been given in relation to it
- **Estoppel by acquiescence:** prevents a party who has knowingly permitted another to act to his own detriment and to the advantage of the former from profiting from

Proprietary Estoppel

- **Elements:**
  - One party (**inducing party**) makes a representation (or engages in conduct) that induces in the other (**relying party**) the expectation they will have a proprietary interest in property;
  - It was reasonable for the relying party to believe the inducing party's representation or conduct;
  - The inducing party knew or intended that the relying party would adopt the expectation;
  - The relying party acted in reliance on the representation / expectation;