

Equity and Trusts
LAWS2385

Topic 1:

Week 1:

Online Activity 1: Introduction to Equity and Trusts

Readings: 'Equity and Trusts in Australia' - M.W. Bryan, V.J. Vann, and S. Barkehall Thomas (Third Edition) (TEXTBOOK) and 'A Sourcebook on Equity and Trusts in Australia' - M.W. Bryan, S.E. Degeling, M.S. Donald, and V.J. Vann (Third Edition) (SOURCEBOOK)

Chapter 1: An Overview of Equity

Equity = fairness and justice.

- Law of remedies.

Decisions will inevitably reflect the subjective beliefs and values of the decision-maker as to what is fair.

- Equity corrects, or supplements the law, but does not replace it.

Aristotle and Lord Ellesmere justified equity on the ground that it modifies the law where the inflexible application of legal rules causes injustice in individual cases.

Equity drives certain outcomes.

Institutional Equity

The creation of a special court, distinct from the courts administering the general law.

- Has the power to modify or correct the general law.

In Australia, it includes the High Court, Federal Court, Supreme Courts, etc...

The paradox of institutional equity is that it is premised on the existence of a court which no longer exists.

Competition between common law and equity

Equity was said to be a 'gloss' on the common law, modifying the common law where the enforcement of legal rights was harsh or oppressive, but not claiming to be a parallel or rival system of law.

Law Reform (Law and Equity) Act 1972 (NSW)

Section 5: Rules of equity to prevail

For NSW, the systems of common law and equity were never, as in England, to be administered by separate courts, but always by one and the same Supreme Court.

- But procedures and doctrines remained distinctive.

Equitable Remedies

- Equitable claims remain 'remedy driven.'

A fundamental distinction is made between the exclusive jurisdiction and the auxiliary jurisdiction of equity.

The exclusive jurisdiction of equity consists of matters which, prior to the judicature legislation, could only be adjudicated upon by Chancery, and not by common law courts.

- They include the enforcement of trusts and other fiduciary obligations, equitable obligations and confidence, and the rescission of contracts on equitable grounds such as misrepresentation and unconscionable conduct.
- Only equitable remedies can be awarded when equity acts in its exclusive jurisdiction
- common law damages are never available.

Equity acts in its auxiliary jurisdiction when it acts in support of legal rights.

- This most often occurs when a tort or breach of contract has been committed and common law damages are an inadequate remedy for the plaintiff.
 - Only then will the award of an equitable remedy be considered.

Contract

The common law determines the existence of a contract, and the rights and obligations of the contracting parties, but equity modifies contractual obligations and provides relief for breach and where the plaintiff's consent to the agreement has been vitiated.

Property

Equity's principal contribution to property law is the trust, which imposes obligations on a titleholder of property to manage the property for the benefit of other individuals.

Civil wrongs

Equity also relieves against the consequences of forms of wrongdoing that are only recognised in equity.

The Maxims of Equity

Some of the principles applied by courts are encapsulated as maxims.

Commonly invoked maxims include the following:

- He who seeks equity must do equity - a plaintiff claiming equitable relief must perform, or be ready to perform, their obligations.
- He 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 fulfils the law.
- Equity does not assist a volunteer.

Case:	<i>Corin v Patton [1990] HCA 12</i>
Facts:	- Mrs Patton, who was terminally ill, wanted to sever her joint tendency and give her share of the property to the plaintiff, her brother. - When she died, the plaintiff claimed his share of the land.
Judgement:	The transfer would have been complete in equity if Mrs Patton had done everything within her power to complete the transfer. It was, however, incomplete.
Key takeaways:	Maxim: Equity does not assist a volunteer. • Equity will not perfect an imperfect gift. • A volunteer who is the object of an intended trust will only succeed if the trust has been completely constituted.

Class 1A - Overview of Equitable Remedies

- **Personal and Proprietary Remedies**
- **The Objectives of Equitable Remedies**

Reading: TEXTBOOK & SOURCEBOOK

Equitable Remedies are always discretionary.

- The court's discretion is exercised after consideration of the positions of both parties.

Personal and Proprietary Remedies

Personal Remedies

Personal remedies are simply orders directed to the person of the defendant.

- The defendant must comply with the order, or else be in contempt of court.
- E.g. awards of damages for tort or breach of contract.

Proprietary Remedies

A proprietary remedy is directed to property to which the defendant holds title.

- The order may declare that identified property belongs to the plaintiff in equity.

There are two types of proprietary remedies:

1. The *constructive trust*: this is an order that the defendant hold identified property on trust for the plaintiff.
2. The *equitable lien (or charge)*: The lien is a security interest over property. The lien acts similarly to a mortgage to secure a debt.

Comparing proprietary and personal remedies

Proprietary remedies enjoy important advantages over personal remedies.

- The principal advantage is that a plaintiff can make a claim to the property that is the subject-matter of a proprietary remedy.
- They are enforceable against third parties who have received the property in question from the defendant.
- In contract, personal remedy is enforceable only against the party against whom the remedy was ordered.

Limitation to proprietary remedies - it cannot be awarded if the defendant no longer has property over which it can be imposed.

The objectives of Equitable Remedies

Coercion - Compelling the defendant to behave in a certain way. E.g. specific performance requires the defendant to perform his contractual obligations according to the terms of the contract.

Compensation - Compensates a plaintiff for loss caused by the commission of an equitable wrong.

Disgorgement - Profit stripping. The defendant can be ordered to account for the profits.

Restitution - The defendant must restore to the plaintiff property which ought to belong to her.

Nullification - Equitable remedies will sometimes nullify the legal consequences of a transaction, without otherwise imposing obligations on the parties.

Reformation - Reforms a legal document so that it reflects the objectively ascertained agreement of the parties.

Vindication - Function of validating the plaintiff's rights.

Case:	<i>Giumelli v Giumelli [1999] HCA 10</i>
Facts:	- Relying on various promises made by his parents to him, Robert Giumelli worked on the family orchard for little or no wages. - The parents promised that they would convey part of the land to him, to compensate him for working without wages.
Judgement:	The appropriate remedy was an award of equitable compensation.
Key takeaways:	Discretionary nature of equitable remedies and the kinds of factors taken into consideration in deciding, whether, how and on what terms to award a remedy. The Court is to take into account all circumstances.

Case:	<i>McKenzie v McDonald [1927] VLR 134</i>
Facts:	- Mrs McKenzie wanted to sell her farm via an agent. - The agent devalued the farm; McKenzie accepted it. - The agent then sold the house at an over-value and made a profit
Judgement:	The agent had to pay back the difference between the market price and the undervalue of the farm by way of compensation.
Key takeaways:	Equitable remedies can be very flexible in regards to the specific circumstances of the matter at hand.

Case:	<i>Nelson v Nelson [2995] HCA 25</i>
Facts:	- Mrs Nelson wanted to obtain a Defence Services Homes Act Loan ('DSHA Loan') which was a loan with a lower interest rate than that available on the open market. - She would be ineligible for this program if she were already a homeowner. - To avoid this, Mrs Nelson purchased a home, but registered the title of the property in the names of her children: Elizabeth and Peter. - Mrs Nelson then applied for the DSHA loan, and falsely declared that she had no financial interest in any real property. - The house was then sold and Mrs Nelson wanted to claim the proceeds from the sale.
Judgement:	Deane and Gummow JJ: The presumption of advancement did not apply: meaning, Mrs Nelson was entitled to the proceeds of sale. However, she was required to repay the loan to the Commonwealth. Mrs Nelson must be prepared to do equity according to the requirements of good conscience. That may involve consideration of more than the interests of the parties to the litigation. Here, good conscience calls for the taking by Mrs Nelson of steps sufficient to satisfy the demands of the underlying policy of the Act.
Key takeaways:	McHugh J: Courts should not refuse to enforce legal or equitable rights simply because they arose out of or were associated with an unlawful purpose unless: (a) The statute discloses an intention that those rights should be unenforceable in all circumstances; or (b) (i) the sanction of refusing to enforce those rights is not disproportionate to the seriousness of the unlawful conduct; (b) (ii) the imposition of the sanction is necessary, having regard to the terms of the statute, to protect its objects or policies; and (c) The statute does not disclose an intention that the sanctions and remedies contained in the statute are to be the only legal consequences of a breach of the statute or the frustration of its policies.

How is an **equitable interest in property** distinguishable from a **legal interest**?

- Interest created more 'informally' (non-compliance with legal formalities)
- Interest binding only the conscience of the holder of legal title.

Trusts

The most important product of equity.

Settlor (S) transfers property to a Trustee (T), who looks after the property on behalf of the Beneficiary (B).

Class 1B - Equitable Property

• Equitable Property Rights

Reading: TEXTBOOK

Equitable property is property (a proprietary interest), which is recognised only in Equity.

- That is, not recognised (as property) at law.
- Example: the beneficiary's interest in the assets of a (fixed) trust.

Equity recognises and enforces interests in property which are not recognised or enforced at common law.

These include:

- A beneficiary's interest under a fixed trust;
- Equitable security interests, such as the equitable charge; etc...

All equitable property rights are sourced in a personal obligation enforced in equity.

Example: if A signs a contract to purchase land from B, but B refuses to complete the contract, equity will grant the remedy of specific performance against B, and B will have to transfer the land to A.

- Eventually, A was treated in equity as if she held a property interest in the land once the contract was signed.

The availability of an equitable remedy does not necessarily mean that the interest protected by the remedy constitutes property.

- Equitable property, like common law property, must be of a kind that is recognised as property in law.
- E.g. confidential information is not recognised as a species of equitable property.

Equitable interests in property can be created in one of three ways:

(1) By agreement;

(2) By express trust; or

(3) By court order or operation of law.

- e.g. a constructive trust derives its efficacy from a court order and not from a settlor's expression of intention to create a trust.

Equitable interests over property and their enforcement share the following features:

(a) Equitable interests in property are created more informally than the equivalent legal interests.

- Interests in land usually have to be created by registration or by deed at common law.
- However, in equity, a deed is not required. The equitable interest will be enforceable if there is a specifically enforceable contract to create the interest, as equity assists those who pay valuable consideration for property.

(b) Equity acts on the conscience of the holder of the legal title to property.

- This means that an equitable interest can be enforced against the person who created the interest or who, by his conduct, is bound by the interest, as well as against any volunteer who takes from that person.

Case:	<i>Walsh v Lonsdale (1882) 21 Ch D 9</i>
Facts:	- The plaintiff orally agreed to take a lease of Providence Mill from the defendant for a term of 7 years with the rent to be payable in advance. - At common law, a lease of this duration must be executed by deed. - When the plaintiff failed to pay in advance, the defendant distrained some of the plaintiff's personal property from the premises.
Issue/s:	Had a valid equitable lease been created?
Judgement:	Yes, the agreement created an equitable lease for 7 years, on the application of the maxim that equity considers as done that which ought to be done. The agreement was specifically enforceable in equity and entitled the defendant to distrain the plaintiff's chattels since, under the equitable lease, rent was payable in advance.
Key takeaways:	The Court's willingness to treat the agreement as an equitable lease rests on the specific enforceability of the agreement. The Jurisdictional Requirements to be met: 1) Specifically Enforceable Agreement: There must be a specifically enforceable agreement which complies with the statutory formalities: s 54A(1) of the <i>Conveyancing Act 1919</i> (NSW) requires an agreement regarding land to be in writing (s 54A(1) or sufficient acts of part performance (s 54A(2)); 2) Valuable Consideration: The Plaintiff (the tenant) has provided valuable consideration; and 3) Damages would be inadequate: This is a contract regarding land and damages would be inadequate. Discretionary Considerations: - Most relevant in this context: The plaintiff (Tenant) must be ready and willing to perform their obligations. Where the Tenant has breached the agreement by failing to pay rent or failing to conduct repairs as required, then specific performance may be refused; and - There are no equitable bars to relief.

Case:	<i>Chan v Cresdon (1989) 168 CLR 242</i>
Key takeaways:	An equitable interest can never give rise to a legal interest.