What is equity? History and Nature of Equity

- Generally speaking, equity is not a self-sufficient system. It therefore does not destroy the law, nor create it, but assist it: Dudley v Dudley (1705)
- In cases of conflict between the common law and equity, equity will prevail: The Earl of Oxford's Case in Chancery (1615); s 5 of the Law Reform (Law and Equity) Act 1972 (NSW)

History of Equity

- The three common law courts were Common Pleas, King's Bench and Exchequer, separated from the King's Council.
- By the end of the fourteenth century the common law had become static and ceased to respond to changed social conditions.
  - The common law courts abandoned their discretionary powers and became increasingly bogged down by a near slavish adherence to precedent and a morass of procedural technicalities.
- The resultant formalism and insistence on technicalities removed the inherent equitable principles from the common law and necessitated a new system that could respond to the changing demands of society.
- By the late Middle Ages, the Chancery Court had become 'a responsive, quick, inexpensive, and desirable avenue of recourse for those who felt that they had been wronged in ways that no other jurisdiction could remedy'.
  - It was this court that developed and administered the principle of equity.
  - However, Chancery was not the only court that administered equitable principles, although it was undoubtedly the most important.
- Important to the growth of the Chancery's jurisdiction was the recognition and enforcement of the 'use', a term which means 'on behalf of'.
  - The system of uses related to transfers of land for the benefit of others and pre-dates the enforcement of uses by Chancery.
    - At the time when uses began to be enforced by Chancery, a transfer of land was called a feoffment.
    - A transferee of land for the use of some other person was called a feoffee to use.
    - The feoffee to use was required to hold the title to land for the benefit of that other person, the cestui que use.
  - The common law did not recognise the rights of the cestui que use, only recognised the rights of the feofee to use.
  - However, the chancellors, by focusing upon the conscience of the feoffee to use, recognised the claim of the cestui que use, preventing the unconscientious exercise of common law rights by the feofee to use and compelling him to exercise such rights for the benefit of the cestui que use.
- In terms of remedies, one of the major remedies administered by the chancellor in the development of equity was known as the common injunction.
  - The effect of such an injunction was to order a plaintiff at common law to discontinue proceedings, or, if a verdict at common law had already been obtained, to prevent it being enforced. – two important features:
    - The remedy was characterised as in personam, in that it attached to the person of the common law plaintiff.
    - The common injunction (and indeed all equitable remedies) was discretionary. – Unless the petitioner in equity could establish unconscientious behaviour by the common law plaintiff the common injunction was not ordered.

Nature of Equity

- 'Equity' refers to that body of cases, maxims, doctrines, rules, principles and remedies which derive ultimately from the specific jurisdiction established by that court.
- The purpose of equity is to address the various defects found in the medieval system of common law,which was suffering a 'sclerosis'.[1]
- Strong influence of Aristotelian philosophy in equity – equity is 'a rectification of law in so far as law is defective on account of its generality'.[2]

The Earl of Oxford's Case in Chancery (1615) Mich 13 Jac 1; 21 ER 485

- This case represented the chief battle between Sir Edward Coke, leading the common law as Chief Justice of the Court of King's Bench, and Lord Ellesmere, leading equity as Lord Chancellor of the Court of Chancery.
- The dominance of the common law had recently been established in Glanvile v Courtney (1614), but the present case reversed that dominance.

1. In this case, a plaintiff who had a legal judgment in his favour granted by a common law court was prohibited by Lord Ellesmere, the Lord Chancellor, from acting upon that judgment.

[1] Peter Radan, Principles of Australian Equity and Trusts.

[2] Aristotle, Nichomachean Ethics, 1137b. See also, Peter Radan, Principles of Australian Equity and Trusts, 3.

1. The History and Nature of Equity

- *Lord Ellesmere outlined how the idea of 'conscience' underpins all equitable doctrines: 'when a [common law] judgment is obtained by oppression, wrong and a hard conscience, the Chancellor will frustrate it and set it aside, not for any error or defect in the judgment, but for the hard conscience of the party'.*

✓ *The outcome of this case was that in cases of conflict between the common law and equity, equity will prevail. – as provided by s 5 of the Law Reform (Law and Equity) Act 1972 (NSW)*

- *Therefore, the role of equity is to control or restrain the common law where the exercise of common law rights is unconscientious -- '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'.*
- *This was confirmed by the HC recently in Australian Broadcasting Corporation v Lenah Game Meats (2001) – 'the conscience of the appellant, which equity will seek to relieve, is a properly formed and instructed conscience has to say'.*
- *'Equity therefore does not destroy the law, nor create it, but assist it': Dudley v Dudley (1705). – i.e., equity is intended 'to support and protect the common law'.*
- *This reflects the fact that equity is now a 'settled system', complementary to the common law, as noted by William Holdsworth in Some Makers of English Law.*

The Effects of the Judicature Acts and the 'Fusion Fallacy'

- *After the passage of Judicature Act, equity and common law are mingled or merged: Day v Mead [1987]*
- *The heart of the 'fusion fallacy' is the proposition that the joint administration of two distinct bodies of law means that the doctrines of one are applicable to the other: Spigelman CJ in Harris v Digital Pulse Pty Ltd (2003)*
- *The general rule is that a plaintiff's common law remedy may be available, despite of the absence of a legal interest, if his equitable interest can be proved: Walsh v Lonsdale (1882).*
- *Thus, in case of conflict between the common law and equity, equity will prevail: Walsh v Lonsdale (1882).*
- *Nevertheless, there is still a distinction between a legal lease and an agreement for a lease specifically enforceable in equity: the latter is only an equitable interest, so can be defeated by a bona fide purchaser for value without notice (and specific performance may not always be available): Chan v Cresdon Pty Ltd (1989).*
- *Accordingly, that a guarantee expressed to be in consideration of entry 'into this lease' was presumed to be interpreted as referring to the existence of a lease at law (and, as such, did not operate in relation to an unregistered lease): Chan v Cresdon Pty Ltd (1989).*

Effects of the Judicature Acts

- *Procedural issues in equity*
  - *Excessive delay due to lack of judges and staff;*
  - *Great expense – fees were paid by reference to the number of pages of the claim;*
  - *It could be necessary to make claims in both courts to obtain a full remedy;*
  - *Confusion – a beneficiary of a trust failed in his claim in dispossession by a trustee in the common law court in Doe d Reade v Reade (1799), as the common law would not recognise the beneficiary as the landowner (needed to be brought in the Court of Chancery).*
- *The passage of the Judicature Acts of 1873 and 1875 in the UK abolished the historic courts of common law and equity, replacing them with a single court of the HC of Judicature with two divisions of the Queen's Bench Division and the Chancery Division, which could administer both common law and equity.*
- *Thus, the key effect was the procedural fusion of law and equity: the First Report of the Judicature Commission stated that 'sending the suitor from equity to law and from law to equity, to begin his suit over again in order to obtain redress, will no longer be possible'.*
- *In case of conflict between the common law and equity, equity will prevail: s 25(11) of the Judicature Act 1873 (UK).*
- *The Judicature Acts in Australia – first adopted by Queensland in 1876, and then introduced in NSW in 1970 through the s 22, 57-63 of the Supreme Court Act 1970 (NSW).*
- *Similarly to the UK, in cases of conflict between the common law and equity, equity will prevail: s 5 of the Law Reform (Law and Equity) Act 1972 (NSW).*

The 'Fusion Fallacy'

✦ A 'fusion fallacy' arises when the decision reached in a particular case is one which could not have been reached under the separate system of courts that existed before the judicature system reforms were enacted. – can be either of the followings:[3]
- The administration of a remedy not previously available at common law or equity;
- The modification of the principles of one branch of the law by the introduction of principles from another.

1. A landlord granted a seven-year lease of a mill to a tenant.
2. The lease was not under seal and was therefore void at law.
3. After the tenant had gone into possession, the landlord demanded, pursuant to the terms of the written lease, a year's rent payable in advance.
4. The tenant refused to pay the rent demanded, the landlord distrained the tenant's goods and the tenant sued for, inter alia, damages for wrongful distress. The tenant argued that he was merely a tenant from year to year, in possession without a lease, with rent payable quarterly not in advance.

Held,
the distress of the landlord was not unlawful.

Walsh v Lonsdale (1882) 21 Ch D 9

- The key legal question in the present case was whether the landlord's common law remedy of distress available, despite the absence of a lease at common law?
- Jessel MR held that there was an equitable lease, as there was a specifically performable agreement and 'equity regards as done that which ought to be done'. – a key equitable maxim.
- Then, the landlord could make the common law claim for distress, because "he holds, therefore, under the same terms in equity as if a lease had been granted".

✓ This was possible only by virtue of the Judicature Acts: 'there are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it.'

- Thus, the consequence of the recognition of the lease under equity was that the tenant 'cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted. On the other hand, he is protected in the same way as if a lease had been granted; – he cannot be turned out by six months' notice as a tenant from year to year.'

1. By a guarantee included in an unregistered lease of shop premises for five years, a surety guaranteed the performance by the lessee (Sarcourt) of its obligations 'under this lease'.
2. At law entry into possession of the unregistered lease and payment of rent gave rise only to a tenancy at will terminable on one month's notice.
3. The lease was duly executed but never registered.
4. Sarcourt defaulted under the lease and Cresdon took action against Chan as guarantor of the unregistered lease.

Held,
Cresdon's action failed.

Chan v Cresdon Pty Ltd (1989) 168 CLR 242

✓ Ratio: that a guarantee expressed to be in consideration of entry 'into this lease' was presumed to be interpreted as referring to the existence of a lease at law (and, as such, did not operate in relation to an unregistered lease).

- In the present case, the HC held that as there was no registered lease there was no enforceable guarantee.
- Cresdon's alternative claim was based upon the rule in Walsh v Lonsdale. – This claim also was unsuccessful.
- The operation of the rule in Walsh v Lonsdale, depended upon the availability of specific performance of the agreement to lease.
  - This is because the decision in Walsh v Lonsdale involved no more than giving the Judicature Acts a procedural operation.
    - A procedural operation means, although there is no recorded instance of a court of equity exercising a jurisdiction to make an order for the payment of rent under an equitable lease, there was a jurisdiction to backdate specific performance to enable an action to be brought at law'.
  - In the circumstances of the case, two facts raised doubts as to the availability of specific performance:
    - Cresdon had in the meantime mortgaged the property.
    - The lease had come to an end before the expiration of the term due to Sarcourt's breach.
- On the other hand, even if specific performance had been available, Cresdon's action was doomed to fail.
  - This was so because, under the rule in Walsh v Lonsdale, all that the agreement to lease amounted to was an equitable lease, it did not create a legal interest.
  - Thus, the agreement for lease was enforceable between the parties as a lease at law, as though the lease had been granted pursuant to the agreement before the decree for specific performance.
  - However, the guarantee that Cresdon sought to enforce was of 'obligations under the lease' and the court ruled that this meant obligations contained in a legal lease. -- the guarantor was the third party to the lease.

✓ Thus, the case is important in that there is still a distinction between a legal lease and an agreement for a lease specifically enforceable in equity: the latter is only an equitable interest, so can be defeated by a bona fide purchaser for value without notice (and specific performance may not always be available).

1. The plaintiff sued his former solicitor. He alleged that, acting on advice from the defendant, he invested money in a private company which went into receivership shortly thereafter.
2. The defendant was a director of the company and there were other conflicts of interest of which adequate disclosure had not been made to the plaintiff.
3. The trial judge found for the plaintiff but reduced the sum recovered to less than that claimed, saying that before making such a substantial investment it would have been at the very least prudent for the plaintiff to have obtained some completely independent and competent financial advice.
4. The plaintiff appealed against the reduction in the sum awarded, contending that compensation for breach of fiduciary duty was not apportionable so as to reflect the responsibility of the plaintiff for the loss suffered.

Held,
dismissed the appeal. Contributory negligence, though a common law idea, could be applied in the present case.

Day v Mead [1987] 2 NZLR 443

- This case is a key example of the 'fusion fallacy' in New Zealand case law.
- The main issue was whether the award of equitable compensation for breach of fiduciary duty could be reduced by contributory negligence, on the basis that the plaintiff should have obtained independent advice.
- The New Zealand Could of Appeal held that the award of equitable compensation for reach of fiduciary duty could indeed be reduced by contributory negligence (despite being a common law concept).
- This was because 'law and equity have mingled or are interacting'. (Cooke P)

[3] Peter Radan, Principles of Australian Equity and Trusts (2nd Ed), 43.

- *Another example of the 'fusion fallacy' in the New Zealand case law is Cooke P's judgment in Aquaculture v New Zealand Green Mussel Co (1990), who stated that 'for all purposes now material,* ***equity and common law are mingled or merged****', in justifying the award of exemplary damages for breach of confidence (being the administration of a remedy in equity which was not previously available)*

Somers J

- *The main difference between an award of damages at common law and of compensation in equity lies in the way in which the appropriate sum is estimated. –> Thus, equitable compensation is not fettered by the requirements of foresight and remoteness which control awards of damages at law.*
- *However, the equitable jurisdiction is exercisable in the absence of adequate remedies at law.*
- *Thus, the assessment will reflect that which the justice of the case requires according to considerations of conscience, fairness and hardship and other equitable features such as laches and acquiescence.*
- *Accordingly, it would be unjust and unfair to impose total liability on Mr Mead.*

1. *An employee, in defiance of an express term in his employment contract, secretly worked for the benefit of his own business and competed with his employer during the course of his employment.*
2. *The employee was fired and the employer sought exemplary damages from him for breach of fiduciary duty.*
3. *The trial judge, Palmer J, ordered exemplary damages, in addition to an order for equitable compensation or an account of profits at the plaintiff's election. This was 'to punish the wrongdoer, to deter others of like mind from similar behaviour, and to vindicate the plaintiff's outraged sense of injustice.*

Held,
the order was reversed on appeal. Exemplary damages were not available.

Harris v Digital Pulse Pty Ltd (2003) 56 NSWLR 298

- *The main issue was whether exemplary damages could be awarded for breach of fiduciary duty to punish the wrongdoer (similar issue as in Aquaculture v New Zealand Green Mussel Co (1990))*
- *Heydon JA stressed that this was a "crude fusion fallacy", in the sense of the administration of a remedy in equity which was not previously available. – Only the High Court had authority to change the law in such a manner.*
- *Spigleman CJ noted that "there is no relevant precedent" for awarding exemplary damages for breach of a fiduciary duty, while Heydon JA stated that the New South Wales Court of Appeal "ought not to change the law of New South Wales so as to create power to do so"*
- *In dissent, Mason P held that exemplary damages could be awarded for breach of fiduciary duty, due to an analogy with the law of torts where exemplary damages were available (but Spigelman CJ thought that if an analogy was appropriate at all, an analogy with the law of contract was superior where exemplary damages were unavailable)*

The Maxims of Equity

Equitable Jurisdictions

- *The application of equitable principles is often said to fall within one of three separate equitable jurisdictions, namely, the exclusive, concurrent and auxiliary jurisdictions.*
  - *The exclusive jurisdiction refers to matter in which equity has 'an exclusive cognisance' because no relief can be obtained at common law. – The best illustration relates to obligations arising under a trust.*
  - *The concurrent jurisdiction refers to matters in which both the equity and common law courts have jurisdiction to make orders. – An example concerns the enforcement of a contract where the primary equitable remedy is the order for specific performance and the common law remedy is an order for damages.*
  - *The auxiliary jurisdiction is also an instance of equitable jurisdiction in support of common law rights. It is exercised when a person goes to equity 'merely in order to obtain its assistance in proceedings which they are taking or about to take in courts of law'. – For example, it could be by means of a quia timet injunction to prevent irreparable injury to property pending a decision at law.*
- *For Meagher, Heydon and Leeming, 'the only distinction is the distinction between the exclusive jurisdiction, on the one hand, and jurisdiction in aid of legal rights, on the other hand'.*

Maxims of Equity

- *The maxims of equity serve to guide the courts; but the maxims of equity will be departed from where it is appropriate to do so.*
- *Inherent limitation of maxims- "it would be a mistake to set too much store by the maxim...It is not a specific rule or principle of law. It is a summary statement of a broad theme which underlies equitable concepts and principles. Its precise scope is necessarily ill-defined and somewhat uncertain", as stated by Mason CJ and McHugh J in Corin v Patton (1990).*

Equity looks on that as done which ought to be done.

- *This maxim has its most frequent application in contract cases and is the basis of the remedy of specific performance.*

- The maxim is also the basis of the doctrine in Walsh v Lonsdale (1882), where it was held that a person who enters into possession of land under a specifically enforceable contract for a lease is regarded, by a court having jurisdiction to enforce the contract, as being in the same position, as between itself and the other party to the contract, as if the lease had actually been granted.
- Another important illustration of the maxim arises in connection with the interest of a purchaser pursuant to an uncompleted contract for the purchase of land: Swiss Bank Corporation v Lloyds Bank Ltd [1979].

Equity follows the law.

- Equity recognises common law rights, estates, interests and titles as valid; it merely controls or restrains the common law where the exercise of common law rights is unconscientious: Ellesmere in The Earl of Oxford's Case (1615).
- Thus, "equity followed and built upon the common law, adding its remedies by way of enforcement of the common law", as stated by Deane J in AMEV- UDC Finance v Austin (1986).
- Therefore, in Leech v Schweder (1873), Mellish LJ said that 'where a right existed at law, and a person came only into equity because the Court of Equity had a more convenient remedy than a Court of law....there equity followed the law, and the person entitled to the right had no greater right....'.

He or she who comes into equity must come with clean hands.

- The maxim is closely related to and descends from the maxim "he or she who seeks equity must do equity'.
- It requires a plaintiff in equity not to be guilty of some improper conduct, or else relief will be denied.
- The maxim confirms that equity is not solely concerned with preventing unconscientious conduct by a defendant, but also requires conscientious behaviour by a plaintiff.
- Here, the wrongdoing must be serious, as held in Geltch v MacDonald (2007), where the wrongdoing was only minor so did not preclude relief being granted.
- Furthermore, the wrongdoing must relate to the equitable relief sought, as held in Black Uhlans v New South Wales Crime Commission (2002).
  - In that case, a motorcycle club argued that the clubhouse property was held on resulting trust for itself, when it was put into the name of one member only.
  - The New South Wales Crime Commission argued that the motorcycle club had 'unclean hands' due to its criminal activity, so was not precluded from being granted relief.
  - But Campbell J in the Supreme Court of New South Wales granted the equitable relief desired by the motorcycle club, as its criminal activity had nothing to do with the purchase of the clubhouse property.

He or she who seeks equity must do equity.

- Plaintiffs in equity must fulfil their legal and equitable obligations before seeking a remedy.
- Therefore, 'if the claim in equity exists, it must be shown to have an ancestry founded in history and in the practice and precedents of the courts administering equity jurisdiction. it is not sufficient that because we may think that the "justice" of the present case requires it, we should invent such a jurisdiction for the first time': re Diplock's Estate; Diplock v Wintle [1948].
- Key authority of Verduci v Golotta (2010), where a mortgage entered into as the result of undue influence could be set aside in equity; but only on the condition that the borrower repaid the sum borrowed with interest.

Equity does not allow a statute to be made an instrument of fraud.

Equality is equity.

- Idea of proportionate equality, – This maxim expresses equity's aim to distribute profits and losses in proportion to the claims and liabilities of the parties concerned.
- But in the absence of evidence, 'equity presumes equality', as held in Waikato Regional Airport v Attorney-General of New Zealand (2003).

Equity acts in personam.

- This maxim dates back at least to the Earl of Oxford's Case (1615), where Lord Ellesmere said that equity could restrain a plaintiff at common law from enforcing a judgment of that court 'not for any error of Defect in the judgment, but for the hard Conscience of the Party'.
- Historically this maxim is significant in that it demonstrates the different manner in which equity executed its judgments and orders as compared to the common law.
  - At common law a judgment of damages was enforced against the property of the defendant.

- In equity, remedies attached to the person of the defendant. – Thus, if a defendant in equity proceedings fails to comply with an equitable order the property of the defendant is not at risk. Rather, the defendant will be held to be in contempt of court and subject to coercive measures or constraints.

✦ A consequence of the in personam nature of equitable relief is that it can be granted provided the defendant is within the jurisdiction of the court, even if the property that is the subject matter of the case before the court is outside the jurisdiction of the court.

Equity will not assist a volunteer.

✦ A volunteer is a person who has not given valuable consideration. – b/c no obligation.
✦ The rationale for this maxim is that it would not be unconscientious for equity to decline equitable assistance to a plaintiff who is a volunteer, whereas it would be so if he or she had provided valuable consideration: Redman v Permanent Trustee Co of New South Wales Ltd (1916).
✦ ``
✦ Valuable consideration means 'a consideration... that has a real and substantial value, and not one which is merely nominal or trivial or colourable': In re Abbott; Ex parte Trustee of the Property of the Bankruptcy v Abbott [1983].
✦ On the other hand, valuable consideration does not mean that the consideration needs to be adequate in the sense of it being reasonably equivalent to the value of what was promised or given by the defendant.

Equity looks to intent not form.

✦ This equitable maxim addresses the situation where if 'by insisting on the form, the substance will be defeated, [equity] holds it to be inequitable to allow a person to insist on such form': Lord Romilly MR in Parkin v Thorold (1852).
✦ Key case authority of Paul v Constance (2007)- a trust can be created, even where the word 'trust' is not actually used.

Equity will not suffer a wrong to be without a remedy.

✦ This equitable maxim relates to the historical purpose of equity, being to address deficiencies in the common law system.
✦ Although equity is developed cautiously, 'equity is a living force and...it responds to new situations. It must do so in ways that are consistent with equitable principles. If it were to fail to respond, it would atrophy': Kirby J in Australian Broadcasting Corporation v Lenah Game Meats (2001).
✦ However, only the High Court has authority to develop equitable principles: Harris v Digital Pulse (2003).
✦ Therefore, in Farah Constructions v Say-Dee (2007), the HC made it clear that trial judges and intermediate appellate courts should not depart from decisions of intermediate appellate court in other Australian jurisdiction, nor radically change existing law were plainly wrong. – such changes to the law were properly within the domain of the HC.

Where the equities are equal, the law prevails.
Where the equities are equal, the first in time prevails.

✦ These twin equitable maxims address priority disputes between competing proprietary interests.
✦ Where the equities are equal, the first in time shall prevail- basic rule for determining a priority dispute between two holders of equitable interests.
✦ Where there is equal equity, the law shall prevail- basic rule for determining a priority dispute between a holder of an earlier equitable interest and a holder of a later legal interest (where the holder of the legal interest is a bona fide purchaser for value without notice).

Equity aids the diligent not the tardy.

✦ This maxim is also expressed as 'delay defeats equity'.
✦ Thus, a plaintiff seeking equitable relief must act promptly and diligently: Smith v Clay (1767).
✦ This is given effect through the equitable doctrine of 'laches'- the right to equitable relief may be lost due to delay.

Corin v Patton (1990) 169 CLR 540

1. Mr and Mrs Patton were joint registered proprietors of land at Berlrose in NSW.
2. Mrs Patton, who was terminally ill, executed three documents shortly before her death.
3. The first was a memorandum of transfer in registrable form, by which she voluntarily transferred her interest in the land to her brother, Corin, subject to a mortgage to a bank which held the certificate of the title.
4. The transfer was not registered prior to her death.
5. At the suit of Mr Patton, McLelland J declared that Mrs Patton had not effectively alienated her interest and that Mr Patton was entitled to the land by survivorship.

Appeal to the SC and HC were both dismissed.

- This is a case where equitable maxims conflicted- so the High Court had to choose which one to follow
- Prima facie, the High Court acknowledged the equitable maxims that 'equity will not assist a volunteer' and 'equity will not perfect an imperfect gift', which suggested that Mr Corin would not have the assistance of equity as he was receiving the interest in the land as a gift.
- But there was an exception for the beneficiary of a trust, and there was a competing equitable maxim of 'equity looks to intention and substance, rather than form': this could assist Mr Corin because in Anning v Anning (1907), Griffith CJ held that a gift can be completed in equity if the transferor has done everything that that transferor needs to do to transfer legal title

- The rationale for refusing to complete an incomplete gift was that a donor should not be compelled to make a gift, the decision to give being a personal one for the donor to make. However, that rationale could not justify continued refusal to recognise any interest in the donee after the point when the donor had done all that was necessary to be done on his part to complete the gift, especially when the instrument of transfer had been delivered to the donee.
- Nevertheless, in the present case, the High Court held that Mrs Patton's interest in the land was not successfully alienated, because she had not done all that she herself needed to do (the certificate of title to the land remained with the bank).
- Thus, the ratio of the present case is that 'if an intending donor of property has done everything which it is necessary for him to have done to effect a transfer of legal title, then equity will recognise the gift. So long as the donee has been equipped to achieve the transfer of legal ownership, the gift is complete in equity'.

- In terms of the maxims of equity, Mason CJ and McHugh J had the following opinion.
- The existing rule is that 'equity will not assist a volunteer to perfect a title which is incomplete.' Equity's refusal may be justified on the footing that the donor should be at liberty to recall his gift at any time before it is complete.
- However, it would be a mistake to set too much store by the maxim. Like other maxims of equity, it is not a specific rule or principle of law. It is a summary statement of a broad theme which underlies equitable concepts and principles. Its precise scope is necessarily ill-defined and somewhat uncertain.
- It is subject to certain clearly established exceptions.
- Accordingly, the maxim does not enunciate an inflexible or universal rule.

Nature of Equitable Interest

Complexity

✦ Does the equitable right give rise to the interest? Or does the interest give rise to the right?
- Before a right or 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: National Provincial Bank Ltd v Ainsworth [1965]
- For example, livingston rights, before the property is executed, what you get is only an equitable chose in action.
- By contrast, once the property is executed, you will get full legal title of the estate.

Property?

✦ Meagher, Heydon and Leeming suggest that the proprietary nature of any equitable interest can be measured by reference to the following four criteria: [4]
- The power to recover the property the subject of the interest or the income thereof as compared with the recovery of compensation from the defendant payable from no specific fund.
- The power to transfer the benefit of the interest to another.
- The persistence of remedies in respect of the interest against third parties assuming the burden thereof.
- The extent to which the interest may be displaced in favour of competing dealings by the grantor or others with interests in the subject matter.

[4] Meagher, Gummow and Lehane's Equity: Doctrines and Remedies, 4th ed, LexisNexis Butterworths, Sydney, 2002, p 126.