What is Equity?

“MGL, Equity Doctrines and Remedies 5th ed [1-005]

“Equity can be described but not defined. It is the body of law developed by the Court of Chancery in England before 1873. Its justification was that it corrected, supplemented and amended the common law. It softened and modified many of the injustices in common law, and provided remedies where at law they were either inadequate or non-existent”

Dal Pont (prologue [P.05]):

“In the most general sense, equity means fairness in the resolution of disputes through the application of good conscience. In Anglo-Australian law, however, equity has a specific and unique meaning. It can be described as that body of law that, before the Judicature Acts of 1873 – 1875, was administered in England by the Court of chancery and was received and administered in the Australian Courts.”

What is Equity

Justice Keane – W A Lee lecture, 2009:

“When we speak of Thomas Aquinas, it is worth reminding ourselves that Aquinas looked to Aristotle, referring to him as “the Philosopher”. Aristotle regarded an even-handed willingness to refrain from insisting upon the full measure of one’s legal rights as a very great social virtue. He called this virtue “epieikeia”. In Latin it was “aequitas” and in the slower Anglo-Saxon tongue, “equity”.

“ a metaphorical term, designating the common standard of civil right and expediency combined, based on general principles and limited by established doctrines....a judicial and not a personal conscience.”

About conscience & CL applies generally that sets up rules that applies to everyone
- Equity applies in personam and individually and acts on the conscience on whom the order is direct
- Conscience is a metaphorical term & the common standards of civil rights > judicial conscience
  - Conscience of equity generally: applies the conscience of the court

**Text 2.4**

- *Lift Capital Partners Pty v Merrill Lynch International* (2009) 253 ALR 482 at 507: ‘[u]nconscionability was and remains the fulcrum upon which entitlement to equitable relief turns’

  Equitable jurisdiction is not to prevent conduct that is not right or dishonest or to redefine notions of justice and fairness

  *Equity is meant to correct situations in which the CL might lead to an unconscionable result*

**The History of Equity**

- The role of the King’s Chancellor
- Increasing technicalities of the common law
- Appeals direct to the Chancellor:
  
  “You have made a promise, Promises are meant to be kept. Your immortal soul will be in danger if you do not. I, the Chancellor, have a duty to safeguard your immortal soul. Accordingly for the good of your soul, I am going to keep you in my prison until you decide to keep your promise.”

- The development of the “use”; marriage settlements.

**The Earl of Oxford’s case**

**Important legislation**

- *Court of Chancery Act* 1850
- *Court of Chancery Procedure Act* of 1852.
- Lord Cairns Act (*Chancery Amendment Act* 1858)
- Rolt’s Act (*Chancery Regulation Act* 1862)
- *Judicature Act* 1873; *Judicature Acts* 1873-1875 (UK)
  - They consolidated the then existing courts into one supreme court of judicature
  - Where there was a conflict in CL & equity, the rules of equity would prevail

  Prior to these equity & CL were separated in different court (1700s)
In Australia, we had the same problem of separate administrations of CL & equity. The judicature act was aimed to stop these procedural actions.

The Relationship Between Law and Equity – The Fusion Fallacy

- 2008 W A Lee lecture, Justice Michael Kirby
- 2009 W A Lee lecture, Justice Patrick Keane:
  “submitted that an appreciation of the fundamental values referred to as the conscience of equity affords good reason to resist the unifying tendencies apparent in the Canadian jurisprudence.”

- Law Reform (Law and Equity) Act 1972 NSW

  5 Rules of equity to prevail
  
  In all matters in which there was immediately before the commencement of this Act or is any conflict or variance between the rules of equity and the rules of common law relating to the same matter, the rules of equity shall prevail.

- Supreme Court Act 1970 (NSW),

  57 Concurrent administration
  
  The Court shall administer concurrently all rules of law, including rules of equity.

The Fallacy

- The fallacy is that the Acts such as the Supreme Court Act 1970 (NSW) fused the substantive elements of law and equity rather than simply a fusion of the administrative and procedural elements.

  Meagher, Gummow and Lehane (xi) 4th ed

  “John Lehane’s challenge that “those who assert that law and equity are fused should explain what they mean, how it happened and what follows from it” has been found, by those prepared to face up to it, to be unanswerable. The position is otherwise where that inquiry has been stifled. In New Zealand, the prospect of any principled development of equitable principle seems remote short of a revolution on the Court of Appeal.” MHL xi

Examples of fusion

- United Scientific Holdings Ltd v Burnley Borough Council. (Lord Diplock)
- Aquaculture Corp V New Zealand Green Mussel Co (NZ High Court)
  

- Wrongly diverting work and profits to their own company; they defrauded their employer (digital pulse)> this breach of trust; whether exemplary damages could be
awarded for breach of fiduciary duty (a CL remedy to be rewarded for an equitable wrong)

- Theoretical differences is seen

- Heydon JA:
  
  “It is not the law of NSW that law and equity were fused when the Judicature system was created by the Supreme Court Act...The legislation “was not intended to affect and does not affect the quality of the rights and claims...”

  “For Courts below the High Court to act in the manner of the single judges sitting in Chancery who made modern equity is to invite the spread of a wilderness of single instances, a proliferation of discordant and idiosyncratic opinions and ultimately an anarchic system operating according to the forms but not the realities of law.”

  Mason P (in dissent) criticizing the above view:

  Inevitably and appropriately unnecessary barriers of separation have been broken down...distinction with nothing but history to support them have, at times been deliberately ironed out or conveniently overlooked as doctrines are passed from generation to generation.”

- “Fusion: Fallacy, Future or Finished” Fusion conference

  Mason: “It is not possible to discuss fusion without reference to the notion of "fusion fallacy" that is important to some Equity scholars. The concept must be taken seriously, whether it represents an orthodox category, a fallacy in its own right, or those scholars' version of "ghosts of the past [that] stand in the path of justice clanking their medieval chains [for which] the proper course for the judge is to pass through them undeterred". To those who believe in them, fusion fallacies are real and dangerous. The successive editions of Meagher, Gummow & Lehane present them as a rogues gallery invented by offending jurists who deserve to be pilloried to deter others.”

  Attorney-General v Blake [2001] 1 AC 268

- Equitable & CL jurisdictions are working together in other countries (Canada)

- The House of Lords awarded the equitable remedy of account of profits (an equitable remedy) for a breach of contract (a legal cause of action).

The W A Lee lectures

- The refusal of the High Court in Breen v Williams (1996) 186 CLR 71 to hold that the fiduciary obligation of a doctor to his patient encompasses the provision of the doctor’s notes of the patient’s previous treatment
- The failure of the High Court to deploy the concept of fiduciary obligation, as have Canadian courts as a means of vindication the claims of indigenous occupants of land in Australia.

- The failure of Australian courts to follow the Canadian lead in awarding exemplary damages for breach of equitable obligations.

- The High Court’s refusal in *Farah Constructions Pty Ltd v Say-Dee* (2007) 230 CLR 89 at [120]-[158] to accede to the view that the liability for receipt of trust property should now be based strictly on a restitutionary approach under which the liability of the recipient may be established without the need for notice of the breach of trust to the recipient.

- The W A Lee lectures

  **Justice Patrick Keane** – 2009

  “...the big picture is of human selfishness, and the extent, and standards by which, individual self-interest, especially in trade and commerce is to be restrained by the courts.

  “We are a rights-conscious society; the essence of a right is the entitlement to have our own way and to have others accept that entitlement. When we look at this big picture we can, I think, more readily see that here are reasons for differences between equitable doctrines and common law rules especially in relation to the regulation of business.”

  **Reasons for equity’s difference:**

  - Equity operates by way of an exception to the legal order of the realm rather than in isolation,

  - Equity is more concerned to restrain the exercise of rights than to promote them, and

  - The notion of “conscience”, which is of central importance to its mission, is not about the state of mind of the defendant” but about societal rights.

  - a way we can enforce conduct that we see as desirable in people

  - Fiduciary duties: right of self-interested action is embodied in the traditional CL approach

  **MGL 5th ed**

  - [2-365] No longer does there seem to be a pressing need to rail against casual or uninformed reasoning based on a misconception of the Judicature legislation

  - [2-375] First, probably no one today seriously asserts that the Judicature legislation itself effected a substantive fusion of equity and common law
The Basic Propositions of Equity

A  Equity acts against the person

B  Equity prevents unconscionable conduct.

C  Equity will only interfere with the rights of third parties in limited situations – that is, where the third party is not a bona fide holder of a legal estate without notice of the plaintiff's equity.

D  Equity will usually not allow form to triumph over intention.

E  Equity takes special care of the weak and the poor.

F  Equity acts according to principle, not on individual notions of fairness

Equity is of moral virtue: they are governed by a rationale of unconscionable conduct

Text 2.7: FIVE CATEGORIES OF UNCONSCIONABLE CONDUCT

- the exploitation of vulnerability or weakness;
  
  E.g amardio case (took advantage of elderly parents)

- the abuse of positions of trust or confidence;
  
  Breaches of fiduciary obligations

3. the insistence upon rights in circumstances which make such insistence harsh or oppressive;

4. the inequitable denial of obligations;

5. the unjust retention of property.

The Maxims of Equity

Equitable rules and remedies are all discretionary

- In order to achieve there rules, they are applied by a series of maxims

- Guides discretion by the equity judge

Text 2.13 “The maxims of equity are basic principles upon which the rules of equity have been established......In essence they reflect and represent fundamental moral ideas or themes that lie at the heart of the equitable jurisdiction.”

These must be guided by legal rules & precedent (by law)

Maxims: no rules to determine when one maxim is inconsistent with another; what one will prevail?
- Difficulty because equity does not apply to everyone like CL does

- **Equity will not suffer a wrong without a remedy**
  
  “the maxim probably never meant that the courts of equity at any time invented a remedy solely because the plaintiff had suffered an injustice for which no remedy was available....Hanbury was probably correct when he said that to state that equity will not suffer a “wrong” to be without remedy really refers only to behaviour which is recognized as being contrary to law, not morals”. (MGL, “Equity Doctrines and Remedies [3-020])

- **Equity follows the Law**
  
  Equity follows the law, but not slavishly nor always. If it did there could never be occasion for the enforcement of equitable doctrine (Cardozo CJ in Graf v Hope Building Corporation (254 NY 1 at 9)
  
  It is supplementary to CL e.g specific performance is a better remedy than damages
  
  Application with limitation periods

- **He (One) who Seeks Equity must do Equity**

- **He who comes to Equity Must Come with Clean Hands**

- **Delay Defeats Equity**
  
  The oppressor's wrong, the proud man's contumely,
  The pangs of despised love, the law's delay,
  The insolence of office and the spurns
  That patient merit of the unworthy takes

- **Equity Will not Assist a Volunteer**
  
  Equity will not perfect an imperfect gift

- **Equity looks to substance and not to form**
  
  Form of a transaction

  *Young et al [3.420]*

  “Formalism became oppression when a plaintiff was able to keep a verdict obtained in the absence of the defendant where the plaintiff had kidnapped the defendant to prevent them from attending court.”

  “At an early stage of its development, the common law would not, for example, entertain an action for breach of covenant if the deed in question had lost its wax seal, perhaps because it had been eaten by a rat”

- **Equity sees as done that which ought to be done.**
• **Equity acts in personam**
  
  **Interests known only to equity**
  
  Equity does recognise rights in a proprietary nature

• Trusts

• Restrictive covenants

• Equity of redemption

• The Right of a Beneficiary under an unadministered estate.
  
  - **Will:** *Succession Act 2006 NSW*
  
  - Death
  
  - **Probate:** *Probate and Administration Act 1898 NSW*
  
  - Administration and distribution

  **Commissioner of Stamp Duties v Livingston (1964 Privy Council)**

  “This dilemma is founded on a fallacy for it assumes mistakenly that for all purposes and at every moment of time the law requires the separate existence of two different kinds of estate or interest in the property, the legal and the equitable. There is no need to make this assumption. When the whole right of property is in a person, as it is in an executor, there is no need to distinguish between the legal and equitable interest in that property.....Equity in fact calls into existence and protects equitable rights and interests only where their recognition has been found to be required in order to give effect to its doctrines.”

• Compare with **Horton v Jones** (1935, High Court)

  Unable to say that a person has both legal and equitable interest: cannot sue yourself for a breach of unconscionable conduct


  Lord Browne-Wilkinson:

  ‘A person solely entitled to the full beneficial ownership of money or property, both at law and in equity, does not enjoy an equitable interest in that property. The legal title carries with it all rights. Unless and until there is a separation of the legal and equitable estates there is no separate equitable title. Therefore to talk about the [legal owner] ‘retaining its equitable interest is meaningless. The only question is whether the circumstances under which the money was paid were such as, in equity, to impose a trust on the [recipient of the funds]. If so, an equitable interest arose for the first time under that trust.”
CLASS TEST: two questions (one essay), things we go through in tutorials, nature of equitable property, interest of beneficiary under unadmin state (livingston case etc), assignment of bare rights to litigate, fiduciary duties, cases in week 3 tute, equitable assignment essay (tute week 4-5), semi closed book> 2 pages

ASSIGNMENTS

• Many sub categories of personal property (primarily choses in action)

TERMINOLOGY

“Assignment”

*Norman v Federal Commissioner of Taxation* [1963] HCA 21, Windeyer J:

Assignment means the *immediate transfer of an existing proprietary right, vested or contingent, from the assignor to the assignee*. Anything that in the eye of the law can be regarded as an existing subject of ownership, whether it be a chose in possession or a chose in action, can to-day be assigned, unless it be excepted from the general rule on some ground of public policy of by statute

• *Means the transfer of the whole of an interest* (previously held by assignor now the assignee)

• “Disposition”

7(1) *Conveyancing Act* 1919 NSW:

'Disposition' includes a conveyance, and also an acknowledgment under section 83 of the *Probate and Administration Act 1898*, vesting instrument, declaration of trust, disclaimer, release and every other assurance of property by any instrument except a will, and also a release, devise, bequest, or an appointment of property contained in a will;

MEANS OF TRANSFERRING INTEREST IN PROPERTY TO ONE PERSON TO ANOTHER

• Different mechanisms for transferring interests for different forms of property + different means for property in equity and legal

  • You must decide what kind of property it is

  • Then find out what the formalities are

If there hasn't been a transfer of assignment in law & equity, then the property stays where it is:

• *Vandervell v IRC* [1966] Ch 261

  Plowman J:
...a man does not cease to own property simply by saying ‘I don’t want it.’ If he tries to give it away the question must always be, has he succeeded in doing so or not.

**Important considerations**

- What kind of property is the subject matter of the purported transfer? (e.g. is it tangible or intangible; if intangible is it a debt or what)
- Is this property legal or equitable? (chooses in possession, goods, debts, intellectual rights all exist at LAW, but some property can only exist in equity e.g. beneficiary under a trust, partnership assets)
- What type of ‘transfer’ is being attempted: *Corin v Patton* (1990) 169 CLR 540 (transfer all of the rights > assignment, or are the parties attempting to declare a trust?)

**There must be intention**

**Equitable Assignment Checklist**

**QUESTION 1**

*Can the property be assigned at all?*

What kind of property is it? Real and personal: there are a number of sub categories within these

- **What kind of property?**
  - House and land - real
  - The certificate of title to your house - personal
  - Legal textbook
  - The interest of a beneficiary under a trust
  - The right to publish the book that you have written - personal (intellectual, intangible)
  - A right to sue for a personal injury
  - The bank cheque that you have received as proceeds from the sale of your house
  - A partners interest in the partnership assets
  - The $500 that I owe you - personal, intangible
  - Your left kidney
  - A legatee’s interest in an unadministered estate

**Virtually all forms of property can be assigned in equity**

- **Non assignable rights: exceptions**
• Public pay (text 5.7):
  • Bare rights to litigate,
  • Certain contractual rights (text 5.26).

**Public Pay**

• Text 5.7 “An assignment of pay by the holder of a public office is prohibited on the basis that such pay is made to enable the office holder to maintain his or her office with decorum and propriety.”

• Exception: *Arbuthnot v Norton* (1846) 18 ER 565

**Bare rights to litigate**

• Text 5.9. A bare right to litigate is a ‘right to claim damages divorced from any transfer of property’

Rights to sue in torts, equity

• Not property, or
  • Too personal that they must attach to a particular person (e.g. personal injury in tort-right to sue but you cannot assign that right to someone else? No)

• Public policy

**MAINTENANCE**

• Champerty is a species of maintenance and maintenance is defined by Halsbury as:
  
  “Assistance or encouragement [provided] by a person who has neither an interest in the litigation nor any other motive recognized as justifying the interference to a party in litigation”

• MGL: “the support, by means of finance of exertion, of an action by a person who has no interest in it”


**EXCEPTIONS TO ASSIGNMENT OF BARE RIGHTS**

• *Glegg v Bromley* [1912] 3 KB 474

G sued B for slander and the same time she owed her husband 7000 pounds. G assigned to her husband: “all that the interest sum of money or premises to which she is or may become entitled by virtue of any verdict, compromise or agreement which she may obtain”

Court found there was no objection
“I know of no rule of law which prevents the assignment of the fruits of an action. Such an assignment does not give the assignee any right to interfere in the proceedings in the action. The assignee has no right to insist on the action being carried on...There is, in my opinion nothing resembling maintenance or champerty in the deed of assignment”.

- **PERSON WHO IS ASSIGNED has a genuine Commercial Interest**


- Trendtex contracted to sell a large quantity of cement to an English company for shipment to Nigeria.
- It had borrowed from Credit Suisse, in order to finance the purchase of the cement.
- The English company was to pay for the cement by means of a letter of credit issued by the Central Bank of Nigeria ("CBN"); that bank failed to honour the letter of credit.
- Trendtex assigned to Credit Suisse all its claims arising out of the cement contracts "until the claims of the assignee are covered”.
- House of Lords held that Credit Suisse had a *genuine and substantial interest* in the success of the CBN litigation, however, the transfer to the third party, which involved the likelihood of a profit “savoured of champerty” and so was contrary to public policy
- Extended more than actions to breach of contract to tort and equity> no longer limitations to the principle where there is a genuine commercial interest

Read

- Text 5.22; Property with an incidental right to litigate
- Text 5.24; Assignment to insurer
- Text 5.26; Contractual rights (personal rights of employment)

Summing up: almost everything that qualifies as property can be assigned (besides the 3 exceptions)

**QUESTION 2**

*Is the assignment of presently existing or future property?*

- What are the parties trying to assign? Is it existing or only come into existence sometime in the future?

**Norman v Federal Commissioner of Taxation** (1963) 109 CLR

Windeyer J:

“It is impossible for anyone to own something that does not exist, it is impossible for anyone to make a present gift of such a thing to another person, however sure he may be that it will come into existence and will then be his to give. He can, of course, promise
that when the thing is his he will make it over to the intended donee. But in the meantime he may change his mind and when the time comes refuse to carry out his promise even though it were by deed. A court of law could not compel him to perform it. A court of equity would not... things not yet in existence could only be the subject of agreement, not of present disposition.... ”

- It's impossible to own something that doesn't exist> cannot make an immediate transfer of something that doesn't exist
- You CAN make a promise that when you will have it, you will transfer it to the assignee
- Must be supported by valuable consideration (equity maxim)

“And, in relation to promises and agreements, equity has been faithful to its maxim that it does not come to the aid of volunteers. For equity a deed does not make good a want of consideration”

If we turn from attempted gifts of property to purported dispositions of it for value, the picture changes completely. The common law objection remains, But in equity a would be present assignment of something to be acquired in the future is, when made for value construed as an agreement to assign the thing when it is acquired. A court of equity will ensure that the would-be assignor performs this agreement, his conscience being bound by the consideration. The purported assignee thus gets an equitable interest in the property immediately the legal ownership of it is acquired by the assignor, assuming it to have been sufficiently described to be then identifiable”.

- CL will not recognise this

**Examples of things that will always be Future Property (CLASS TEST)**

- Interest under a will where the testator is not yet dead.
- The interest of a beneficiary under a discretionary trust in the trust property
- A bare right to litigate where the action has not yet been commenced.
- Company dividends not yet declared
- Copyright in songs not yet written

**Norman v Federal Commissioner of Taxation [1963] HCA 21**

- FACTS: In a voluntary deed Norman granted to his wife the right to receive £450 interest on a loan and £460 company dividends
- Interest on the loan accrued in the relevant tax year although the loan had been made in a previous year. The borrower had the right to pay off the loan at any time and Norman could demand payment at any time but had to allow the borrower 18 months to pay.
- ISSUE: HAD THERE BEEN A VALID ASSIGNMENT OF THESE TWO PROPERTIES?
The High Court held unanimously that the dividends were future property.

- It would only come into existence if and when the company ACTUALLY declared a dividend; there was no possibility of the shareholder insisting that this be done.

- It is only after the dividend is actually declared that the shareholder has a right to sue for its payment as a debt.

High Court held by a bare majority that the right to receive interest was a future right or a right of a future property

- Dixon J; “It appears to me that the future interest was the merest expectancy or possibility, having no existence in contemplation of law”

- Menzies J – no equitable assignment of the right to interest because what was assigned was not an existing right but was no more than a right which might thereafter come into existence and so could not be effectively assigned in equity without consideration.

- McTiernan J (minority) – A present chose in action arose from the obligation to pay interest even though that interest couldn’t be demanded until the end of the year and was subject to a reduction in rate. The obligation was in existence when the deed was made.

- Windeyer J:

  ‘The distinction between a chose in action, which is an existing legal right, and a mere expectancy or possibility of a future right ...does not, in my view depend on whether or not there is a debt presently recoverable by action because presently due and payable. A legal right to be paid at a future date is, I consider, a present chose in action, at all events when it depends upon an existing contract on the repudiation of which an action could be brought for anticipatory breach

Distinction: on one hand: right to a chose or intangible right enforceable against somebody ; on the other hand: There can't be a present or immediate assignment for something that doesn't exist yet regardless if it comes into existence in the future

5.72:

- Marcus Smith, *The Law of Assignment, the Creation and Transfer of Choses in Action, 2007 OUP*

  ‘The distinction between future choses and rights enforceable in the future turns on existence and not on enforceability. Rights enforceable in the future exist in the present. They grow out of a present legal relationship. They exist as future rights, even if they are contingent and not certain to occur. The nature of the contingent right – or the circumstances that will transform a potential right into a presently enforceable right – is defined by the presently existing legal relationship’