

LAWS317 – EQUITY AND TRUSTS

Session 2, 2016

Complete lecture and reading notes using:

1. Peter Radan and Cameron Stuart, *Principles of Australian Equity and Trusts* (LexisNexis Australia, 3rd ed, 2015);
2. Radan et al, *Principles of Australian Equity and Trusts: Cases and Materials* (LexisNexis Australia, 3d ed, 2015).

TABLE OF CONTENTS	
TOPIC	Page
Week One: The History and Nature of Equity	3
Week Two: The Relationship Between Law and Equity	10
Week Three: Dispositions of Property	22
Week Four: Dispositions of Equitable Interests and Writing Requirements	37
Week Four: Property with a Limited Capacity for Assignment	41
Week Five: Fiduciary Obligations	45
Week Five: Introduction to Trusts	55
Week Six: Creation of Express Trusts	61
Week Seven: Variation and Termination of Trusts	72
Week Seven: Trustees	78
Week Eight: Beneficiaries and Tracing	89
Week Nine: Charitable Trusts	94
Week Nine: The Administration of Charitable Trusts	104
Week Ten: Resulting Trusts	110
Week Eleven: Institutional Constructive Trusts	120
Week Eleven: Remedial Constructive Trusts	128
Week Twelve: Equitable Estoppel	136
Week Twelve: Confidential Information	139

Week One: The History and Nature of Equity

THE HISTORY OF EQUITY

History in the United Kingdom

- Early Court of Chancery
- The common injunction
- Further development and systemisation
- Criticisms and problems
- Judicature Acts

History in Australia

USES AND TRUSTS

THE NATURE OF EQUITY

- The relevance of unconscionability
- Equitable jurisdictions
- Equitable maxims
- Important principles

THE HISTORY OF EQUITY

History of Equity in the United Kingdom

- Begins with King Henry II:
 - He centralised administration of justice to King's Council.
 - Council responsible for legislature, executive + judiciary.
- By reign of King Edward I:
 - Justice distributed b/w three courts that developed from King's Council.
 - These courts developed the **common law**.
- Common law used and developed but then becomes static and use of precedent unresponsive to **changing social conditions**.

Early Court of Chancery:

- Individuals would petition King to right a wrong where no existing remedy (e.g. under common law).
- Becomes popular so King delegates authority to **Lord Chancellor**.
- Becomes **principal place for administering principles of equity**.
- Case decided on facts, decrees only bound parties to that case.
- Known as **court of conscience**.
- First time English legal system developed alternative dispute resolution system to overcome deficiencies of legal system.

Development of the common injunction

- Equitable remedy used from 15th century + administered by chancellor against a common law plaintiff, requiring discontinuance of proceedings or preventing enforcement of a judgement.
- *In personam* because it attached to common law plaintiff.
- Must establish unconscientious behaviour by P.

Further development and the systemisation of equity

- *Earl of Oxford's Case*:
 - Concerned protracted litigation re entitlement to land.
 - Significance: Lord Ellesmere said '*The Office of the Chancellor is to correct Men's consciences for Frauds, Breach of Trusts, Wrongs and oppressions...set it aside, not for any error or Defect...but for...hard Conscience*'.
- Above approach (supremacy of equity over common law) affirmed by King James I who made a Royal Decree in 1616.
- Equitable principles become more solidified. They are no longer based on subjective notions of conscience *Cook v Fountain*.

Criticisms and problems

- Excessive delays.
- Charles Dickens made damning condemnation of Chancery: 'gives to monied might the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope...'
- Problems lead to call for single common law/equitable court.

Judicature Acts

- **Supreme Court of Judicature Act 1873** (UK):
 - Abolishes common law and equity courts and makes **one supreme court of judicature** in England.
 - Reaffirms + gives statutory force to Royal Decree of 1616 – **equity prevails** over common law.
- New court has two parts:
 - 1. High Court of Justice – includes Queen's/King's Bench + Chancery Division.
 - 2. Court of Appeal.
- Despite the *Act*, **common law remains relatively dominant in practice**.

Equity in Australia

- First Charter of Justice: begins creating the legal system e.g. courts of Criminal and Civil jurisdiction.
- Second Charter of justice: abolishes Court of Civil Jurisdiction and creates Supreme Court.
- Third Charter of Justice: gives Supreme Court equitable jurisdiction.
- Judicature system reforms: successive provisions in each colony that gradually fuse common law and equity. By 1972 (NSW being the last), it is reaffirmed that **equity prevails over the common law**.

USES AND TRUSTS

- 'Use' = 'on behalf of' (e.g. land held on behalf of others).
- The 'use' becomes the modern day trust.
- Uses of uses:
 - Circumventing primogeniture/dower rights.

- Protecting women's rights: using a marriage settlement (form of a use) to circumvent rule that on marriage, women's property becomes her husband's. When this rule is abolished, marriage settlements decline. NB: sometimes denied women's rights – see 1.32.
- Avoiding tax liabilities: e.g. by distributing income to different family members to lower taxable income.
- 'Trust' = When someone has rights they're bound to exercise on behalf of someone else or to accomplish a purpose, that someone is called a trustee and has those rights in trust for the other person or for that purpose.
 - Maitland, *Equity and the Forms of Action at Common Law* 44.
- Alleged (by Vernit) that trusts are **similar to Islamic waqf**.
- *Waqf*: 'a permanent dedication by a Muslim of any property for religious or charitable purposes, or for the benefit of the *waqf's* founder and his descendants, in such a way that the owner's right is extinguished and the property is considered to belong to God.

THE NATURE OF EQUITY

The relevance of unconscionability (see 2.4 of text)

- 'unconscionability was and remains the **fulcrum upon which entitlement to equitable relief turns**' *Lift Capital Partners Pty Ltd v Merrill Lynch International* (2009) 253 ALR 482, 507.
- In *Legione v Hateley*: relief against forfeiture and penalties given due to D's unconscionable conduct.
- *Baumgartner v Baumgartner*: legal title to land subject to constructive trust given unconscionable conduct of legal owner.
- *Commonwealth v Verwayen*: per Mason CJ – unconscionability 'the driving force behind equitable estoppel.'
- **Finding** of unconscionable conduct **must be made objectively**.
- '**Unconscientious**' preferred/more accurate term for unconscionable.

Instances of unconscientious conduct

P Parkinson, 'The Conscience of Equity' in P Parkinson (ed), *The Principles of Equity*, 2nd ed, Law Book Co, Sydney, 2003, p 29 at 35

- Exploitation of vulnerability/weakness;
- Abuse of positions of trust/confidence;
- Insisting on rights where doing so is harsh/oppressive;
- Inequitable denial of obligations;
- Unjust retention of property

Equitable Jurisdictions

1. Exclusive

- Equity alone has jurisdiction because no relief at CL available.
- Example: obligations arising from a trust.

2. Concurrent

- Courts of Equity + CL have jurisdiction.

- Example: re enforcing a contract – CL remedy is damages + E remedy is specific performance.
- In such cases of concurrent jurisdiction, equity supports the common law.

3. Auxiliary

- Where equity is sought only to get assistance in current or anticipated proceedings.
- Example: getting a *quia temet* injunction to stop injury to property pending a common law decision.
- Equity supports CL.

Equitable Maxims

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

- Historically important because equity evolved to meet deficiencies in CL.
- E.g. equity of redemption addresses CL stance that mortgagor has no right to land if he fails to pay by due date.
- Claims must be grounded in precedent/practice of courts – *Diplock v White*.
- Whilst equitable rules aren't rigid/ inflexible, courts can't proceed on general notions of justice + and not look at settled principles – *Stewart v Atco Controls Pty Ltd (in liq)*.

2. Equity follows the law

- Equity supplements deficiencies of CL, it's not a rival system.
- It recognises existence + validity of CL rights, estates, titles and interests.
- Example: Time stipulations in contracts
 - At CL, where time stipulations are of the essence, failure to adhere allows innocent to terminate.
 - However, equity will not allow termination if it would be unconscionable - *Stickney v Keeble* (1915). Unconscionability may arise where there has been part performance of the contract or where time is not of the essence.
 - Thus if time is not of the essence then equity will intervene, if time is of the essence (e.g. by express provision or by implication) then equity will not intervene.
 - NB: just because it says time is of the essence doesn't mean it is.
 - Equity looks to substance over form.
 - NB: Conveyancing Act s 13 gives statutory effect to equitable rules, changing time stipulations from essential terms to intermediate terms.
 - The equitable maxims that apply are:
 - Equity follows the law
 - Equity looks to substance over form
- Example: Consideration
 - At CL – consideration need only be sufficient. It doesn't have to be adequate thus allowing nominal consideration.
 - In E – remedies not available to enforce contracts unless supported by *valuable* consideration.

- Note that in equity, ct may believe consideration was inadequate and thus refuse order for specific performance. This is rare.
- Usually, the above factor + fraud, misrepresentation etc. will lead court to refuse equitable relief.

3. Where the equities are equal, the first in time shall prevail, and where there is equal equity, the law shall prevail

- Rule one example: If A and later B, obtain equitable mortgages over same property, in the absence of postponing conduct by A, A gets priority.
- Rule two: where there is an earlier equitable interest and later legal interest, legal interest holder gets priority if acquired in good faith, for valuable consideration and without notice of earlier equitable interest. In such a situation, the equities being equal, the legal interest prevails.

4. One who seeks equity must do equity

- Plaintiffs in equity must fulfil legal and equitable obligations before seeking a remedy.
- Example: *Verduci v Golotta* – mortgage as a result of undue influence set aside on condition that borrower repaid sum borrowed plus reasonable interest.

5. Delay defeats equity

- P must act promptly and diligently when seeking E relief.

6. Equality is equity

- Equity aims to distribute profits and losses in proportion to claims and liabilities of the parties.

7. Equity will not assist a volunteer

- (*Colman v Sarrel; Corin v Patton*)
- A volunteer is someone that hasn't given valuable consideration.
- Note the maxim doesn't require that the consideration be paid or executed.
- Example: equity won't grant specific performance re purchase of land for nominal consideration of \$1. However breach enforceable at CL by damages.
- What is 'valuable' consideration?
 - Usually requires finding of **some economic worth** as **compared to something nominal**, trivial or colourable- *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)*.
 - Determination of 'valuable' largely based on facts/circumstances.
 - If parties are at arm's length and transaction commercial in nature, valuable consideration generally present.
- NB: the rule is not absolute, there are exceptions *Blackett v Darcy*.

Exceptions to the rule that equity will not assist a volunteer:

1. Beneficiaries of a trust

- **Beneficiaries can bring actions against trustee to enforce trust even though B hasn't given consideration** for the interest, provided that trust is 'completely constituted...by a present declaration of trust or by a transfer by the settlor of the legal title or to the intended trustee' – *Corin v Patton*.

2. Donatio mortis causa (gifts in contemplation of death)

Requirements

1. Made in contemplation, though not necessarily in expectation of impending death.
2. To be absolute and perfected only on donor's death, revocable until that event occurs and ineffective if not.
3. Delivery of subject matter of gift or essential indicia of title thereto, amounting to parting with dominion and not mere physical possession over subject matter.

Not clear but this rule probably doesn't extend to real property.

3. Inter vivos gifts and the rule in *Strong v Bird*

- If a donor has attempted to make an immediate *inter vivos* gift (one occurring during one's lifetime) of property to a donee, or a purported immediate voluntary release of a debt owed by the donee to the donor, but the gift fails because of failure to comply with necessary legal formalities...
- Then, if donee becomes executor of donor's estate, gift considered perfected by vesting of legal title in donee - *Strong v Bird (1874)*.
- Requirements:
 - Intention continuing up to donor's death to make the immediate gift - *Rutledge v Sheridan [2010]*.
 - Mere expression of intention insufficient, must be attempt to make immediate gift – *Matthews v Matthews (1913)*.

Equity looks to intent rather than form

- Courts distinguish between the form something takes and the intention behind it.
- If following the form would be contrary to the intention or substance of that thing (e.g. following form of a contract instead of its real substance), then it would be inequitable for the form to prevail.
- Example: following this maxim and that 'equity follows the law', failure to complete contract on date stipulated (where time is not of the essence by express provision or implication) won't result in breach justifying termination. Equity permits completion within a reasonable time.
- By looking to substance, 'equity is able to treat as done that which in good conscience ought to be done' *Theodore v Mistford*.

Equity looks on that as done which ought to be done

- Equity will treat agreements to do something as if the agreement had actually been performed.
- Requirement: agreement must be specifically enforceable – *Parkview Qld Pty Ltd v CBA*, reaffirming *Chan v Cresdon Pty Ltd*.

- Basis for principle in *Walsh v Lonsdale*:
 - Someone who enters into possession of land under a specifically enforceable contract to lease is regarded as being in the same position (as b/w himself + other party) as if the lease had actually been granted.
- Expanded in *Industrial Properties (Barton Hill) Ltd v Associated Electrical Industries Ltd* [1977] – more than one agreement allowed + no need for legal relationship between legal estate holder and lessee.
 - A agreed to sell property to B, transfer not registered. B leased to C. C defaulted and B sued C. Despite defective lease, still an agreement and applied *Walsh v Lonsdale*.

Equity acts in personam

- E concerned with rectifying morally blameworthy conduct of the defendant – Levenstein.
- At CL a judgement of damages is against D's property. D's assets can be realised to satisfy P's judgement against D.
- In E, judgement against the defendant himself. If he fails to comply, property not at risk. However, held in contempt of court and subject to coercive measures.
- Standard of proof for contempt = beyond reasonable doubt.
- Given *in personam* nature of equity, D must be in court's jurisdiction even if property isn't. D will be in jurisdiction when he has property in that jurisdiction. Though there is a general presumption that D has this.

Important principles

- Equity does not deny existence or validity of common law rights and principles.
- Instead, it is used on a discretionary basis when enforcement of the common law is unconscientious.
- 'Law without support in values is ineffective because it is static rather than dynamic.' [Justice Gummow HC] *W M C Gummow, 'Equity: Too Successful?' (2003) 77 Australian Law Journal 30 at 34.*

Week Two: The Relationship between Law and Equity

THE RELATIONSHIP BETWEEN LAW AND EQUITY

Equity Prevails

Commentary – Judicature Acts and Australian equivalents

The doctrine in *Walsh v Lonsdale*

- Applicability of the doctrine
 - *Manchester Brewery Co v Coombs*
 - *Ahern v L A Wilkinson (Northern) Ltd* [1929]
 - *Chan v Cresdon Pty Ltd* (1989)

THE RELATIONSHIP BETWEEN LAW AND EQUITY

Equity prevails

- Supreme Court of Judicature Act 1873 (UK) s 25(11):
 - Equity prevails in cases of conflict with common law.
- Law Reform (Law and Equity) Act 1972 (NSW) s 5:
 - Australian equivalent of above – equity prevails in cases of conflict with common law.

Commentary – Judicature Acts and Australian equivalents

- Legislation presupposes existence of CL.
- No intention to fuse principles into one system but achieve procedural improvements in administration of law and equity *MCC Proceeds Inc v Lehman Brothers International (Europe)*.
- *Felton v Mulligan*: ‘the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters’.
- *United Scientific Holdings Ltd v Burnley Borough Council*: Lord Diplock (disagreeing with above statement) ‘the waters of the confluent streams of law and equity have surley mingled now’, to emphasise a dichotomy is incorrect.
 - One interpretation of Diplock: law of trusts would be abolished because Judicature Acts would abolish distinction b/w trustee + beneficiary. NB this wasn’t intention or effect.
 - Second interpretation: maybe Diplock intended to say that Act didn’t prohibit further development of E + CL.
- Diplock’s views debated in NSW because we didn’t adopt judicature system until 1970s.
- Criticism by Meagher, Gummow and Lehane in *Equity, Doctrines and Remedies*:
 - Diplock’s views echo a fusion fallacy – where decision wouldn’t have been reached under separate courts of CL + E.
 - Effects of fusion fallacies:
 - 1. Administering remedies not previously available under CL or E.
 - 2. Modifying principles of one branch of law by introducing principles from other.

- Criticism of criticism: *Elders Pastoral Ltd v Bank of New Zealand*: neither CL or E are stifled by origin, each borrows from other to harmoniously develop law as a whole.

The doctrine in *Walsh v Lonsdale*

- **Facts:** Agreement to lease mill at rent payable quarterly, provision allowed landlord to demand a year's rent in advance. Lease not registered thus void at CL. Tenant in possession, paid rent. L demanded year's rent in advance and T defaulted. L levied for distress at CL. T sought injunction and damages for illegal distress.
- **Issue:** Whether L's CL remedy of distress permissible despite absence of CL lease.
- **Decision:** In favour of landlord.
- **Reasoning:** Someone who enters into possession of land under a specifically enforceable contract to lease is regarded as being in the same position (as b/w himself + other party) as if the lease had actually been granted. In this case, the parties conceded that SP available.
- **Rules:**
 - Doctrine only applies if P has a right to specific performance of the agreement.
 - Put another way, until a formal lease is executed in compliance with decree of specific performance, there exists an equitable lease only, though parties stand in same position as if a lease had been granted.

Applicability of the doctrine

Manchester Brewery Co v Coombs [1901]

- Applies only to cases where there is a contract to transfer legal title and an act has to be justified or action maintained by force of legal title.
- Two questions:
 - 1. Is there a contract of which specific performance can be obtained?
 - 2. If yes, will the title acquired by such SP justify at law the act complained of, or support at law the action I question?

Ahern v L A Wilkinson (Northern) Ltd [1929]

- A Court's decision RE availability of SP need not be formally administered, can just proceed as if it has been.

Chan v Cresdon Pty Ltd (1989) 168 CLR 242

- **Facts:** Unregistered written lease from Cresdon to Sarcourt, Chan as guarantor. S defaulted, Cresdon took action against Chan as guarantor. Cresdon had thus mortgaged property.
- **Decision:** Cresdon failed.
- **Reasoning:**
 - 1. No registered lease thus no enforceable guarantee. The guarantee Cresdon sought to enforce was of 'obligations under the lease' and court ruled this meant obligations contained in a legal

lease. Given no such legal lease existed, there was no enforceable guarantee.

- 2. Alternative claim based on *Walsh v Lonsdale* failed. Equitable leases created under the doctrine in *W v L* do not create a legal interest. Thus equitable lessee defeated by a bona fide purchaser for value and without notice.
- Operation of *W v L* depends on availability of SP. Two factors raised doubts about availability of SP.
 - 1. Cresdon had mortgaged the property.
 - 2. Given Sarcourt's breach, lease had ended before expiration of the term of lease.
- Even if SP was available, Cresdon's action doomed to fail because under *W v L* all that the agreement amounted to was an equitable lease.
- The guarantee Cresdon sought to enforce was of 'obligations under the lease' and court ruled this meant obligations contained in a legal lease. Given no such legal lease existed, there was no enforceable guarantee.

Industrial Properties (Barton Hill) Ltd v Associated Electrical Industries Ltd [1977]

- A agreed to sell property to B, transfer not registered. B leased to C. C defaulted and B sued C.
- Despite defective lease, still an agreement and applied *Walsh v Lonsdale*.
- More than one agreement allowed + no need for legal relationship b/w legal estate holder and lessee.

The Nature of Equitable Estates and Interests

THE NATURE OF EQUITABLE ESTATES AND INTERESTS

- One interest comprising legal and equitable interests is one absolute interest - *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)*.
- Trusts: equitable estate of beneficiaries are engrafted into the legal estate held by trustee.

The complexity of equitable interests

- *Dickinson v Burrell*
- *Gross v Lewis Hillman Ltd*

Indicia of equitable interests

- *National Provincial Bank Ltd v Ainsworth*
- *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*
- Rights of sole beneficiaries under a trust
- Rights of beneficiaries in unadministered estates
 - *Commissioner of Stamp Duties v Livingston*
 - *Horton v Jones*
 - Bankruptcy: *Bankruptcy Act; Official Receiver v Schultz*
 - When does administration occur? *Re Maguire; Hughes v La Baia*

Equitable Interests, Personal Equities and Mere Equities

- *Breskvar v Wall* (1971) 126 CLR 376
- Multiple Classification of Equitable Rights
- Mortgagors and Mortgagees: *Latec Investments Ltd v Hotel Terrigal P/L*
 - Are the mortgagor's rights caveatable?
 - *Swanston mortgage P/L v Trepan Investments P/L*
 - Cases are divided...

THE NATURE OF EQUITABLE ESTATES AND INTERESTS

- Equitable estates and rights in property differ from case to case.
 - This is because equity protects rights + interests when needed to effect its doctrines:
 - **'Equity in fact calls into existence and protects equitable rights and interests in property only where their recognition has been found to be required in order to give effect to its doctrines'** – Viscount Radcliffe in *Commissioner of Stamp Duties (QLD) v Livingston*
- If one person has the legal estate and entire equitable interest he holds one unqualified legal interest, not two separate interests- *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)*.
- Equitable interest merges into legal estate to comprise a **single absolute interest** – *Ibid.*
- Trusts: a tricky example
 - These are the highest form of equitable proprietary interest.
 - Equitable estate of a beneficiary under a trust is engrafted onto and not carved out of the legal estate held by trustee – *Re Transphere Pty Ltd* (1984) 5 NSWLR 309, 311.
 - Put another way, the content of the beneficiary's interest is his right to compel trustee to hold and use legal rights in accordance with trust terms.
 - Issue: does a beneficiary's interest arise from right of enforcement or is the right of enforcement a consequence of the interest?
 - Answer: latter – enforceability isn't a pre-condition but an incident or characteristic of such an interest signifying its quality or extent – *Burns Philp Trustee Co Ltd v Viney* [1981] 2 NSWLR.
- NB in the context of remedy for SP – its availability is a precondition for finding an equitable interest – *Haslam v Money for Living (AUST) Pty Ltd* (2008) FCR 301, 318.

The complexity of equitable interests

Dickinson v Burrell (1866)

- Facts: A conveys property by gift to B. Though the transfer was a result of undue influence exerted by B. A assigns right to rescind transaction (CL remedy for UI) to C.
- Issue: Can C seek equity's assistance to rescind transaction and have property reconveyed to C.
- Decision: yes.
- Reasoning:

- Because A's right can be enforced by C against B (as a result of UI) thus it is **more than merely a personal right against B**.
- It is an **equitable proprietary right** that when assigned or devised to C, can be enforced by C against B.
- Significance:
 - To give effect to the doctrine of UI, it is necessary to hold that A has an equitable proprietary interest. In this case, the right to set aside transfer of land gave rise to an equitable proprietary interest in land in favour of A.
 - This reflects Viscount Radcliffe's comment in *Livingston* – '*Equity in fact calls into existence and protects equitable rights and interests in property only where their recognition has been found to be required in order to give effect to its doctrines*'.

Gross v Lewis Hillman Ltd [1970] Ch 445

- Facts:
 - Lewis Hillman Ltd sold tenanted land to Grace Rymer Investments Ltd. Grace Rymer, pursuant to an agreement with Anne Gross, directed Hillman to transfer property to Gross. Contract of sale b/w Hillman and Rymer induced by fraudulent misrepresentation re status of tenants. Gross sought to rescind transfer of property to her from Hillman.
 - Or – A induced to purchase property from B as a result of a fraudulent misrepresentation and transfers property to C.
- Issue:
 - Whether the right to rescind the land (which Grace Rymer had as a result of the contract b/w itself and Hillman) passed to Gross when she became the owner of the land pursuant to her agreement with Rymer?
- Decision:
 - Unanimously held that the right to rescind didn't pass to Gross in this case; C cannot assert against B the right to rescind that A had against B.
- Reasoning: Because C is denied the remedy of rescission in this situation, right of A must be seen as purely personal and not proprietary.
- Distinguishable from *Dickinson v Burrell*:
 - In *Dickinson*, A assigned right to rescind. This isn't the case here.
 - Here the assignee isn't claiming to recover an equitable interest in property previously conveyed away by his assignor, but is claiming to throw back the property assigned to him not on his immediate assignor but on the party who sold it to his assignor.

Indicia of Equitable Interests

- No fixed list of criteria (*Burns Philp Trustee Co Ltd v Viney*) as equitable interests don't have attributes common to all.
- Though cases and scholarship espouse indicia of equitable interests:

National Provincial Bank Ltd v Ainsworth [1965] AC 1175, 1247-8

Before a right or interest can be admitted into the category of property or of a right affecting property, it must be:

1. Definable;
 2. Identifiable by third parties;
 3. Capable in its nature of assumption by third parties (assignable); and
 4. Have some degree of permanence or stability.
- Assignability is a consequence not a test of a proprietary right – *Commissioner of Stamp Duties v Yeend*.
 - Though an absence of assignability will tend against the characterisation of a right as property – *Australian Capital Television Pty Ltd v The Commonwealth*.

Meagher, Gummow and Lehane's Equity: Doctrines and Remedies

Heydon, Leeming and Turner suggest that the proprietary nature of equitable interests can be measured according to four criteria:

1. Power to **recover property** of subject of interest or income thereof, compared to recovery of compensation from D payable from no specific fund;
2. Power to **transfer** benefit of interest to another;
3. Persistence of **remedies** in respect of the interest against third parties assuming burden thereof; and
4. **Priority** - The extent to which the interest may be displaced in favour of competing dealings by the grantor or others with interest in the same subject matter

The right of a sole beneficiary under a trust

- Bare trust: where T's only duty is to transfer to B when called or to a third party as directed by B (*Herdegen v Federal Commissioner of Taxation*)
- Trustee's duties in detail: (*CGU Insurance Ltd v One. Tel Ltd in liq*)
 - Exist by virtue of office
 - To get trust property in, protect it, vindicate rights attaching to it
 - Exists unless negated by statute or trust instrument
- Trustee carrying on a business is not a bare trustee – *Old Papa's Franchise Systems P/L v Camisa Nominees P/L*.
- Trust amenable to termination doesn't mean T isn't a bare trustee, BT only when B has called on T to terminate trust – *Saunders v Vautier*.
- Bare trusts arise where:
 - 1. Assignor of future property is a BT of property for assignee when property comes into existence;
 - 2. Vendor of land on payment of purchase price by P becomes a bare trustee for P;
 - 3. Legal title holder when purchase price provided by another person is a BT of property for person providing purchase price, pursuant to principles of resulting trusts – *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR

In relation to Heydon, Leeming and Turner's criteria, beneficiaries under a bare trust *inter vivos* can:

1. Demand transfer from trustee of legal title to property (**recovery**);
2. Dispose of beneficial interest to another person, subject to any statutory writing requirements (**assignability**);
3. Pursue property against third parties by recourse to remedy of tracing (**remedies**);
4. Assert priority of interest against others except a bona fide purchaser of legal estate buying for value without notice (**priority**)

The right of a beneficiary in an unadministered estate

The *right* here is that of a person to inherit deceased's property from date of death to administration.

Commissioner of Stamp Duties (Qld) v Livingston 1965 AC (UK)

- Facts: Mrs Coulson entitled to 1/3 share of dead husband's estate when she died. On her death, her husband's estate hadn't been administered and her share not yet ascertained. Commissioner claimed she died owning equitable interest in land (to be inherited from husband) thus owed levy succession duty under statute.
- Issue: Whether Mrs Coulson at date of death had an equitable interest in relation to the property. If so, must be levy succession duty.
- Decision: Mrs Coulson had no beneficial interest at date of death thus no duty payable.
- Reasoning: Executor's held whole of the property in the estate with no distinction/w legal and equitable interests. She was entitled to a chose in action, capable of being invoked for any purpose connected with the proper administration of the estate.
- Significant comments:
- **Despite having no equitable interest, C's rights as beneficiary protected because courts control executors in use of their rights over assets but does so by enforcing remedies not involving admission or recognition of equitable rights of property in those assets. Equity calls into existence and protects equitable rights and interests in property only where their recognition has been found to be required in order to give effect to those interests.**

In relation to Heydon, Leeming and Turner's criteria, the following can be said about the rights of beneficiaries in an unadministered estate:

1. Recovery

- Beneficiary's right is not an equitable interest in the context of administration of deceased estates.
- All the beneficiary has is the power to compel executor to properly administer.
- Executor has all the property rights.
- B's right to compel E to properly administer carries with it the right to receive property once estate is administered.

2. Assignability

- Beneficiary's right is proprietary in nature in relation to being transferred to others.
- It's a chose in action capable of transmission by will.
- Part of the chose in action is transmissible by will.
- It is also assignable.

Horton v Jones (High Court of Australia) 1935

- Facts: Horton looked after Jones, J orally promised to leave fortune to H. J died and had rights as next of kin in unadministered estates of four kids. Estates included land. H sued estate on oral contract.
- Held: H not entitled to benefit of contract.
- Reasoning:
- Starke, Evatt and McTiernann JJ: agreement void for uncertainty.
- Rich and Dixon JJ: status of interest and statute
 - Section 54A(1) *Conveyancing Act* requires that sale disposition of land or interest in land be evidenced in writing.
 - Thus, had to determine if H had an interest.
 - Decided he had no right in any specific asset but had more than a mere equity (personal) – he had an equitable interest.
 - Given he had an interest, the agreement fell short of the statutory writing requirements under statute.

*Issue is unresolved: Livingston says there is no equitable proprietary interest but Horton says there is. Horton was Australian but first in time, Livingston not in Australia but second.

3. Remedies

- Beneficiaries can recover from third parties assets wrongfully withheld from the estate – *Livingston*.
- This right doesn't amount to a right of property.

4. Priority

- There can be no competition with other legal or equitable interest and priority issue doesn't arise because **the right is not proprietary and is only a chose in action**.

Bankruptcy and the rights of beneficiaries in an un-administered estate:

- If B is bankrupt, rights vest in Official Receiver – *Bankruptcy Act 1966* (Cth) ss 5(1), 116.
 - S 5(1): includes choses in action as property for bankruptcy purposes;
 - S 116: vests all property passing to a bankrupt whilst undischarged in Official Receiver

Official Receiver in Bankruptcy v Scultz