Equitable Rights and Equitable Titles by Uni Study Guides

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This article is a topic within the subject Equity and Trusts.

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Required Reading

M.W. Bryan & V.J. Vann, *Equity and Trusts in Australia* (Cambridge University Press, 2012), pp. Textbook Chapter 2 (up to 2.11) and Chapter 8 (up to 8.7).

DKLR Holding Co (No 2) Pty Ltd v Cmr of Stamp Duties [1980] 1 NSWLR 510 ([13]-[18]).

National Provincial Bank v Ainsworth [1965] AC 1175 per Lord Wilberforce (up to 1254 / "...itself adds nothing to the argument").

Beconwood Securities v ANZ [2008] FCA 594 (up to [58]).

An introduction to equitable remedies

[1] Equitable remedies grew out of the practice of chancellors, sitting without a jury but assisted by clerks and masters, exercising continuing supervision.

- Equitable remedies are always discretionary – not automatically awarded once plaintiff proved case.
- The court's discretion is exercised after consideration of the positions of both parties before it; sometimes the effect of the remedy on other parties, including the wider community, is considered too.

- At common law the plaintiff is limited to damages as a remedy. Equitable remedies are more varied and can be distinguished according to their effect and according to the purpose they fulfil:

Personal Remedies

[2] An order directed to the person of the defendant.

- The defendant must comply with the order, or else be in contempt of court.
- The award of a personal remedy has no direct impact on the defendant's property.
- Examples in equity include equitable compensation, account of profits and injunction.

Proprietary Remedies

[3] Directed to property to which the defendant holds title.

- Order may declare that identified property belongs to the plaintiff in equity (constructive trust).
- A court may also direct the sale of property in order to satisfy the plaintiff's judgement, unless the defendant satisfies the judgement out of other resources he possesses (**equitable lien**).

There are two types of proprietary remedies: a constructive trust and an equitable lien (or 'charge').

Constructive Trust

- An order that the defendant hold property on trust for the plaintiff.
- The plaintiff will be entitled to the property in equity, or to a proportionate interest in that property assessed by the court.
- If the property appreciates in value the plaintiff will be entitled to that benefit but equally, they bear the risk of depreciation.

Equitable Lien (or charge)

- A security interest over property.
- Plaintiff does not obtain a share of the property (as above), instead it acts similarly to a mortgage, to secure a debt.
- If the defendant does not discharge the debt to the plaintiff out of other funds, the property in question will eventually be sold and the plaintiff paid out of its proceeds.
- As in *Giumelli v Giumelli*,[4] a lien may be imposed as security for payment of the personal remedy of equitable compensation.

Comparing proprietary remedies and personal remedies

[5] Proprietary remedies enjoy important advantages over personal remedies:

- **Insolvency**
- Principle advantage is that a plaintiff can make a claim to the property that is the subject-matter of a proprietary remedy.
- This is crucial if the defendant is a bankrupt or insolvent company because the property will vest (go to) the plaintiff rather than the trustee in bankruptcy or liquidator and therefore the defendant's unsecured creditors will not have access to it.

- The award of personal remedy entitles the plaintiff only to the status of an unsecured judgement creditor in the event of the defendant's insolvency.
- If the defendant has insufficient assets to discharge his debts, the plaintiff will only recover, at best, a proportion of the debt, in common with other unsecured creditors.
- **Third Parties**
- The second advantage of proprietary remedies is that they are enforceable against third parties who have received the property from the defendant.
- Subject to the limitation that the right to recover the property is not enforceable against a good faith purchaser of the property, without notice of the plaintiff's rights.
- A personal remedy is enforceable only against the party against whom the remedy was ordered.
- **Non-monetary value**
- Proprietary remedies entitle the plaintiff to claim specific property to which they attach special value, for which money cannot provide adequate compensation.
- **Main Limitation**
- A proprietary remedy to specific property cannot be awarded if the defendant no longer has property over which it can be imposed.

Equitable Proprietary Interests

Introduction

[6] Personal remedies, (such as specific performance and injunctions), have the principle function of enforcing *personal* rights, such as performance of a contract.

- Over time equity proved willing to award personal relief almost routinely, not only against owners of property but also against third parties who had received the property.
- Eventually, these developments were perceived as having created a proprietary interest in favour of the party entitled to the relief.
- E.g. if A signs a contract to purchase land from B, but B refuses to complete the contract, equity will grant the remedy of specific performance against B and B will have to transfer the land to A.
- This happened so often that A was treated in equity as having a property interest once the contract was signed.
- Similarly, the regular awards of personal relief against trustees in breach of trust gave rise to a proprietary interest in the beneficiary.

What is property?

[7] Equitable property, like common law, must be of a kind which is recognised as property in law (for example, confidential information is not recognised as property). Equity recognises **additional interests** in property which are not enforced by the common law:

1. A beneficiary's interest under a fixed trust (see 13.6)
2. A partner's interest in the partnership

3. Proprietary interests that are counterparts to common law interests, such as the equitable fee simple and equitable lease (which differ in their method of creation and the extent of their enforceability).
4. Equitable security interests (such as equitable lien).
5. Equitable rights over land such as the equitable easement or restrictive covenant over land which, unlike common law interests, do not have to be created by deed.

How are property interests created?

[8] There are three ways in which property interests may be created:

1. By agreement. For example, an equitable mortgage is created by an agreement between a lender and a borrower.
2. By express trust. (Ch 5)
3. By court order or operation of law (eg, a constructive trust).

Characteristics of equitable property interests

The main characteristic of equitable property interests is **informality**.

- A deed is not required. Equitable interest will be enforceable if there is a specifically enforceable contract to create the interest.
- Equity assists those who pay valuable consideration for property. Even where valuable consideration has not been paid, a transfer may be enforceable is the transferor has done all that is necessary to complete the transfer.
- Equity looks to the intent and not the form of a legal transaction.

Acts on the conscience of the holder of the legal title to the property

- Equitable interest can be enforced against the person who created the interest or who, by his conduct, is bound by the interest, as well as against any volunteer who takes from that person.
- Not enforceable against a good faith purchaser who does not have notice of the equitable interest.
- In contrast, legal interests in property “bind the world”, they are binding on any recipient of the property regardless of awareness of an interest.
- (Legislation has largely displaced the doctrine of notice: see below).

The nature of equitable ownership

[9] An absolute owner of property does not hold two estates, one legal and the other equitable. They hold only the legal interest in the property.

This was discussed in *DKLR Holding Co (No 2) Pty Ltd v Comissioner of Stamp Duties (NSW)*:[10].

- **You can’t be your own trustee**
- In this case, Aickin J stated “...that the holder of an estate in fee simple cannot be a trustee of that fee simple for himself for what he holds is a single estate, being the largest estate in land known to the law.”[11]
- **Legal and Equitable title cannot be split**
- The owner of a property cannot keep equitable title in a property whilst transferring legal title to another.

- Eg, If Anna transfers a property to Tracy, to be held on trust for Anna, she transfers the legal title to Tracy who is then under the obligation of a trustee. (Brennan J “an equitable interest is not carved out of a legal estate but impressed upon it.”
- **Interest in property is proportionate**
- The scope of an equitable interest is commensurate with the relief equity will grant to enforce it.
- Eg, a property right conferred on the beneficiary of a fixed trust, versus a beneficiary of a discretionary trust who has enforceable rights against trustees and third party who have obtained title to property but have actual property interest.