

Trusts – Law 463
Fall Term 2017

INTRODUCTORY NOTES

'LAW' & 'EQUITY'

LAW	EQUITY	UNJUST ENRICHMENT
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LAW: *In rem* (against a “thing”) jurisdiction. Statutes, regulations, common law.
Example: property rights.

EQUITY: *In personam* (against a person) jurisdiction of the Court. Wrongs, obligations, remedies, and other applications. Example: a trust.

UNJUST ENRICHMENT: A developing area of law which seeks to address unjustified transfers of value from one person to another with a corresponding deprivation to the transferring party without an adequate legal justification and with no parasitic reliance on a legal or equitable doctrine.

Trusts are a part of Equity.

'Equity' in this context does not mean social fairness, its contemporary meaning. Rather, equity refers to a body of principles that are enforced by courts having a formal jurisdiction to do so. Thus, as examples, the contrast would be between 'specific performance' (an *equitable remedy* that you studied in Contracts) and the failure to provide mandatory accommodations for disability (as required under the *Ontario Human Rights Code*).

In Ontario, the Superior Court of Justice has such an 'equitable jurisdiction'; small claims courts have a limited equitable jurisdiction to award legal or equitable relief where the relief requested is a monetary payment under the limit of \$25,000 or the return of personal property valued within that limit.

Key points:

- As it developed in English law (that was in turn received into the law of the common law provinces at Confederation), the jurisdiction of courts of equity was a supplementary jurisdiction to the common law courts.
- Equity was derived in large measure from moral principles and was a jurisdiction that was personal ('in personam'), rather than merely being tied up in the protection of property ('in rem'). Thus, injunctions (a court order compelling a person to do or abstain from doing something) are equitable in origin. At common law, a land owner could seek damages for trespass at law but would require an injunction in equity to prevent future trespass.
- Today, courts of law and equity have 'fused' and equitable and common law principles have in many cases merged. However, many equitable doctrines remain distinct from principles of law (for example, constructive trusts). Whether substantive principles of equity and law ought to remain distinct from one another is a matter of controversy.

Equity's Evolution

The English common law at its earliest stages was quite rigid, requiring the application of a flexible jurisdiction in equity to cure its harsh application. The jurisdiction fell to the Chancellor, and the nature of the office dictated the nature of the institutionalisation of equity in England.

The earliest Chancellors were monks who came from Rome to England with Augustine in the 6th century. These were in effect royal scribes. It was not until after the Norman conquest that Chancellors began to fulfil judicial duties. These earlier Chancellors, though, filled two important roles: first, they were literate and as such they were keeper's of the 'King's Seal'; and secondly, as chaplains of the king, they were keepers of the 'King's conscience.' After the Norman conquest, the Chancellors became something of tax collectors as the Norman kings consolidated their power. Indeed, the office was sold by the King during this time with the Chancellor recouping his investment from charges for use of the Royal Seal.

The office was reformed during the chancellorship of Thomas à Becket, commencing in 1154. When he was appointed Archbishop of Canterbury in 1157 he resigned the office, suffering much the same misgivings as Thomas More was to do later as to the nature of the office. After Magna Carta in 1215, equity became rigid; the closed system of writs was the hallmark of equitable formalism.

The latter half of the 15th century was the return to the influence of religion through the great ecclesiastical Chancellors. Canon law was influential. The climax came with Wolsey (1515-1529) who saw equity as higher than law and seemingly based decisions on his own will. After Wolsey, chancellors were common lawyers and equity became reconciled with law.

St. German's book *Doctor and Student* (1523) was a systematic attempt to describe how equity ought to be used and developed in the form of a dialogue between a theologian

and student of the law. St. German's contribution to equity was promotion of a system of precedent rationalised to the internal structure of law rather than external sources. By 1616, St. German's ideas were largely accepted by Lord Ellesmere in the *Earl of Oxford's Case* (1615), 21 ER 485 (Ch), by which equity became seen as a supplement to law and something in itself quite like law. This led in many ways to the decay of equity on the 18th and 19th centuries as equity became increasingly rigid, bound up with an equally narrow conception of property rights in law. Certainly wide-ranging equitable doctrines based on moral arguments did not attract much approval in an age of commerce which prized certainty and predictability.

Modern equity, as we shall see, has become much more flexible.

The 'Maxims of Equity'

The 'maxims of equity' have operated like the 'canons of construction' in statutory interpretation – principles that the court can look to in deciding upon rules and their application. Case law remains important but the principle of precedent is much more flexible and the maxims remain important.

Some maxims of particular relevance:

- **EQUITY ACTS IN PERSONAM**

The maxim *Equity Acts in Personam* means that a court of equity has a jurisdiction over a specific person; it is thus a personal jurisdiction. Historically this meant that equity was not exercised over the person because he or she owned something (held title) but because of their conduct; thus, equity acts on the conscience of the defendant and prevent that person from acting unconscionably.

Equitable remedies and interests, then, generally operate against only the person subject of the court's order which is enforceable though the threat of imprisonment for contempt. For example, a common law judgement vesting title in property in A is traditionally considered as 'good against the world' – A enjoys rights *in rem* – whilst the order of a court in equity enforcing an equitable interest enforces a beneficial interest in the property in the hands of the defendant regardless of legal ownership. Thus, whilst the equitable interest can be enforced against a person with legal title to the property, it can also be enforced against a person never having had either legal title or possession of the property (a third party accessory to breach of trust) where the court's jurisdiction can be invoked. The only person consistently to defeat the beneficial interest enforced by the court is a bona fide purchaser for fair value ('equity's darling') of the title who has no notice of the beneficial interest – his conscience is not affected and equity will refrain from exercising its jurisdiction over him.

- **EQUITY FOLLOWS THE LAW**

A person who comes to equity for relief against interference with a property right gains no more rights in equity than enjoyed at law, whether framed merely as a matter of the

width of an equitable remedy or the recognition of a legal interest as an interest protected in equity.

- **WHEN THE EQUITIES ARE EQUAL THE LAW PREVAILS**

Where two people have equally claims in equity, the claim that is supported by a common law claim (i.e. based on title to the property), prevails. Similarly, when there are two such competing claims, the claim made first has priority ('when the equities are equal, the first in time prevails').

- **HE WHO SEEKS EQUITY MUST DO EQUITY**

A person coming to equity cannot seek an advantage to the detriment of the defendant; for example, by seeking an accounting of profits made but leaving the defendant to suffer a tax burden alone based on an earlier transaction.

- **HE WHO COMES TO EQUITY MUST COME WITH CLEAN HANDS**

The court retains a discretion to refuse equitable relief where the plaintiff has acted improperly (say by breaching a contract in the same matter).

- **EQUITY IS EQUALITY**

Absent other considerations, those similarly situated enjoy equity's protection in equal shares.

- **EQUITY ASSISTS THE DILIGENT NOT THE TARDY**

This is similar to the principle that equity promotes self-reliance: "[i]t is not the function of equity to give relief to plaintiffs from their own folly and neglect, but to restrain defendants taking unfair advantage of them;" *Tufton v. Sporni* [1952] 2 TLR 516, 519; *Allcard v. Skinner* (1887), 36 Ch.D. 145, 182, 188. However, the traditional attitude is for equity to restrain injustice rather than to do justice, per Lord Evershed MR writing extra-judicially in (1954), 70 LQR 326,329.

- **EQUITY LOOKS ON THAT AS DONE WHICH OUGHT TO BE DONE**

This deals with equity's ability to regard a private transaction as intended or to regard an equitable obligation as taking effect when it is most just in the circumstances.

- **EQUITY WILL NOT PERFECT AN IMPERFECT GIFT**

Equity will not usually order a gratuitous transfer. This will be considered in detail later in the course.

- **EQUITY WILL NOT ALLOW A STATUTE TO BE USED AS AN INSTRUMENT OF FRAUD**

Formal statutory provisions intended to protect an interest cannot be manipulated outside their rationale to provide equitable relief.

THE TRUST CONCEPT

The concept itself is difficult to define. Consider this dicta in *Green v Russell* [1959] 2 QB 226, 241:

“a trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) for the benefit of persons (who are called the beneficiaries or *cestuis que trust*), of whom he may himself be one, and any one of whom may enforce the obligation.”

Terminology

Settlor - the person who set up a trust (in a ‘settlement’) by contributing property to the trust and vesting ownership in the trustee.

Trustee - an individual or trust institution that holds legal title to property in trust for the benefit of the trust beneficiaries.

Beneficiary - the person for whose benefit the trust is created. The beneficiary has an equitable interest in the trust property which can be enforced against the trustee.

Classification of Trusts

There is no authoritative system of classification of trusts. The conventional orthodoxy is to group trusts (other than charitable trusts) as express, resulting and constructive:

Express trusts:

- Such trusts are created by express or inferred intention of the settlor *inter vivos* or the testator as a testamentary disposition of property. That intention must be expressed in relation to certain property and in favour of certain people. These are known as the ‘three certainties’ (certainty of intention, certainty of property, certainty of beneficiaries).

- Such trusts may be either “bare trusts” (the trustee has no active management duties, and merely holds for the beneficiary) or active trusts.
- Express trusts might be fixed or discretionary, or even settled for charitable purposes. A fixed trust has specific beneficiaries who have set beneficial interests without any room for discretion on the part of the trustee to select beneficiaries or set their equitable entitlements.

Resulting trusts:

These are trusts that arise by operation of law based on the presumed, but rebuttable, intention of the settlor to settle a trust on behalf of herself. For example, a failed gift is held on resulting trust for the transferor.

Constructive trusts:

Here the trust arises by operation of law without respect to the intent of the settlor, and in opposition to the intent of the current legal owner. It is often a remedial device.

Advantages of a Trust

The advantages of the trust are many. The settlor can adjust ownership of the property with a high degree of flexibility, strong enforcement mechanisms, and very effective means of manipulating property. Thus, *ownership* can be separated from *control* (or *management*) of the trust property and the benefits distributed to different people, at different times, and under different conditions.

One can point to a number of instances in which the trust is especially useful:

- *the promotion of charitable purposes:* whilst a charity may wish to incorporate or form an unincorporated association, the trust allows for funds to be collected in relation to a single-occurrence or on a more permanent basis with little fuss or organisation. Those funds can be applied for different but related purposes in appropriate circumstances where the original purposes have lapsed, become redundant, etc. Whilst law may allow the parties to act, trusts makes the operation simpler and more effective.
- *commercial uses of the trust:* The use of the *Quistclose trust* (wherein what would ordinarily be regarded as a loan for a specific purpose that has not been achieved – for example, to pay a specific third party creditor - is regarded as a trust) allows commercial actors to effect commercial transactions with security. Some argue that this type of trust is contrary to the policy underlying the insolvency laws, however equity has taken the position that the trust is especially useful and supports an interest in commerce which is especially useful for smaller businesses that are in fact close to bankruptcy but can be saved by continued trading, made possible in part through the *Quistclose trust*.

- *the secret trust and testamentary dispositions*: though controversial, the trust allows for flexible disposition of property upon the settlor's death which allows S to make provision for persons privately and discretely. Whilst many argue that this unjustifiably dispenses with the rules respecting wills and risks fraud, the benefits to beneficiaries of such trusts (.e.g. illegitimate children) are very useful indeed.

In all of these areas, legal devices cannot compare with the trust concept for ease, flexibility, and adaptability.