

# The history of equity and common law law equity essay

[Law](#)



A few lines about the history of equity and common law (Court of Chancery etc). Although equity literally means fairness, we use this term for the body of principles developed by the Court of Chancery. If someone says I don't want the money (the damages), I want the land. Common law courts can't help you. Equity can: specific performance. Equity may intervene to mitigate the harshness of the common law. for e. g. it might allow a mortgage to be redeemed even though the actual redemption date had passed. Equity is discretionary. In *Patel v Ali* (1984) Ch. 283 (HC), an equitable remedy (specific performance) was refused because the court believed that the seller, who had a leg amputated and was relying on help from friends, would lose the help if she was forced to move. At common law, she would have to pay damages for breach of contract, but equity intervened and the court exercised its discretion albeit on a principle: the granting of specific performance would have amounted to hardship. FusionThe Judicature Acts, abolishing the Court of Chancery and the Courts of Common Law, introduced High Court and Court of Appeal and gave a preference to equity in case of a conflict (s 25 (11) The Judicature Act 1873). In *Walsh v Lonsdale* (1882) 21 Ch D 9 (HC), a lease was held to be existing even though it was not granted by deed: equity looks on that as done which ought to be done. The question whether the common law and equity are fused is still debated. This can be looked at from two angles: administrative and substantive. The Judicature Acts brought the common law and equity under one roof and fused the two legal systems administratively, but whether it has fused the substance of the two legal systems is subject to debate. Ashburner in *Principles of Equity* considered common law and equity to be two separate streams which ' do

not mingle their waters'. Sarah Worthington advocates the end of equity and considers its origins to be in history and not in policy. The Courts of Common Law developed law of torts, whereas the Court of Chancery developed 'equity'. Court of equity was a court of conscience: the rulings were based not on formal rules of evidence but on the replies of the defendants to the interrogation. It would be unconscionable for the chancellor to deal with one suitor differently than the other. Since 1875, the common law and equity are applied under the same roof. In the eyes of equity, those for whom the property is held are the real owners of the property (page 14). The legal owner is entitled to claim the dividends of the company shares, an equitable owner is entitled to the monies equivalent to the dividends. Because the legal owner is the sole owner and has the beneficial interest, it doesn't mean that he has an equitable title too: he is not holding it on trust for anyone. A trustee has all the same powers as the legal owners, he just have duties as well. Beneficiary's equitable interest is proprietary and personal both. Proprietary: the beneficiary's rights are attached to the trust property itself, if the property disappears, the trust disappears. If the property is transferred in breach, the beneficiary can enforce his continuing equitable interest in the property. Personal: they will get their interest in accordance with the trust terms. The trust is the trustee's obligations to carry out the trust terms properly. It is the trustee's personal obligation to carry out the trust according to the terms with respect to the property, but then it is dependent on the very existence of the trust property itself. Therefore, the trust is fundamentally proprietary: the obligations are not just attached to the trustee for the time being but they run with the property. The creation of

trust, it seems, requires the distinction between legal and equitable title to be maintained. Whether beneficiary will exercise his personal or proprietary right depends on the situation. If the trustee breaches any of his obligations, he will rely on personal right to sue him. If it is about tracing the proceeds of a trust property, he will rely on proprietary rights (they are enforceable against the world). If the trustee has breached his obligation in the sense that he has unlawfully transferred the legal title to someone else when he is not allowed on the trust terms, the beneficiary might exercise both. The fusion question is: was it just an administrative fusion of laws, or was it about having just a single system? Lord Selborne LC: '... those rights and remedies.. under which we actually live.. should be equally recognised.. in all branches of the Court'. The government was of the view that it was just an administrative fusion. AG Sir John Duke Coleridge said: ' The defect of our legal system was.. that if a man went for relief to a Court of Law, and an equitable claim or an equitable defence arose, he must go to some other Court and begin afresh. Law and Equity.. if the Bill passed.. would be administered concurrently'Tinsley v Milligan is an example of substantive fusion of law and equity: There was a difference in the way in which common law and equity dealt with that situation. HL said that the same approach should apply to circumstances of illegality whether your claim is for common law property right or equitable property right. Lord Browne-Wilkinson: ' More than 100 years has elapsed since the fusion of the administration of law and equity. The reality of the matter is that, in 1993, the English law has one single law of property made up of legal and equitable interests'. Although equity means fairness and justice, we do not take it in this way, for it doesn't

mean that the common law rules and principles are based on unfairness and injustice. A common law rule is the one that has its roots in the law administered in the Courts of Common Law before 1873. An equitable rule is the one that has its roots in the law administered in the Court of Chancery. When we, as students of law, talk about 'having property in something', we mean that property is the legal right involved in the thing, and is not the thing itself. Ownership and proprietary right are sometimes interchangeably used but, in the words of Justice James Edelman, 'the former expression might be better avoided altogether'. A legal proprietary right is an interest recognised by common law courts as property and to create or transfer these there were some formalities to be undertaken. If the formalities are not undertaken, the equity comes into play and recognizes the interest as a property if it ought to be recognized as such. These interests are therefore the equitable proprietary rights because they are recognized in equity alone. It is important to understand this as this is of major importance while resolving the issues of priority. A principal example of equitable proprietary right is the beneficial interest under a trust. It is equitable because the common law does not recognize this interest. Some beneficial interests under a trust will not be vested at all until some conditions are met. These are called conditions precedent to vesting. Others will not be vested and will not affect the validity of the trust. An example is a discretionary trust where the trustee decides the allocation of interests by is/is not test. When we have a trust instead of absolute ownership, we have two people owning the property. One is regarded as owner at common law (trustee), the other is regarded as owner in equity (cestui que trust or beneficiary). The position of

the owner in equity is closer to the one of legal owner in absolute ownership in terms of entitlement to enjoy the property. To put it in simpler terms, the person benefiting from the property has equitable title and the one ensuring that this happens has the legal title. However, before the trust of property is created, it is only the legal title that exists (see Figure 1 in Appendix). It is only after the creation of the trust that the equitable title arises. This was explained in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 where Lord Browne-Wilkinson stated: '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.'

### **Australian Article ('Discussing' the question)**

The 'property right' in equity is different from the 'property right' at common law. In *Shell UK Ltd & Ors v Total UK Ltd* [2010] EWCA Civ 180, Shell suffered enormous losses because of its failure to supply fuel to its customers as a result of the explosion at oil terminal, for which Total was held liable. It is important to mention *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785, which became an authority following the decision that the person has to have either the legal ownership or a possessory title at the time the damage occurred. Shell wanted to bypass this decision in Court of Appeal when it failed before the trial judge. The Court of Appeal allowed the appeal because it believed that the beneficiary is able to recover the consequential losses which only he has

suffered, if the trustee is joined to the action. The reasoning of the Court of Appeal has in it the essence of the idea that the equitable titles and legal titles should be treated in the same manner: '[we] would be prepared to hold that a duty of care is owed to a beneficial owner of property (just as much as to a legal owner of property)' (at 102 [142]) Therefore, Shell neglected the point that there is a difference between 'proprietary right' in equity and at common law. This decision was in contrast to the one in *MCC Proceeds Inc v Lehman Brothers International (Europe)* [1998] 4 All ER 675 where it was held that it is only the trustee who can sue a third party for conversion of bearer shares. However, the crux of the reasoning of CA in Shell was that the concept of the real owner is contradictory at common law and in equity: both see different people as the owner. It is essential to remember that the beneficiary's interest is not a right to the trust, rather it 'relates to the rights which the trustee holds' (page 7). This understanding of the nature of the beneficiary's interest has attracted much academic support (A Burrows *The Law of Restitution* (3rd edn); R Chambers "Constructive Trusts in Canada" (1999) *Alberta L Rev* 173; L Smith, "Unravelling Proprietary Restitution" (2004) 40 *CBLJ* 317; B McFarlane and R Stevens "The Nature of Equitable Property" (2010) 4 *Journal of Equity* 1). But the Court of Appeal treated the beneficiary as having a right in relation to the trust asset itself in Shell.