

Analysis of doctrine of equity



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The doctrine of equity was created to fill in the gaps of common law by providing more flexible remedies, unlike common law which only provide damages such as injunction, specific performance, equitable estoppel etc. Equity only governed by the maxims where it is based on the principles of fairness and conscience and are not as strict as common law.

Hence, as the doctrine of equity developed and became more and more flexible in the past centuries, it has now been argued by many academics that equity is now too conceptually messy to be useful. It has been argued that equity is a blend of strict rules and discretionary principles which attributes to English Law with its flexibility. He further explained that equity comprised of firm rules as well as discretionary principles which will be applicable in different circumstances.[1]In deciding this, the flexibility of equity would be discussed, especially in the areas of such as the three certainties, Quistclose trust and doctrine of fiduciaries.

In the case of *Knight v Knight* [2], Lord Langdale MR had laid down the 'three certainties test' to create a valid private express trust. Certainty is an important element in trust as without certainty, the intention, object and subject of the trust could not be determined by the courts which would then lead to an invalid trust.

Under certainty of intention, the settlor must use very clear words and expression to impose a legal obligation for the trustee to hold the property on trust. Generally, imperative words are more encouraged to be used in a will as compared to precatory words. In the case of *Re Adams* [3], the phrase 'in full confidence' was used in the clause and it was held that there was no

trust created as there is no imperative words used in the will. However, in *Comiskey v Bowring* [4], even the same phrase was used as in *Re Adams* case, but it was held that the wording created a trust. It could be submitted that the courts now no longer only look at a single word to determine whether there is a trust but look at the whole of the will.

In more complex situations where there are no documents available, the courts might infer intention from acts or the words of the parties. In *Paul v Constance* [5], it was held that the words ‘the money is as much yours as it is mine’ is sufficient to make a valid trust as there was repeated conduct and has a clear intention. It was suggested that the courts are being too generous in the decisions.

However, in *Jones v Lock* [6], it was held that it was insufficient to manifest a clear intention for the father to create a trust for the son. The problem is that both cases were lack of specific intention to create a trust, there were only general intention to benefit. However, both cases were held differently. It could be argued that the actions were louder than the words in *Paul*’s case. Gardner suggested that the difference of both cases was merely the reflection of changing judicial attitudes.[7]

Next, under the certainty of subject matter, the test used by the courts would be whether the property could be certainly identified. However, the courts have recently created an artificial distinction between tangible and intangible property. In *Re London Wine Co* [8], it was held that no two bottles of wine are alike and therefore it could be identified for their customers.

However, in *Re Goldcorp Exchange Ltd* [9], it was held that the claimants whose gold bullion had been segregated were successful in the claim but not those whose bullion had not been segregated. The reasoning was that the stock of the gold has been constantly changing and it was hard to say which particular piece of gold belongs to any particular customer. It could be submitted that the courts were trying to uphold the principle of fairness by having a different decision from *Re London*'s case as the tangible property items here could not be segregated properly.

On the other hand, in *Hunter v Moss* [10] where the property is intangible, a different approach was taken by the courts. In the case, it was held in favour of the claimant and stated that the segregation as in tangible property is not necessary where a trust is made over an intangible property. The reasoning for this is that since the shares are indistinguishable from one another, they will be treated as equal. Based on all three cases above, it could be seen that this area is messy as this certainty has not been applied consistently and the judges have too much discretion changing the judicial attitudes.

Lastly, the certainty of object matter required that there must be ascertainable beneficiaries in a trust. *Re Baden (No. 2)* [11] had shown that there are different approaches to deal with when there is a class of objects in a discretionary trust. The test used in the case was originated from *McPhail v Doulton* [12] where the application of a complete list test was impossible and borrowed the 'is or is not' test from *Re Gulbenkian's Settlements* [13] to determine the beneficiaries.

However, there are 3 interpretations on the applicability of the test. Firstly, Sachs LJ upheld the literal application of the original test, but reversed the burden of proof on the claimant to prove that he falls within the class of beneficiaries. Sachs LJ further noted that this does not apply to all discretionary trust situations as a lot of trust with uncertainty would be validated. Secondly, Megaw LJ suggested the approach used in *Re Allen* [14] which was overruled by *Re Gulbenkian*'s case where it held that a trust should be valid if a substantial number of people can show that they are in the class. Finally, Stamp LJ suggested a strict approach where he stated that it is necessary for both conceptual and evidential certainty to exist without any unknown of the certainties. Any unknown of the certainties would lead to an invalid trust. It could be submitted that this area would be too messy for the future cases to refer as there are too many different views.

The flexibility of equity could also be found in Quistclose trust which created by Lord Wilberforce in *Barclays Bank Ltd v Quistclose Investments Ltd* [15]. The 'Quistclose trust' arises when a company borrows money with a particular purpose in mind for that money. Lord Wilberforce suggested there are primary trust to pay dividend and secondary trust arose in favour of the lender if primary trust failed. However, this was heavily criticised as it failed to meet the three certainties to be a valid trust. Later, Lord Millet in *Twinsectra v Yardley* suggested that there is only one resulting trust instead of two trusts while majority of the court held that it was an express trust. In *Re EVTR* [16], Dillon LJ suggested that it was a constructive trust for the purpose of the loan. Moreover, academics like Alastair Hudson had suggested that the better analysis for this should be an express trust.

[17]Furthermore, in *Re Farepak Food* [18], Mann J held that there was no trust and described this as a 'contractual relationship' as opposed to trustee-beneficiary.[19]

Furthermore, equity also shown its flexibility in fiduciary area. A fiduciary is a person who holds a position of trust and confidence. Fiduciary has the duty to act in the best interest of the principal in a fiduciary relationship. A fiduciary is bound by the 'no conflict' rule where he must make sure that his duties to the principal do not conflict with his own interest and not allowed to make a profit. The leading case would be *Boardman v Phibbs* [20]which involves trust where it applied the strict rule which originally from cases such as *Keech v Sandford*[21]and *Bray v Ford* [22]. The decision was a made in majority of the judges while the other two judges gave dissenting judgments. Lord Upjohn in dissenting suggested that the case should be approached in a more equitable angle and should be decided on its own individual facts instead of laying down a strict rule to be followed like the common law courts.

However, in *Murad v Al-Saraj* [23], the majority of courts again decided by following the rules. Arden LJ from the majority suggested that the court should revisit the inflexibility of rule of equity in harsh circumstances. Furthermore, Jonathan Parker LJ from majority also suggested that it is the time for the court to relax the severity of the rule. In minority, Clarke LJ suggested that the fiduciary could argue for a share in profits even though they breached their duty by reasoning with *Warman International v Dwyer* [24]. In *Foster Bryant Surveying v Bryant* [25], it was held that the defendant was not required to account his subsequent profit as the facts were different

from the ‘ traditional’ cases. It was suggested that this case law would only be followed when there are same facts in the future.

Based on the above, equity has been flexible to evolve to suit the needs of the society. Hence, it is tremendously complex as it was built centuries of laws, but the courts are free to generate new principles and to adapt or apply the old ones depending on the situation. As suggested by Alastair Hudson, equity forces us to consider the plight of the individual in this complex world and to save that individual from being caught up in the legal machine or exposed to irremediable suffering.[26]In conclusion, it could be submitted that equity is still useful even though it might be conceptually messy as shown above. However, this would be inevitable as equity has to be flexible but it would be also required to maintain some consistencies across the cases to prevent the law from being vague.

(1650 words)

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