

CHAPTER 18 EQUITY AND TRUSTS

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SECTION 1 INTRODUCTION

Dual Legal System

18.1.1 Singapore, a former British colony, has inherited the common law legal system. One of the unique features of the common law model is the dualism which is inherent in the legal system. Common law legal systems are largely precedent-based and the precedents can be divided roughly by their origins, namely, Law and Equity. Equity may be defined as a body of rules, principles and remedies initially developed and administered in the English High Court of Chancery before 1873. Both branches of the law are historically distinct although both are now administered by the same courts concurrently (see section 3 of the Civil Law Act (Cap. 43, 1994 Revised Ed.) and section 26 of the Subordinate Courts Act (Cap. 321, 1999 Revised Ed.)).

Reception of Equity in Singapore

18.1.2 English principles of Equity were introduced to Singapore through the Second Charter of Justice 1826 (see *R v Willans* (1858) 3 Ky 16). Section 3 of the Application of English Law Act (Cap 7A, 1994 Revised Ed.) stipulates that the 'common law of England (including principles and rules of equity), so far as it was part of the Law of Singapore immediately before the commencement of this Act, shall continue to be part of the law of Singapore' subject to modification and suitability to the circumstances of Singapore (see A. Phang, *The Law of Contract*, (Butterworths, 1998), 19 – 22).

Relationship Between Law and Equity

18.1.3 Although there has been a merger of administration of Law and Equity, the traditional view is that there is no fusion of equitable and common law rules and principles. A familiar metaphor used to describe this state of affairs is as follows: 'the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters' (see W. Ashburner, *Principles of Equity* (Butterworths, 1933), 18. Cf. *United Scientific Holdings v Burnley Borough Council* [1978] AC 904, 944). However, in recent times this view has been challenged by some distinguished scholars who call for greater integration of Equity and the Law

(see A. Burrows, 'We Do This at Common Law But That in Equity' (2002) 22 OJLS 1; S. Worthington, *Equity*, (Clarendon, 2003), 293, 309. Cf. Meagher, Gummow and Lehane's *Equity [:] Doctrines and Principles* (Butterworths, 2002), 52 - 54).

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SECTION 2 THE CONSCIENCE OF EQUITY AND EQUITABLE MAXIMS

The Conscience of Equity

18.2.1 One of the central themes of Equity is that: 'Equity is dynamic. A great attribute, thus an advantage, of equity, is its flexibility to achieve the ends of justice' (per Chao JA [Chwee Kin Keong v Digilandmall.com \[2005\] 1 SLR 502](#), 528). It has often been said that one of the basic principles of Equity is that it operates on the conscience of the litigants (see *Riverlate Properties Ltd v Paul* [1975] Ch 133, 141 cited in [Chwee Kin Keong v Digilandmall.com \[2005\] 1 SLR 502](#), 525 - 526). However, this does not mean that cases are decided on the subjective view of the judge of what is 'just' in the case without reference to principles and case law. Whether a litigant's conscience is tainted is determined by a careful examination of the facts of the case and relevant precedent.

Equity and Legal Innovation

18.2.2 Another outstanding characteristic of Equity has been its capacity to be a fertile source of legal innovation. It has been said that Equity is not past the age of childbearing but that its 'progeny must be legitimate – by principle out of precedent' (per Bagnall J *Cowcher v Cowcher* [1972] 1 WLR 425, 431). An example of Equity's innovation in the Singapore context is the line of cases whereby the courts have granted injunctions on abusive calls of performance bonds based on the equitable notion of unconscionability. (See e.g. [GHL Pte Ltd v Unitrack \[1999\] 4 SLR 604](#)).

Equitable Maxims

18.2.3 Equitable maxims are not rules which can provide answers to specific legal problems. Rather, they are pithy summary statements of broad themes which underlie equitable concepts and principles.

The Maxims

18.2.4 Some significant maxims of Equity are:

- Equity looks on as done which ought to be done.
- Equity follows the law.
- He who comes to Equity must come with clean hands.
- He who seeks Equity must do Equity.
- Where Equities are equal the law prevails.
- Where equities are equal, the first in time prevails.
- Equity is equality.
- Equity assists the diligent, not the tardy.

Equity looks to the intent, rather than to the form.
Equity will not assist a volunteer.
Equity acts in personam.
Equity will not suffer a wrong without a remedy.
Equity will not allow a statute to be made an instrument of fraud.

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SECTION 3 EQUITABLE OBLIGATIONS

Introduction

18.3.1 Equity governs certain civil obligations. The most well known are fiduciary obligations, obligations relating to confidential information, knowing receipt and dishonest assistance.

Fiduciary Obligations

18.3.2 Fiduciary obligations are imposed upon those who are in a position of trust and confidence vis-à-vis another person. The core idea of a fiduciary duty is that a fiduciary is under an obligation to be loyal to his principal. Fiduciary obligations were first developed in the context of a trust (see *Keech v Sanford* (1726) 25 ER 223). Over time this concept has been extended to govern the management of other relationships like company directors and their companies, the solicitor-client relationship and the relationship between partners (see *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41).

Identifying Fiduciary Relationships

18.3.3 Certain classes of relationships are established as being fiduciary in nature. These include:

Trustee-Beneficiary (*Keech v Sanford* (1726) 25 ER 223).

Company directors vis-à-vis their companies (see [Hytech Builders Pte Ltd v Tan Eng Leong](#) [1995] 2 SLR 795).

Solicitor-client (see [The Law Society of Singapore v Khushvinder Singh Chopra](#) [1999] 4 SLR 775).

Agent – principal (see [ERA Realty Network Pte Ltd v Puspha Rajaram](#) [1999] 1 SLR 190).

Partners (see <http://www.singaporelaw.sg/rss/judg/5433.html>). See also H.Y. Yeo, *Partnership Law in Singapore*, (Butterworths, 2000), 167 - 186).

18.3.4 The categories identified above are by no means exhaustive. Courts have been known to impose a fiduciary obligation in other relationships when the relationship is one of trust and confidence (see *Meagher, Gummow and Lehane's Equity* [:] *Doctrines and Principles* (Butterworths, 2002), 158 – 159).

Identifying the Content of Fiduciary Obligations

18.3.5 It has been said the 'standard of duty imposed by law on a fiduciary is the highest standard known to the law. It is a duty to act for someone else's benefit by sacrificing one's own personal interest to that of the other. If the fiduciary is not prepared to make such sacrifice he will never be able to protect and advance the interest of the other. Selfishness is the antithesis of selflessness. The office of a fiduciary is founded on selflessness. Selfishness is absolutely prohibited' (per GP Selvam in [Kumagai-Zenecon Construction Pte Ltd and Another v Low Hua Kin \[2000\] 2 SLR 501](#), 505 – 506; upheld by the Court of Appeal in [\[2000\] 3 SLR 529](#)). Thus, a fiduciary has a duty not to put himself in a position of conflict of interests, not to misuse trust property and confidential information, and not to make an unauthorised profit by reason of his position as a fiduciary.

Breach of Fiduciary Obligations and the Importance of Context

18.3.6 In determining whether a fiduciary obligation has been breached, it is important to consider the context of the relationship (see [Singapore River Cruises v Phun Teow Kie \[2000\] 4 SLR 791](#); J.D. Davies, 'Keeping Fiduciary Liability within Acceptable Means' [1998] Sing JLS 1, 5 – 7). The strict fiduciary rules which apply to trustees might not apply with regard to other fiduciary relationships which might arise in a commercial context. For example, where there is a contract between the fiduciary and the principal, the scope of the fiduciary duties are defined by the agreement (see [ERA Realty Network Pte Ltd v Puspha Rajaram \[1999\] 1 SLR 190](#); [\[1998\] SGHC 213](#)). Also, different rules of causation and remoteness may apply in cases of trustees and non-trustee fiduciaries.

Distinguishing Breaches of Fiduciary Duties and Negligence

18.3.7 Not all breaches of duties by fiduciaries are necessarily breaches of fiduciary obligations. A breach of fiduciary duty must be distinguished from mere incompetence. The latter does not attract equitable rules but are governed by tort principles (see [Bristol & West Building Society v Mothew \[1998\] 1 Ch 16](#)).

Causation and Remoteness of Loss

18.3.8 Even where a breach of fiduciary has occurred, the plaintiff must show that the consequences complained of flowed from the breach of fiduciary duty (see [Ohm Pacific Sdn Bhd v Ng Hwee Cheng Doreen \[1994\] 2 SLR 576](#); [Target Holdings v Redfern \[1996\] AC 421](#)). Cf. [Low Hua Kin v Kumagai-Zenecon Construction Pte Ltd \[2000\] 2 SLR 501](#) where it was said that the principles of causation, foreseeability and remoteness do not readily apply in considering the fiduciary's liability to make restitution. But on appeal [\[2000\] 3 SLR 529](#), the Court of Appeal while not commenting on this part of the judgment, embarked on a careful analysis of whether the chain of causation had in fact been broken. It would seem that the Court of Appeal's approach implicitly recognises that matters of causation do come into play in deciding the fiduciary's obligation to make restitution. 'See also [John While Springs v Goh Sai Chuah Justin \[2004\] 3 SLR 596](#).'

Remedies

18.3.9 The remedies against a fiduciary who makes an unauthorised profit may be personal or proprietary. A fiduciary may in appropriate circumstances be made to account for an unauthorised profit or to hold a property acquired in breach of a fiduciary duty on constructive trust for the plaintiff.

Obligations in Relation to Confidential Information

18.3.10 A person breaches a duty of confidence if it can be shown that: (a) there was unauthorised use of information to the detriment of the person communicating it; (b) the information had the necessary quality of confidence; and (c) the information was imparted in circumstances importing an obligation of confidence (see *Coco v Clark* [1969 RPC 41; applied in *X Pte Ltd and Another v CDE* [1992] 2 SLR 996; [1992] SGHC 229).

The Need to Particularize the Confidential Information

18.3.11 It has been said in the context of an allegation of a breach of confidence by an employer against an employee, 'an employer must particularize the confidential information which he seeks to protect. It is oppressive for him to rely on a general statement that the information is confidential or to delay the giving of particulars until after discovery' (per Lai J in *Tang Siew Choy and Others v Certact Pte Ltd* [1993] 3 SLR 44). See also *Chiarapurk Jack v Haw Par Brothers International Ltd* [1993] 3 SLR 285; *Flamelite (S) Pte Ltd v Lam Heng Chung* [2001] SGHC 66. An appeal in *Flamelite* was lodged to the Court of Appeal on other grounds: see [2001] 4 SLR 557.

Remedies

18.3.12 Remedies for a breach of confidence include injunctions, account of profits, delivery up and possibly monetary compensation. There is also some Commonwealth authority suggesting that a court can declare a constructive trust as a remedy for a breach of confidence (see *Lac Minerals v International Corona Resources* (1989) 61 DLR (4th) 14. Cf. HW Tang 'Confidence and the Constructive Trust' (2003) 23 Legal Studies 135).

Knowing Receipt

18.3.13 The elements of liability for knowing receipt are as follows: (a) there is a trust property; (b) the property (or its traceable proceed) is transferred in breach of trust to the defendant; (c) the defendant received the property for his own benefit; and (d) the defendant had the requisite knowledge of the breach of trust (see *Caltong (Australia) Pty Ltd v. Tong Tien See Construction* [2002] 3 SLR 241). With regard to element (a) and (b), must there be the existence of trust property before liability for dishonest assistance can attach to a defendant or can a person be liable for dishonestly assisting in a breach of fiduciary duty absent the presence of trust property? In two Singapore cases, *Banque Nationale de Paris v Hew Keong Chan Gary* [2001] 1 SLR 300 at [136] and *Malaysian International Trading Corp Sdn Bhd v Interamerica Asia Ptd Ltd* [2002] 4 SLR 537 at [5], Lai Kew Chai J assumed that liability for dishonest assistance can extend to dishonestly assisting in a breach of

fiduciary duty. While it is recognised that the former case was overturned on agency grounds (see [Banque Nationale de Paris v Hew Keong Chan Gary \[2002\] 1 SLR 29](#)), it is suggested Lai J's analysis is the correct approach. Since liability appears to be premised on accessory liability, there seems to be no reason for a dogmatic insistence on the existence of trust property. Further, Lai J's approach obviates the need to make the finding of a trust on slender grounds before liability for dishonest assistance can be established (see e.g. [Bansal Hermant Govindprasad v Central Bank of India \[2003\] 2 SLR 33](#)). Element (d) is contentious because the degree of knowledge required depends on the theoretical framework adopted to explain this action.

Competing Theories on Knowing Receipt

18.3.14 At the moment, there are three competing theories to explain liability for knowing receipt of trust property. They are:

(a) Knowing receipt is premised on the principle of unjust enrichment and hence liability is strict upon proof of receipt of trust property. 'It would be confined to restoring an unjust gain. Change of position would be available as a defence accordingly' (per Lord Nicholls, 'Knowing Receipt: The Need for a New Landmark' in *Restitution Past Present and Future*, (Cornish et. al. (eds.), (Hart, 1998), 244);

(b) Knowing receipt is premised on the concept of unconscionability. Nourse LJ in *BCCI v Akindele [2001] Ch 437, 455* (noted Tjio, (2001) JBL 299) said that '[a]ll that is necessary is that the recipient's state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt'; and

(c) Knowing Receipt is better viewed as equity's cousin to the common law action of conversion. It is a response to the interference with the plaintiff's equitable title (see L. Smith, 'W(h)ither Knowing Receipt?' (1998) 114 LQR 394; L. Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (2000) 116 LQR 412). Since an equitable title is always susceptible to being defeated by a bona fide purchaser for value without notice, some degree of knowledge must be present before liability attaches.

Position in Singapore

18.3.15 In Singapore, it is not entirely clear which theory is accepted to explain liability for knowing receipt. There is dicta supporting a knowledge requirement for knowing receipt (see [Rajabali Jumabhoy v Ameerli R Jumabhoy \[1998\] 2 SLR 439](#); [Caltong \(Australia\) Pty Ltd v. Tong Tien See Construction \[2002\] 3 SLR 241](#)) and that knowing receipt is restitutionary in nature (see [Banque Nationale de Paris v Hew Keong Chan Gary & Ors \[2001\] 1 SLR 300](#), though note that an appeal was allowed on agency grounds: [Banque Nationale De Paris v Tan \[2002\] 1 SLR 29](#)). See also [Tang Hsiu Lan v Pua Ai Seok \[2000\] SGHC 163](#) for the suggestion that knowing receipt is restitutionary in nature.

Dishonest Assistance

18.3.16 The elements which must be proved to establish dishonest assistance are: (a) that there has been a disposal of the plaintiff's assets in breach of trust or fiduciary duty; (b) the defendant assisted or procured that breach of duty; (c) the

defendant acted dishonestly; and (d) the plaintiff suffered a loss ([Caltong \(Australia\) Pty Ltd v. Tong Tien See Construction \[2002\] 3 SLR 241](#)).

Defining Dishonesty

18.3.17 The difficulty in this area has been to define conduct which is deemed to be dishonest. There are two approaches to this problem. First, there is an objective approach to analysing dishonesty. Second, there is the partly objective/partly subjective approach to dishonest assistance derived from criminal law.

The Objective Approach

18.3.18 It has been said: '[a]cting in reckless disregard of others' rights or possible rights can be a tell-tale sign of dishonesty. An honest person would have regard to the circumstances known to him, including the nature and importance of the proposed transaction, the nature and importance of his role, the ordinary course of business, the degree of doubt, the practicability of the trustee or the third party proceeding otherwise and the seriousness of the adverse consequences to the beneficiaries. The circumstances will dictate which one or more of the possible courses should be taken by an honest person. He might, for instance, flatly decline to become involved. He might ask further questions. He might seek advice, or insist on further advice being obtained. He might advise the trustee of the risks but then proceed with his role in the transaction. He might do many things. Ultimately, in most cases, an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of honest conduct...Likewise, when called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party, such as his experience and intelligence, and the reason why he acted as he did' (per Lord Nicholls in [Royal Brunei Airlines v Tan \[1995\] 2 AC 378, 390 – 391](#)). This paragraph was cited by the Court of Appeal in [Bansal Hermant Govindprasad v Central Bank of India \[2003\] 2 SLR 33](#).

The Partly Objective/Partly Subjective Approach

18.3.19 A person is only regarded as dishonest if his conduct falls below the objective test of dishonesty and he himself realised that he is dishonest (see [Twinsectra v Yardley \[2002\] 2 AC 164](#) (noted by Yeo and Tjio, (2002) 118 LQR 502)). [Twinsectra](#) was cited with approval in the case of [Malaysian International Trading Corp v Interamerica Asia \[2002\] 4 SLR 537](#). However, the Privy Council (comprising of Lords Nicholls, Steyn, Hoffmann, Walker and Carswell) in [Barlow Clowes International v Eurotrust International \[2004\] W.T.L.R. 1365](#) has attempted to rationalise Lord Hutton's speech in [Twinsectra](#) as being no different from the principles stated in [Royal Brunei Airlines v Tan](#). As such, it is envisaged that the combined objective and subjective test of dishonesty will not survive when it is next considered by an English court and hence, should also not be accepted in Singapore.

The Position in Singapore

18.3.20 In Singapore, it is not entirely clear which approach is accepted to analyse the element of dishonesty since this issue has yet to be considered in depth by the Singapore courts.

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SECTION 4 EQUITABLE REMEDIES AND DEFENCES

Specific Performance

18.4.1 Specific performance is a discretionary equitable remedy whereby the court decrees that the defendant has to perform a promissory obligation. Specific performance is usually only decreed if there is no adequate remedy at law (see G. Jones and W. Goodhart, *Specific Performance*, (Butterworths,1996)) .

Injunctions

18.4.2 An injunction is a discretionary equitable remedy whereby the court restrains the doing of a wrongful act (a prohibitory injunction), or orders a particular act to be done (a mandatory injunction). An injunction is usually only ordered if damages are an inadequate remedy (see [Bengawan Solo Pte Ltd v Season Confectionery Co \(Pte\) Ltd \[1994\] 1 SLR 617](#)).

Declaration

18.4.3 A declaratory relief is an order made by a court which declares with finality the rights and obligations of the parties with regard to the dispute before it. Although this remedy historically originated in Equity, the modern declaratory remedy is governed by statute (see e.g. [Lim Kim Cheong v Lee Johnson \[1993\] 1 SLR 313](#); [Salijah v Mohd Irwan Abdullah \[1996\] 1 SLR 63](#); [Cheong Yoke Kuen v Cheong Kwok Kiong \[1999\] 2 SLR 476](#)).

Anton Piller Orders

18.4.4 An Anton Piller order is an order of court made to preserve property or documents which are the subject of a proposed or pending action. The name of this order is derived from the case of *Anton Piller v Manufacturing Processes* [1976] Ch 55. It has been said that the Anton Piller order is a draconian remedy and has very drastic effect and far-reaching consequences. As such, it should be granted only in exceptional cases (see [Computerland Corp v Yew Seng Computers \[1991\] SLR 247](#); [Asian Corporate Services \(SEA\) Pte Ltd v Impact Pacific Consultants Pte Ltd and Others \[2005\] SGHC 138](#)).

Mareva Injunctions

18.4.5 A Mareva injunction restrains a defendant from dealing with his assets to prevent their dissipation from the jurisdiction of the courts. The name of this order is derived from the case of *Mareva Compania Naviera v International Bulkcarriers SA*

[1980] 1 All ER 213n. See e.g. [Guan Chong Cocoa Manufacturer v Pratiwi Shipping SA \[2003\] 1 SLR 157](#) for guidance on the factors that are relevant to the granting of a Mareva injunction.

Delivery Up and Cancellation

18.4.6 Delivery up and cancellation is an equitable remedy leading to the destruction of relevant property.

Monetary Compensation

18.4.7 With regard to equitable damages, it is not entirely clear whether the Singapore courts have the jurisdiction to order such damages (see [Shiffon Creations \(Singapore\) v Tong Lee Co \[1987\] SLR 563; \[1987\] SGHC 53](#). Cf. K.B. Soh, 'Jurisdiction to Award Equitable Damages in Singapore' (1980) 30 Mal. L. Rev. 79).

Rescission

18.4.8 Rescission is an equitable remedy enabling transactions like contracts or other dispositions of property to be set aside at the instigation of one party, if the transaction was tainted by a vitiating element like misrepresentation, undue influence, mistake, duress or fraud. Rescission operates retrospectively and avoids the transaction ab initio (see e.g. [Forum Development Pte Ltd v Global Accent Trading \[1995\] 1 SLR 474](#)).

Rectification

18.4.9 Rectification is an equitable remedy to correct instruments or deeds which do not accurately reflect the continuing common intention of the parties. The plaintiff must show convincing proof of a continuing common intention that contradicts the written instrument (see [Kok Lee Kuen v Choon Fook Realty \[1997\] 1 SLR 182](#)). In exceptional circumstances, rectification may be allowed on a party's unilateral mistake e.g. the other party was guilty of fraud, or the other party knew of the mistake, or the transaction is a voluntary transaction.

Promissory Estoppel

18.4.10 The doctrine of promissory estoppel is classically stated in two well-known passages. The first of these is that 'it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results – certain penalties or legal forfeiture – afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties'. The second passage is that 'if persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will

either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time [has] elapsed, without at all events placing the parties in the same position as they were before' (see Halsbury's Laws of Singapore, vol 9(2) (LexisNe18is, 2003) at para 110.277). This passage was cited in [QBE Insurance v Winterthur Insurance \[2005\] 1 SLR 711](#).

Estoppel by Convention

18.4.11 Estoppel by convention operates '[w]hen the parties to a transaction proceed on the basis of an underlying assumption – either of fact or law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so' (see *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84, 122). The following are elements to estoppel by convention: (a) that there must be a course of dealing between the two parties in a contractual relationship; (b) that the course of dealing must be such that both parties must have proceeded on the basis of an agreed interpretation of the contract; and (c) that it must be unjust to allow one party to go back on the agreed interpretation (see [Singapore Island Country Club v Hilborne \[1997\] 1 SLR 248](#)). See also [MAE Engineering v Fire-Stop Marketing Services \[2005\] 1 SLR 379](#)).

Issue Estoppel

18.4.12 The elements of issue estoppel are as follows: (a) there needs to be a final and conclusive judgment on the merits; (b) that judgment has to be by a court of competent jurisdiction; (c) there has to be identity between the parties to the two actions that are being compared; and (d) there must be an identity of subject matter in the two proceedings (see [Lee Tat Development v Management Corporation of Grange Heights Strata Title No 301 \(No 2\) \[2005\] 3 SLR 157](#)).

Laches

18.4.13 Laches is an equitable doctrine which disentitles a plaintiff to relief in circumstances when there has been unreasonable delay or negligence in pursuing a right or claim. Two important factors in laches are: the length of the delay and the acts done during that time. It has been said that laches is an equitable doctrine which only applies to equitable claims (see [Syed Ali Redha Alsagoff v Syed Salim Alhadad \[1996\] 3 SLR 410](#)). However, the Court of Appeal has considered the applicability of laches in a restitution claim which is a common law claim (see [Management Corporation Strata Title No 473 v De Beers Jewellery \[2002\] 2 SLR 1](#)).

Unclean Hands and Illegality

18.4.14 A person seeking to invoke an equitable discretionary remedy must come to the court with clean hands. A person guilty of serious misconduct is precluded from obtaining such equitable remedy. Where a person seeks to assert a legal or equitable title, 'he is entitled to recover if he is not forced to plead or rely on the

illegality, even if it emerges that the title on which he relied was acquired in the course of carrying through an illegal transaction' (per Lord Browne-Wilkinson *Tinsley v Milligan* [1994] 1 AC 340, 376. This case was followed in [Top Ten Entertainment v Lucky Red Investments](#) [2004] 4 SLR 559). It must be noted that *Tinsley* has come under severe criticism and has not been followed in Australia (see *Nelson v Nelson* (1995) 70 ALJR 47; A. Phang, 'Of Illegality and Presumptions – Australian Departures and Possible Approaches' (1996) 11 JCL 53).

Set Off

18.4.15 Equitable set off is a substantive defence and is exercisable as a form of self-help remedy. A person is not obliged to wait for legal proceedings to be brought against him to deduct his cross-claim. The right of equitable set off arises where there are good equitable grounds for directly impeaching the title to the legal demand which the creditor is seeking to enforce. Equitable set off must arise out of the same transaction or is so closely connected with it that it would be manifestly unjust to allow the creditor to enforce payment without taking into account the cross-claim which could be deducted (see [Pacific Rim Investments v Lam Seng Tiong](#) [1995] 3 SLR 1).

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SECTION 5 EQUITY AND PROPERTY

Equitable Interest

18.5.1 One of the unique features of the common law system is the existence of a dual ownership of property. Ownership of property can be divided into the following: a legal interest and an equitable interest. A legal interest is enforceable against the whole world while an equitable interest is enforceable against the whole world except for the bona fide purchaser for value without notice. For example, where the property is held on trust, a trustee holds the legal title of the trust property, whereas the beneficiary has the equitable interest in the trust property. It must be noted that in matters of priority, the position might be decided by the relevant statute e.g. the Land Titles Act (Cap 157, 2004 Revised Ed.) will govern issues of priority with regard to registered land. The duality of property ownership also enables the creation of security interests such as mortgages, floating charges and fixed charges. Usually in these security interests, the debtor is the legal owner whereas the creditor is the equitable owner of the property. The equitable ownership can be asserted as a proprietary claim if the debtor becomes insolvent. It must be noted that some security interests must be perfected under the relevant statutory regime (see e.g. Companies Act (Cap 50, 1994 Revised Ed.).

Express Trust

18.5.2 An express trust is a trust which is expressly created to achieve certain desired consequences (see J. H. Langbein, 'The Secret Life of the Trust: The Trust as an Instrument of Commerce' (1997) 107 Yale Law Journal 165; S. Worthington, 'The

Commercial Utility of the Trust Vehicle' in *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds*, (Kluwer, 2002), 135). The usual pattern of an express trust is as follows: a settlor transfers trust property to the trustee on trust for the beneficiaries and specifies the terms of the trust. A settlor can also declare himself to be a trustee for the beneficiaries.

Elements of an Express Trust

18.5.3 The initial transfer of the trust property must comply with the relevant formalities (e.g. see section 7 of the Civil Law Act (Cap 43, 1999 Revised Ed) which requires a trust in respect of immovable property to be manifested and proved in writing signed by some person who is able to declare such trust). In order to be a validly constituted trust, the 'three certainties' must be met. First, the intention of the settlor to create the trust must be certain. Second, the identity of the trust property must be certain. Finally, the identity of the beneficiaries must be certain.

Resulting Trust

18.5.4 A resulting trust arises from the operation of law. There is a two-stage analysis pertaining to the existence of a resulting trust. The first stage involves the search of the transferor's actual intention. If the actual intention can be discerned, i.e. that a gift or an express trust or sale was intended, then no question of a resulting trust arises (see [Goh Swee Fang v Tiah Juah Kim \[1994\] 3 SLR 881](#); [Sitiawah Bee bte Kader v Rosiyah bte Abdullah \[2000\] 1 SLR 612](#)). The second stage operates where no intention may be discerned. In such circumstances, the law presumes a resulting trust if the transaction cannot be explained as a gift or sale of property. As succinctly put by Lord Upjohn, 'in reality the so-called presumption of a resulting trust is no more than a long stop to provide the answer when the relevant facts and circumstances fail to yield a solution' (see [Vandervell v IRC \[1967\] 2 AC 291, 313](#)).

Constructive Trust

18.5.5 A constructive trust is a trust which is imposed by operation of law on a defendant in certain circumstances according to equitable principles. For example, where a fiduciary in breach of his duties accepts bribes, the court will declare that the fiduciary holds the bribes on constructive trust for the benefit of the principal (see [Kartika Ratna Thahir v PT Pertambangan Minyak dan Gas Bumi Negara \(Pertamina\) \[1994\] 3 SLR 257](#)). It has been held in the following circumstances that a mortgagee of a property holds a property on constructive trust for a claimant where: (a) the mortgagee had knowledge of the claimant's unregistered beneficial interest in the property; (b) the mortgagee made an allowance of that interest and discounted it in the evaluation of the property; and (c) in the agreement between mortgagee and registered owner acknowledged and committed to honour the unregistered beneficial interest (see [Ho Kon Kim v Lim Gek Kim \[2001\] 4 SLR 340](#); [\[2001\] SGCA 62](#)). A constructive trust was also declared in respect of money mistakenly paid to a company where the recipient knew of the mistaken payment and the money was held in a separate account (see [Re Pinkroccade Educational Services Pte Ltd \[2002\] 4 SLR 867](#)).

Proprietary Estoppel

18.5.6 The elements of a proprietary estoppel are that there must be an assurance by the plaintiff which results in reliance to the detriment of the defendant (see e.g. [Goh Swee v Tiah Juah Kim \[1994\] 3 SLR 881](#)). Once these elements are present, an equity is said to arise in favour of the defendant against the plaintiff. The underlying philosophy of proprietary estoppel is an endeavour to ensure the 'minimum equity to do justice' (see *Crab v Avon District Council* [1976] Ch 179, 198; *Gillett v Holt* [2001] Ch 2001). The equity can be satisfied either by an order of monetary compensation or the transfer of property.

Tracing

18.5.7 It has been said '[t]racing is thus neither a claim nor a remedy. It is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property' (per Lord Millett in *Foskett v McKeown* [2001] AC 102, 128). The law of tracing is plagued by a perceived difference between common law tracing and tracing in equity. It is often said that the common law was only capable of tracing property when a clean substitution of property was involved and could not trace through a mixed fund. Equity, on the other hand, had no such difficulty in tracing into mixed funds. However, Lord Millett in *Foskett v McKeown* [2001] AC 102, 128 opined that 'there is nothing inherently legal or equitable about the tracing exercise. There is thus no sense in maintaining different rules for tracing at law and in equity' (see also Lord Steyn in *Foskett v McKeown* [2001] AC 102, 113). *Foskett v McKeown* [2001] AC 102 has been cited by the Singapore Court of Appeal in [Caltong \(Australia\) Pty Ltd v. Tong Tien See Construction \[2002\] 3 SLR 241](#)). For detailed rules of tracing see L. Smith, *The Law of Tracing* (Oxford, 1997).

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