

CHAPTER V: EQUITABLE REMEDIES

5.1 General Characteristics

From the birth of equity one feature is remarkable namely; its ability and willingness to grant elastic remedies which were not obtainable at common law. These remedies gradually evolved and became settled in their rules and principles. Some common features of these remedies may be deciphered:

5.1.1 Equity acts *in personam*

This is one of the most remarkable and most popular maxims of equity. During its early development, the equitable decree was enforced by acting against the person of the defendant for example by committing him to prison than by acting in rem against the property involved. The decree of specific performance for example is available against the individual defendant.

If the defendant is within the jurisdiction of the court and can be compelled personally to carry out his obligations, the court may order him to do so even though the subject matter of the contract is outside the jurisdiction of the court. In **Penn v. Baltimore**, the plaintiff and the defendant had entered into a contract fixing the boundaries of Pennsylvania and Maryland, the former of which belonged to the plaintiff and the latter to the defendant. The plaintiff sued the defendant in England to have the agreement specifically performed and one of the objections taken by the defendant related to the jurisdiction of the court. This objection was set aside by Lord Hardwick on the grounds that: "...the conscience of the party was bound by this agreement and being within the jurisdiction of this court which acts *in personam* the court may properly decree it as an agreement". Although the land was not within the jurisdiction, the defendant was, and the court would hold him in contempt, unless he complies.

Lord Selbourne held the same view in the case of **Ewing v. Orr Ewing** when he said that the courts of equity have always been, and will continue to be courts of conscience that render justice *in personam*, irrespective of whether the parties are locally *ratione domicilii* in England or not.

5.1.2 Discretionary

Generally, equitable remedies are discretionary. At law, a plaintiff who proved his case was entitled as of right not only to his judgement but also to enforce it by the forms of execution available at law. Little did his conscience appeal to the court, however dialectary he had been and however the result. Furthermore, the judge must grant a remedy on the bases of his conscience and general principles of law because otherwise this would amount to the denial of justice. It is through the help of this characteristic that the judge was able to use and enjoy wide discretion in equity to provide solution to almost, if not all cases that came before the court; thus the maxim equity will not suffer a wrong without a remedy.

5.1.3. Ensuring Observance:

Equitable remedies can never be issued unless the court can ensure that, they would be observed. Since equity does not act in vain, specific performance would be decreed only where defendant is in a position to comply with the order. In **Jones v. Lipmann (1962)**, the defendant entered into a contract to sell some land to the plaintiff. Then he sought to avoid specific performance by selling the land to a company acquired by him solely for this purpose and controlled by him. While specific performance will not normally be ordered for a vendor who no longer owns the property, here the defendant was still in a position to complete the contract because it was the creation of the vendor; a device and a sham; a mask which he held before his face in an attempt to avoid recognition by the eye of the law.

5.1.4. Common Law Remedies Inadequate

Equitable remedies are only available where common law remedies are inadequate. For example, where the obligation is a continuing one, necessitating a series of actions at law for damages, or where the law would be difficult to fortify. But specific performance would not be granted if on the construction of the contract the parties have agreed that a specific sum of money is to be paid as an alternative to performing the contract.

5.2. Types of Remedies

5.2.1 Specific Performance

This equitable remedy consists of an order of the court commanding a party to a contract or trust to perform his obligations according to its terms. The basis of the jurisdiction to grant specific performance is due to the inadequacy of common law remedies for damages in the breach of contract or trust. **Lord Selbourn** could say in

Wilson v. Northampton Junction Railways that “The court gives specific performance, instead of damages only where it can by that means do more perfect and complete justice”. Thus the common law remedy may be regarded as inadequate and specific performance may be available in an appropriate case where only nominal damage could be recovered by an action at law or where there is a continuing obligation which could necessitate a series of actions at law for damages.

Again damages at law can only be awarded for a breach of contract but a breach of contract is not absolutely important for a claim for specific performance. See the cases of **Mark v. Lilley** and **Hasham v. Zenab**.

The commonest cases where the court will readily grant specific performance are those for the sale of land or other transactions related to land for example lease. The court would hardly grant specific performance of a contract for the sale of goods or articles unless these were of exceptional beauty or rarity. Although the court will not order the sales of government stocks to deliver the stocks because government stock is always readily obtainable in the market, it would order performance of an agreement for sale of purchase of stocks or shares which cannot always be bought in the market; see the case of **Duncufft v. Albrecht**. Specific performance is not available as of right, but it is discretionary by nature. In *Haywood v. Cape*, it was held that: “it must be exercised according to fixed and settled rules”. Words that can be fair to a person may be unfair to another. The refusal of an individual to comply with the decree of specific performance may give rise to criminal sanction for contempt of court.

5.2.1.1. Grounds on which Specific Performance may not be granted or be refused

(a)- For specific performance to be granted, it must be in accordance with the rules of the law of contract and it must involve a contract which is clear and certain. By this we mean that the concluded contract must have respected the essential ingredients of a valid contract under English law namely offer and acceptance, consideration, intention to create legal relations and of course the absence of a vitiating factor such as mistake, threat or duress; the contract must not also be tainted with illegality.

(b)- Where the plaintiff would be adequately compensated by the common law remedy of damages, specific performance may not be granted: **Hutton v. Witting**. This is to say contracts which require constant supervision especially contracts between employers and employees are excluded. This is because the court may not know the

extent or content of the elements of such contract as such damages will be available instead of a decree of specific performance.

(c)- A plaintiff seeking specific performance will obtain the same if only there is before the court any other party to join him in enforcing the contract. This reasoning is sound because as we have earlier seen, equity does not act in vein; see the case of **Tito v. Waddel** [Voluntary contracts]

5.2.1.2 Defences (Bars) to Specific Performance

(a)- **Mistake or Misrepresentation:** Specific performance may not be granted if it will cause hardship to the defendant, but hardship is however a matter of circumstance to be determined from the facts of each case. It is a matter of discretion. See the cases of **Webster v. Cecile** and **Martins v. Freeman**.

(b)- Lashes or Delay

Unreasonable delay to an action may be used as a defence against the grant of specific performance since it is well known that “delay defeats equity”. See to this effect the case of **South Comb v. Bishop of Exeter (1947)**.

(c)- Misdescription of the subject matter

The court would not grant specific performance against defendant who proves before the court that there was a misdescription of the subject matter of contract; for example that a certain painting was effected by A whose skills in painting are unmatched and is generally known to be so when in fact the painting was effected by B who is little known in the field. Thus the court will not force a buyer to receive what he did not contract for, nor will it force a seller to give what he did not promise or what he does no longer possess.

(d)- Hardship

If the grant of specific performance will inflict great hardship on the parties or third parties the court will be reluctant to grant same. See the cases of **Patel v. Ali** and **Hope v. Walters**.

(e)- Conduct of the Parties

The party seeking specific performance must show that he has performed all his obligations under the contract since it is a cardinal rule and maxim in equity that he who comes to equity must come with clean hands; see **Walsh v. Lonsdale**.

(f)- Public Policy

Specific performance shall not be decreed for a contract whose execution will be contrary to public policy, see **Wroth v. Tyler**.

5.2.2 INJUNCTIONS

5.2.2.1 Meaning and Background

An injunction is an order of the court directing a person or persons to do or to restrain from doing a particular act or thing. It is an equitable remedy which originally could only be obtained in the Court of Chancery or the Court of Exchequer. This unavailability gave rise to more duplication of proceedings as where the plaintiff required an injunction as a remedy for legal rights.

The Common Law Procedure Acts of 1854 gave common law courts the power to grant injunctions in certain cases. The present jurisdiction is governed by the Supreme Court Act 1981 replacing the jurisdiction which vested the jurisdiction of the Court of Chancery and common law in the High Court. **Section 37 (1)** of the Supreme Court Act 1981 provides that, *“the High Court may by order (whether interlocutory or final) grant an injunction in all cases in which it appears to the courts to be just and convenient to do so”*.

It should be noted that prima-facie or at first sight the jurisdiction is not as wide as it appears to be. It is exercised not on individual preference of the judge but “according to sufficient legal reasons or settled legal principles” as pointed out by Jessel MR. Thus a plaintiff with rights or a defensible course of action cannot obtain an injunction however just and convenient it is, see to this effect the case of **Gouriet v. Union Post Office Workers (1978)**.

5.2.2.2 Common Types Of Injunctions

(a)- Prohibiting and Mandatory Injunctions

These are the commonest forms of injunctions. A prohibitory injunction is one by which a plaintiff is directed to refrain from doing some particular act while a mandatory injunction is one by which a person is enjoined to do a particular act or to do a particular thing. It happens sometimes that an unlawful act had already been committed such that an action restraining its commission is already meaningless. In this case, justice can still be done by issuing a mandatory injunction ordering the act to be revoked; in fact a mandatory injunction is compulsive. It restrains the continuance

of wrongful acts by directing the performance of a positive act. However, a lot of caution must be exercised in ordering it.

(b)- Perpetual Injunction

This is one which has been granted after the rights thereto have been established in an ordinary action in which both sides have been fully heard and it is intended to settle finally the relation between the parties in connection with the dispute so as to relieve the plaintiff of the need to bring a series of actions as his rights are from time to time infringed by the defendant.

The word perpetual does not necessarily signify that the order is to remain permanently effective or must endure forever; it only means that the order would only settle the present dispute between the parties. This is because in some cases, the defendant maybe entitled to request that the operation of an injunction be expressly limited to a particular period as for instance where a man has entered into valid contract not to enter into competition with his former employer without a defined duration for say 3 years after leaving the employment.

(c)- Interlocutory Injunction

It may happen that a plaintiff would not always wait for an action to come on in the normal course; it may be that irreparable damage would be done to him if the defendant is not immediately restrained. If such is the case, the plaintiff will serve to the defendant a notice that on the next action day, his counsel will pray the court for an injunction. This notice may enable the defendant's counsel also to be heard if he wishes, but the hearing would not be a final decision on the merits of the case.

If the plaintiff's affidavit has made up a sufficient case, the judge will grant an interlocutory injunction which is effective only until the trial of the action,

(d)- *Ex-parte* injunction (Before the other side is heard)

If the urgency of the case is such that the plaintiff cannot wait until the next trial day or motion day, he can apply for an *ex-parte* injunction which he will hold good until the next action day, by which time notice can then be served on the defendant who will then have the chance of opposing the plaintiff's application for an interlocutory injunction.

The phrase *ex-parte* means that the court has not had the opportunity to hear the other side of the matter which would be affected by its decision. An *ex-parte* is where an action is brought for a debt due against the defendant who is not within the

jurisdiction; the court may grant an *ex-parte* injunction to restrain the defendant from removing the assets outside the jurisdiction pending trial (which is the original form of the Mareva Injunction).

(e)- Interim Injunction

This injunction restrains the defendant not until the trial but until some specified date if for some special reason, it will be unjust to protect the plaintiff beyond that date.

(f)- Quia timet Injunction

A *quia timet* injunction is one which prevents infringement of the plaintiff's rights where the infringement is threatened but has not yet been perpetrated. It exists in relation to perpetual interlocutory injunction. The plaintiff must show a very strong possibility of future infringement and that the ensuing damage would be of a most serious nature.

The most glaring example of a case where this injunction may be granted is where the defendant has yet done no harm to the plaintiff but he is threatening and intending (so alleges the plaintiff) to do works which would cause irreparable damage or harm to him or his property if carried to completion. So if it is only a mere probability of future injury or mere speculation of possible mischief which may never happen at all, the court will not grant this injunction, **Worsley v. Swann**. Thus in **Fletcher v. Beale**, a plaintiff failed to make a case of sufficient probability and an injunction was refused to restrain a defendant from polluting a river by depositing chemical from which noxious liquid could flow from a certain land, into a river on the ground that the liquid could be prevented from reaching the river. In **Draper v. British Optical Association**, the court refused to restrain the holding of a meeting to consider the removal of the plaintiff from the defendant association, for it was to be assumed that they could not remove him unless they were entitled to do so for instance by the constitution of the association.

(g)- The Anton Piller Injunction:

The first time courts had the opportunity to grant this injunction was in the case of **Anton Piller K.G v. Manufacturing Processes (1976) Ch 55**. The salient ingredient of this type of injunction is its surprise element. It is granted to the plaintiff to enable him and official authorities to enter and search the defendant's premises and to gather evidence or proof that will be eventually used against that defendant in a court action. The order is passed with the intention of taking the defendant by surprise. Its aim or

major objective is to prevent the defendant from destroying proof and this justifies its surprise nature. So this injunction will only be granted in special circumstances.

(h)- The Mareva Injunction (freezing order)

This injunction was created in the case of **Mareva Compania Naviera S.A v. International Bulk Carriers SA (1975) 2 Lloyd's Rep 509**. This injunction prevents a defendant who may be but who has assets within the jurisdiction of the court from removing his assets with the intension of frustrating the execution of court judgement when it is eventually handed down against him.

5.2.2.3 Principles Guiding the Issue of Injunction

The principles that will guide the court in the grants of an injunction are not different from the general characteristics of equitable remedies which we examined earlier. It must however be added here that contempt of court would guide the courts in the grants of an injunction. As far as contempt is concerned, the general principle is that non-compliance with an injunction is contempt of courts punishable by imprisonment, sequestration of property or payment of fine, see the case of a **Re-supply of Ready-made Concrete no 2 and the Director of General Fair Trading v. Buckler (1990)**.

A burning question is whether third parties can be charged for committing contempt. The answer is debatable. If a third party acts ignorantly of an injunction, he will not be charged for contempt of court. However if the third party knowingly acts contrary to an injunction, he would be charged for committing contempt. In **Attorney General v. Times Newspaper Ltd (1992)**, the newspaper published confidential materials which other newspapers had been forbidden from publishing were held guilty of contempt.

5.2.3 The Equitable Remedy of Rescission

Rescission is an equitable remedy by which a specific contract or other transaction is rendered unenforceable in law. It is, in a sense, a decree of specific *non-performance*. This remedy has been described (by Woodeson, R. for instance) as one of the most common and natural occasions for the exercise of equitable jurisdiction.

An important precondition for the grant of rescission is that *restitutio in integrum* must be possible (putting the parties in the position in which they were before they entered the rescinded agreement). But in case of breach of a fiduciary relationship

(such as trust, insurance and agency), the requirement of *restitutio* is not absolutely needed. So on grounds of public policy, the court may do what is practically just even if she will not be able to bring the parties back to their integral positions (see the case of **Erlanger v. New Sombrero Phosphate Co (1879) 3 App Cas 1218** by Lord Blackburn). The decision in the above case was retaken much later on in the case of **O’Sullivan v. Management Agency and Music Ltd (1985) 3 All ER 351, CA**.

5.2.4 Subrogation

Literally speaking, subrogation means asking for something in another person’s right. The remedy is usually described in metaphorical terms as ‘standing in another’s shoes’, such as it was the case in **Banque Financiere de la Cite v. Parc (Battersea) Ltd (1999) 1 AC 221, 226**.

The well-settled principles of subrogation were set out by **Walton J** in the case of **Burston Finance Ltd v. Speirway Ltd (1974) 1 WLR 1638**. The operation of the remedy is rather simple; if a third party – T pays off a debt owed by a debtor – D to a creditor – C, it means that T can step into D’s shoes and claim any assets which were held by C to secure the payment of the debt by D, although T can only claim those assets to the extent that his money discharged C’s claim against D.

5.2.5 Rectification

This form of equitable remedy is available as a relief against mistake as Millett J pointed out in the case of **Gibbon v. Mitchell (1990) 1 WLR 1304** [see also the more recent case of **Gallaher Ltd v. Gallaher Pensions Ltd (2005) EWHC 42 (Ch)**]. The remedy may also be available to rectify a situation of fraud as seen in the early case of **Collins v. Elstone (1893)**. However, the remedy of rectification has proved to be more effective in the case of mistakes concerning contracts and wills (see **Holtam v. Holtam (2004) All ER (D) 408**). The effectiveness of the remedy is also seen in the general types of transactions in which a party’s adviser should have appreciated that the party did not understand the terms of the arrangement. In the case of **Bhatt v. Bhatt (2009) EWHC 734 (Ch)** for instance, the mistake arose from the party’s poor grasp of the English Language.

It should be highlighted however that the courts have insisted on the fact that the remedy must be specifically pleaded (by the party seeking rectification – it is not automatic) and proved. Examples of cases demonstrating this insistence of the courts include: **Chartbrook Ltd v. Persimmon Homes Ltd (2009) UKHL 38, [2009] 1 AC**

1101, House of Lords; as well as the case of **Cherry Tree Investment Ltd v. Landmain Ltd (2012) EWHC Civ 736; [2012] 2 P & CR 10, Court of Appeal**. But in some special cases, the court may order for rectification out of its own power. This is the case in transaction that do not carry the clear intentions of the parties, such as the intention of the settlor or testator in trust relationship. In this case, the court may order for rectification because ‘equity looks to substance not form’ (see the case of **Re Segelman (deceased) [1996] 2 WLR 173**). We notice a sharp contrast with common law here because under that branch, documents are construed according to their form with little regard to the prior intentions of the parties (see **BCCI v. Ali (2002) 1 AC 251, HL**, as well as the case of **Cambridge Antibody Technology v. Abbott Biotechnology Ltd (2004) EWHC 2974 (Pat), Ch D (Patents Ct)**).

5.2.6 The Equitable Remedy of Account

Account in this context is the process by which the court assesses sums due from one party to another, it also describes the remedy of payment that is ordered at the end of the assessment process. An action for an account was, at one time, available at common law, but the Chancery procedure for taking accounts, was *so superior that by the 18th Century the common law action for an account had come to be superseded by equitable proceedings for an account* (statement made by the court in the case of **Tito v. Waddell (No. 2) [1977] Ch 106**).

For our present purpose, an account is a good remedy which may be available for the beneficiary against a defaulting trustee. In this case, through the remedy, the trustee will have to present his financial accounts and then give an account of his dealing with the trust property as well as to consequently make up any shortfall in the fund. It should be noted that a trustee will also be liable to make an account for unauthorized profits realized during his trusteeship. It was stated in the case of **AG v. Guardian Newspapers Ltd (No. 2) [1990] 1 AC 109** that the remedy of account may also be available against a defendant for him to disgorge profits made from unauthorized use of confidential information.

5.2.7 Equitable Set-off

It may be appropriate to end our discussion on equitable remedies by looking at an equitable remedy which can work on a ‘self-help’ basis without judicial intervention. Before the Judicature Acts of 1873-1875, a court of equity could sometimes restrain a party who had brought an action at law from proceeding to trial if, for example, the

defendant had an arguable cross claim. Since the passage of the JA, it is no longer possible, as Morris LJ pointed out, to obtain an injunction to restrain a pending action but equity can instead order equitable set-off on the basis that neither the claim nor the counterclaim ought to be insisted upon without taking the other into account (see the case of **Hanak v. Green (1958) 2 QB 9**).

In a more precise manner therefore, equitable set-off will be available where a cross-claim is ‘so closely connected with [the claim] that it would be manifestly unjust to allow [the claimant] to enforce payment without taking into account the cross-claim’ (as per Lord Denning in the case of **Federal Commerce and Navigation Co Ltd v. Molena Alpha Inc (The Nanfri) [1978] 2 QB 927**). The same position was taken in the case of **Geldof Metaalconstructie NV v. Simon Carves Ltd (2010) EWCA Civ 667, CA**.

5.3 SOME EQUITABLE MAXIMS

5.3.1 Equity Acts *in Personam*

This maxim has been discussed earlier on in these notes, but a few more clarifications are pending.

At first, unconscionability was conceived along medieval ecclesiastic lines as a burden on individual or personal conscience. It was therefore assumed that equity, like private conscience, could only act against the individual defendant in person (*in personam*). However, we have seen that equity came to accept that the rights of a beneficiary under a trust are binding not only upon the individual conscience of trustees and third parties, but upon the trust assets themselves. So equity began to act by analogy to the common law idea of entitlement to property. Despite that development, this maxim is still used, just as it was in the **Earl of Oxford’s Case (1615) 1 Rep Ch 1** to justify equitable intervention when the equitable jurisdiction comes into conflict with another jurisdiction.

5.3.2 Equity will not suffer a Wrong without a Remedy

The maxim *prima facie* suggests that equity is the healer of every form of wrongdoing. But the reality is that equity is concerned with only one type of remedy here which is the ‘unconscionable’ reliance on common law. So in clear terms, equity will not go ahead to remedy a wrong which is not recognized in law. So no matter how

morally wrong a particular social action or behaviour might be, it is not appropriate for equity to label it as being generally wrong in law if the law itself will not do so.

In its early history, it was the practice of Chancery to hear certain claims precisely because there was no established common law writ or ‘form of action’ (under the writ system for instance) covering the case. So this is how equity was then perceived as the jurisdiction that will not suffer a wrong without a remedy, just in a bid to contrast the situation with that which obtained under common law at the time.

5.3.3 Equity follows the Law (*aquitas sequitur legem*)

Equity does not supplant the law; this is the idea that derives from the various definitions of equity through which we learn that equity does not come to compete with, but to complete the law. Gary Watt pointed out that: “*if the law was a stone, the function of equity will be to smooth away the sharp edges by which the law causes injustice and to fill in the cracks where the legal remedies are inadequate and to fill in the cracks where the legal remedies are inadequate*”. Equity will smooth the law, but not to the point of eroding it completely or to overfill the cracks so as to make the stone uneven.

It is also said that *equity follows the law, but not sheepishly*. If equity sometimes goes a little further than the common law, it does so only because the common law has carried it most of the way. Aesop strengthens this assertion by stating that: *even a wren can fly further than an eagle if the wren rides on the eagle’s back until the eagle is exhausted*. This is why sometimes, equitable remedies for breach of contract (specific performance and rescission) may be superior to what is available at common law in the same context (compensation or damages), but, as it has been pointed out already, equitable remedy will only come in if it is clear that the common law remedy will be insufficient. Why? It is so because *equity follows the law*.

5.3.4 Equity looks to Substance, not Form

This maxim does not tell us the functional distinction between equity and the law, unless it is to say that equity will not permit a party to rely upon a legal form, or the formal wording of a law, in a way that will be substantially unconscionable. We should however be clear about what the maxim does *not* mean. It does not mean that equity looks only at substance because equity also respects the form that legal deeds and contracts take since we have just seen that equity follow the law. It does not therefore mean that equity never insists on the form and this is why today in England,

S. 2 of the Law of Properties (Miscellaneous Provisions) Act 1989 now provides that equity cannot grant specific performance of a contract to sell land unless the contract was in writing, containing all relevant terms and signed by both parties. On the contrary, one should not also go with the idea that the common law always looks only at the form. Therefore, common law also looks at substance. In the case of **Street v. Mountford (1985) 1 AC 809** for instance, Lord Templeman held a form of ‘licence’ to be in substance a lease.

5.3.5 Equity will not permit a Statute to be used as an instrument of Fraud

At first, it may be very hard to reconcile this maxim with the principle of parliamentary sovereignty. Normally, a statute must be applied according to the proper interpretation of its words, no matter how just or unjust the consequences of doing so may be and in this way, no court is expected to disapply it or admit exceptions to it.

On a closer examination however, we see that this maxim is applied to instead uphold the integrity of the statute rather than to undermine it. The maxim is usually applied in relation to statutory formalities. A party seeking to avoid an informal or insufficiently formal transaction is ordinarily entitled to refer to, and rely upon, the other party’s failure to comply with the necessary statutory formalities, but the maxim prevents the defendant from so pleading where it will be unconscionable for him so to do: see the case of **Shah v. Shah (2001) 3 WLR 31, CA**.

5.3.6 Those who come to Equity must come with clean Hands

This maxim, it should be said, is retroactive by nature and so it looks at the past inequity that the person coming to seek for equity has done. In **Lee v. Haley (1869) 5 LR Ch App 155** for instance, the claimant sought the discretionary equitable remedy of an injunction with a view of protecting their trade as coal merchants. The old court of Chancery refused to grant the injunction, because the claimant had ‘unclean hands’, not because of the coal, but because he had ‘systematically and knowingly’ sold his customers short on weight. The judge held that equity would not grant a remedy for the protection of a fraudulent trade.

It should be noted that this maxim only applies where the discretionary relief is sought; it does not apply to prevent a claimant from enforcing his equitable entitlement to property (**Rowan v. Dann (1991) 64 P & CR 202**). However, the maxim has the potential to deny specific performance of an estate contract as it was held in the case of **Coastworth v. Johnson (1866) 55 LJQB 220, [1886–90] All ER 547**. So even if the

defendant's behaviour towards the claimant has been intolerably bad, the maxim cannot be used to deprive that defendant of his equitable interest to property.

5.3.7 Those who come to Equity must do Equity

Just like the previous maxim, this one also applies only in relation to the discretionary remedies such as specific performance and rescission. But unlike the previous maxim, this one is more oriented to the future and seems to be more precautionary. In **Vadasz v. Pioneer Concrete (SA) Pty Ltd (1995) 69 ALR 678**, the maxim was applied when a guarantor sought rescission of his guarantee on the ground that he had been induced by a misrepresentation to give a guarantee more extensive than he had intended to give. The High Court of Australia granted rescission but held that the claimant would have to 'do equity' by returning, or paying for, goods that the defendant had supplied to the guarantor since the date of the guarantee. This judgement was in approval of the English Court of Appeal decision in **O'Sullivan v. Management Agency Ltd (1985) QB 428**.

5.3.8 Equity sees as done that which ought to be done

It should be said at once that 'ought' is a dangerous word to use in any branch of law. Equity does not use the ought in any moral sense; its only morality is that the law ought to be followed. So what then is the importance of this maxim?

Although equity will sometimes require an obligation to be performed when the common law would be content to award compensation for failure of performance, law and equity are basically in agreement that a legal obligation *ought* to be fulfilled. In **Tilley v. Thomas (1867) LR 3 Ch App 61 at 72**, it was held that: *contracts ought to be performed. To break them, and to propose compensation for the breach by damages, is not complete justice*. So the key lies in equity's ability to see that which ought to be done as if it had already been done.

5.3.9 Equity Imputes an Intention to fulfil an Obligation

This maxim is similar to the last but unlike the previous one which allows the court to adopt the fiction that an obligation has been fulfilled which ought, in future, to be fulfilled, this maxim introduces the lesser fiction that an obligation has already been fulfilled which ought already to have been fulfilled. The essence of this maxim is equity's refusal to accept that a legal or equitable obligation has not been met. So for instance, when a trustee mixes trust money with his own money and spends part of the

mixed fund, it is assumed that the trust money remains in the unspent part of the fund wherever such an assumption is necessary to fulfil the trustee's obligation to the trust (see **Re Hallet's Estate (1880) LR 13 Ch D 696, CA**).

The maxim can be applied in the face of clear evidence that the party subject to the obligation had no intention whatsoever of fulfilling it. This is because the requisite intention is imputed, not merely implied.

5.3.10 Where the Equities are equal, the first in Time Prevails

This maxim is sometimes paraphrased as *the first in time is the first in right* because it is essentially employed to determine priority between competing claims to equitable proprietary rights to asset, usually to land. In **Liverpool Marine Credit Co v. Wilson (1872) LR 7 Ch App 507 at 511**, the court held that whereas a *legal owner's right is paramount to every equitable charge not affecting his own conscience, an equitable owner, in the absence of special circumstances, takes subject to all equities in date to his own estate or charge*.

5.3.11 Where Equity and Law conflict, Equity Prevails

This is not so much a maxim as a rule that determines the jurisdictional priority of equity. The rule can trace its origins back to the **Earl of Oxford's Case**, but today, it also appears in statutory form. This Supreme Court Act 1981 provides in its s. 49 that in case of conflict between equity and the law, the rules of equity should prevail and this is in the same connection with the provisions of s. 25 of the Judicature Acts 1873-1875.

5.3.12 Delay defeats Equity

This maxim may also appear in another form: equity aids the vigilant and not the indolent (*vigilantibus et non dormientibus jura subveniunt*). So for purposes of fresh evidence and exactitude or nearness to it in the testimonies of witnesses, where one's rights are infringed, he should make hay in bringing the action. If such person stays for some unreasonable time and without any concrete justification without bringing the action in court, his action will be said to be time-barred.

PART TWO: TRUST

CHAPTER VI: MEANING AND DEVELOPMENT

1.1 DEFINITION OF THE CONCEPT OF TRUST

One of the most helpful definitions was proposed by Maitland in his book entitled: Equity: A Course of Lectures (2nd Edn) 1936. The author in that book says that: “*when a person has rights which he is bound to exercise upon behalf of another or for the accomplishment of some particular purpose, he is said to have these rights in trust for that other or for that purpose and he is called a trustee*”.

Basically, the idea is that one person (the trustee), acts on behalf of another person (the settlor), in the interest of an identified person (the beneficiary). The definition proposed by the author does not mention the issue of property in the trust relationship (which does not mean that property is not subject to trust). May be the reason is because property itself is difficult to define and it should be pointed out that property is not the only subject matter of trust. So mentioning property in the definition may suggest that trust always involves property only.

There is no denying the fact that it is easy when trust is constituted on tangible items, such as a car, but the subject of trust may also be intangible, such as debt. Probably, that is why Maitland defines the subject matter of trust in terms of rights rather than property. In this way, it will be easy to talk of the right to use money (intangible) and the right to use a piece of land (tangible).

1.2 HISTORICAL DEVELOPMENT OF TRUST

‘Use’ is said to be the progenitor of trust. The trust of land began when the medieval monks wished to enjoy the benefits of land without infringing their vow of poverty by actually being owners of land. In the early days, land owners went on religious crusades and pilgrimages leaving behind their families and land. So before “taking up the cross”, the crusader legally passed on land to a trusted friend who, despite that status, knew that he was to return the land to the crusader on return; but meantime, he had to hold the land for the benefit of the crusader’s family. In this transaction, it should be pointed out that if the trustee refused to give accounts on the land to the crusader’s family, such as for rents perceived on the land, or otherwise exercised his legal entitlement to the land in bad conscience, the beneficiaries (the family) had no legal claim or rights against such bad faith trustee. However, they had a small corridor

of hope as they were permitted to petition to the King (*sovereign justiciar*) for justice in the light of the circumstances of the particular case. If the king was moved by the claim, he could ask a recalcitrant trustee to simply fulfil his duties. In any case, the fact remains that under the common law at that time, the beneficiaries had no property rights in the trust assets.

1.2.1 Historical Relationship between Trust and ‘Use’

As early as the 7th and 8th Centuries, the Common Law had a form of ‘*use*’ in relation to chattels and money under which money had and received by ‘A’ for the use of ‘B’ subjected ‘A’ to a common law obligation in relation to the use of the money. Under this relationship, if ‘A’ refused to account to ‘B’ for the money, the latter could bring an action against the former to account for the money which came to resemble something like the modern action for breach of trust. So this form of common law *trust* known as ‘*use*’ was enforced by the courts long before the Chancery even started recognising trust of land. Land could not be included in the common law scheme of *uses* but the chancellor was prepared to enforce the same transaction of use over land. As such, by the early 13th Century, land was acknowledged as a practical device for separating legal title from beneficial enjoyment. That is why if ‘A’ had to go for a crusade he was permitted to convey his land (“the *feoffment of uses*”) to his trusted friend ‘B’ (“the *feoffee to uses*”) for the use and benefit of A’s family until ‘A’ returned and recovered his property. So this sort of transaction from all indication did not therefore give A’s family legal rights to the property but only beneficial rights which were based on the confidence that A had reposed on B’s conscience. This is where the chancellor came in to make sure that B did not place an unconscionable reliance on his legal title to the detriment of A and his family (note that the king only did this in rare circumstances if he was moved).

Henry VIII enacted a Statute of Uses in 1536 to permit the transfer of legal title of assets in the trustee’s possession to the beneficiary of the use (the so-called *cestui que use*) thereby ensuring proper ‘execution of the use’. However, the limitation of this statutory effort was that its scope was only limited to *use* that was constituted in relation to land.

1.2.2 How was Trust Constructed?

1.2.2.1 Declaring oneself to be Trustee

The simplest way by which trust was (and can be) created was for the absolute owner of the asset to declare that he holds the asset for the benefit, at least in part, of someone else. So it will be common in this circumstance to hear one say that “I hold this book, with immediate effect, on trust for my room-mate”. Once the original absolute owner becomes the trustee, the room-mate becomes the sole beneficial owner or ‘equitable’ owner of the book and as such, the room-mate can insist that the book be transferred to him or her.

1.2.2.2 Transferring Property to the Trustee on Trust

This is the most classical manner of creation of trust. The original owner transfers legal title to a designated trustee in the interest of a beneficiary (of course there can be several beneficiaries and several trustees).

Under a traditional settlement trust, the trustee who receives property holds it for the interest of one beneficiary for the lifetime of that beneficiary whom we refer to as the *life tenant* (or life beneficiary) who has the right at any appropriate time to ask that property be transferred to him or to continue receiving income from such property. Where this sole beneficiary dies, a second type of beneficiary comes in known as the *remainder man* (or the remainder beneficiary). It should also be noted that there may be many lifetime tenants and many remainders.