

Questions & Answers

EQUITY AND TRUSTS

Ninth edition

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The nature of equity and the law of trusts

Introduction

The topics covered by this chapter are, by their very nature, bound to be broad and discursive. If you took the opportunity at the beginning of your course (or even during the preceding summer vacation) to undertake some of the general reading recommended by your lecturer, you will reap your reward here. Success in answering these questions depends on a broad reading of the available literature and an historical, even philosophical, approach. You may largely ignore the minutiae of the law reports in favour of a jurisprudential understanding of the development of equity and its doctrinal bases.

For relevant literature, see the Further reading section at the end of this chapter, and check your own reading list for additional material recommended by your lecturer.

The chapter contains four essay questions. The usual principles apply in tackling such questions in exam conditions: draw up a plan in rough and stick to it; do not ramble; make a series of points; write a conclusion.

However, there is a difference in answering essay questions of this type and some of the essay questions covered in the rest of the book. Essays that require discussion of substantive law do, at least, start with something on which to hang your hat. An essay, for example, on the development of the search order, or on the constructive trust, requires an analysis of a sequence of case law. If you know half a dozen cases on the point, then the art is to angle them at the question. Different essay titles on the same area of substantive law usually require the same case law but with a different nose! Essay questions on highly theoretical subjects do require a different style. They require a factual base and plenty of examples of the points you are making, but for high marks they need a touch of original thinking. Even if your thinking is not original, they require a thoughtful intellectual analysis of other people's thinking. If you have not thought about the issues raised by these questions before you enter the examination room, then you are not going to achieve high marks on these questions. If you have the makings of a highly practical lawyer, then select a problem question!

It is quite likely that these topics could crop up as assessed essay questions. If so, then a long session in the library is the starting point. Conduct your preparation for the essay as if you were undertaking a piece of research. Survey the literature noting carefully your sources. Then think over your arguments. Do you agree with X that there has been a fusion of law and equity or do you agree with Y that there has not? Why do you agree or disagree? Do you see both sides of the argument? Argue the case with your friends then write it up while the adrenaline is flowing.



Question 1

The innate conservatism of English lawyers may have made them slow to recognise that by the **Judicature Act 1873** the two systems of substantive and adjectival law formerly administered by courts of law and courts of equity . . . were fused. As at the confluence of the Rhone and the Saone, it may be possible for a short distance to discern the source from which each part of the combined stream came, but there comes a point at which this ceases to be possible. If Professor Ashburner's fluvial metaphor is to be retained at all, the confluent streams of law and equity have surely mingled now. (Lord Diplock in ***United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904.**)

Discuss.



Commentary

The reference is to Ashburner, *Principles of Equity*, 2nd edn, Butterworths, 1933, at p. 18. Further useful references are Lord Evershed MR (1954) 70 LQR 326; V. Delaney (1961) 24 MLR 116; and J. E. Martin, 'Fusion, fallacy and confusion' [1994] Conv 13. It is interesting to note that there are several statements from judges of the highest seniority which concur with the statement of Lord Diplock quoted in Question 1, at least to the extent that they consider that this issue is redundant and the combined effect of the systems should be considered. See, for example, Lord Millett in *Equity in Commercial Law*, Law Book Co, 2005; Lord Evershed (1948) JSPTL 180; and Lord Denning (1952) CLP 1, and in *Landmarks in the Law*, Butterworths, 1984. Academic writers seem, in general, to take a different view. So, the question is provocative, even controversial. A good example of the conflict is provided by the House of Lords' decision in ***Tinsley v Milligan* [1994] 1 AC 340** and the ensuing case law. For a criticism of this decision, see R. Buckley (1994) 110 LQR 3.



Answer plan

Establishing the case, ***United Scientific Holdings Ltd v Burnley Borough Council***, in context:

- Discussion of view that law and equity have mingled with supporting commentary from judges
- Identification of the problem in the separate development of common law and equity with historical survey

- Discussion of effect of **Judicature Acts 1873–1875**
- Critique of Lord Diplock's view with examples
- Discussion of situations and examples of statutes where the difference between legal and equitable interests has been eroded
- Distinction between legal rights and remedies and equitable ones
- Case examples.



Suggested answer

The statement by Lord Diplock was accepted unanimously by the judges in the House of Lords. The case concerned the timing of the service of notices triggering rent-review clauses. The notice to trigger a rent review had been served late by the landlord and the question arose as to whether time was of the essence. The **Law of Property Act 1925, s. 41** provides that 'stipulations in a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules'. The section clearly states that a rule of equity is to be adopted within the body of legal rules. Lord Diplock proclaimed that the systems had, quite simply, become fused and that no distinction was to be drawn between law and equity.

This view is at the most extreme, yet it is one apparently shared by other eminent judges. Lord Denning, in *Landmarks in the Law*, states that 'the fusion is complete'. Sir George Jessel MR in *Walsh v Lonsdale* (1882) 21 ChD 9, one of the first cases on this issue to be heard subsequent to the **Judicature Acts 1873–1875**, said 'there are not two estates as there were formerly, one estate at common law by reason of the payment of rent from year to year, and an estate in equity under the agreement. There is only one court, and the equity rules prevail in it.' This view was concurred by Carnwath LJ in *Halpern v Halpern* (No 2) [2007] EWCA Civ 291 when relying on the **Senior Courts Act 1981** to conclude that '130 years after the "fusion" of law and equity ... an argument based on a material difference in the two systems would have faced an uphill task'[70]. In *Tinsley v Milligan* [1994] 1 AC 340, Lord Browne-Wilkinson said that English law was now a single law which was made up of legal and equitable interests, and a person owning either type of estate had a right of property amounting to a right *in rem* not merely a right *in personam*. The approach of Lord Goff in *Napier and Ettrick (Lord) v Hunter* [1993] AC 713 is in accord with this: 'No doubt our task nowadays is to see the two strands of authority, at law and in equity, moulded into a coherent whole.'

The difficulty originates from the early development of equity as a separate system from the common law. The common law courts emerged in the centuries following the Norman Conquest. Intervention by the Lord Chancellor gradually developed into a separate body of law, known as equity, which had, by the fifteenth century, become well established. The Chancellor's jurisdiction was exercised through what became the Court of Chancery. The two systems were sometimes in conflict. Parties seeking

common law relief would need to seek the jurisdiction of the common law courts. If they wanted equitable relief they would go to the Court of Chancery. This might occur during the course of the same litigation. The common law courts only had limited jurisdiction to grant equitable relief. The **Common Law Procedure Act 1854**, s. 79, gave the common law courts a limited power of granting injunctions; the **Chancery Amendment Act 1858** gave power to the Court of Chancery to award damages instead of (or in addition to) injunctions or specific performance.

The problem became acute in the nineteenth century, and a series of Parliamentary reports led eventually to the **Judicature Acts 1873** and **1875**. These Acts amalgamated the superior courts into one Supreme Court of Judicature. The Courts of Queen's Bench, Exchequer and Common Pleas and the Court of Chancery, the Court of Exchequer Chamber and the Court of Appeal in Chancery, were all replaced by the Supreme Court. The Supreme Court consisted of the Court of Appeal and the High Court, which originally had five divisions (subsequently reduced to three). The Supreme Court could administer both rules of common law and equity. Thus, there is no question as to the fusion of the courts. The two distinct sets of courts fused on 1 November 1875. Sir George Jessel MR, who, as Solicitor-General, was the government officer largely responsible for the Judicature Acts, said in *Salt v Cooper* (1880) 16 ChD 544, that the main object of the Acts was not the fusion of law and equity, but the vesting in one tribunal of the administration of law and equity in all actions coming before that tribunal.

Yet it is difficult to pursue Lord Diplock's dictum further to the point of saying that the substantive rules of law and equity are themselves indistinguishable. In trusts there is a distinction between legal and equitable interests and the right to trace property in equity depends on the existence of a fiduciary relationship. Except where statute has intervened, legal and equitable interests are distinguishable in that legal interests are rights *in rem* that bind the whole world whereas equitable rights are lost against equity's darling (the bona fide purchaser of a legal estate for value without notice). In land with unregistered title, the **Land Charges Act 1972** made a number of equitable interests registrable (and one legal interest—the puisne mortgage) and indeed had the effect of determining that such interests which are not registered are void against certain types of purchasers. Nevertheless, in land with unregistered title, a group of equitable interests still fall outside the ambit of this statute and are subject to the equitable doctrine of notice. Equitable interests behind a trust, pre-1926 equitable easements and restrictive covenants fall into this category.

It is possible to cite examples, however, where the distinction has become irrelevant. In registered land, the categories of registered, minor and overriding interests imposed by the **Land Registration Act 1925** (and now reflected in the **Land Registration Act 2002**) cut across the distinction between legal and equitable interests. Statute has rendered the distinction redundant.

Remedies present some interesting examples of the distinction which has grown up between law and equity; a distinction which arose as 'an accident of history' according to Lord Nicholls in *A-G v Blake* [2000] 3 WLR 625, p. 634. In general, legal rights and remedies remain distinct from equitable ones. Some overlap does, however, occur; for example, an injunction, an equitable remedy, can be sought for an anticipatory breach

of contract, or to stop a nuisance, both common law claims. In *A-G v Blake* [2000] 3 WLR 625, the House of Lords allowed the equitable remedy of account of profits for a claim for breach of contract where the common law remedy of damages would have been inadequate. The equitable remedy of account of profits is normally available where there is a fiduciary relationship but the House of Lords permitted its application otherwise in exceptional cases where it was the effective way to remedy a wrong. By contrast, in *Seager v Copydex Ltd* [1967] 1 WLR 923, CA, an action was brought for breach of confidence in respect of confidential information revealed by the defendants about a carpet grip. Such a claim is equitable and normally the equitable remedies of injunction and account are available. However, an injunction would have been ineffective and the judge awarded damages. It would seem, therefore, that a common law remedy is available for an equitable claim for breach of confidence. See, for example, the *Spycatcher* case, *A-G v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109 (p. 286 per Lord Goff).

In *Tinsley v Milligan* [1994] 1 AC 340, it was held that the equitable principle governing when title to property was affected by illegality had now merged into the rule of common law. A claimant can therefore enforce a property right acquired pursuant to an illegal contract, provided that he does not need to bring evidence of the illegality to establish his title.

In *Tinsley v Milligan*, the conflict between law and equity again became apparent. Two women agreed that a house they shared should be held in the name of one so that the other could fraudulently claim housing benefit. When they later disagreed, the legal owner sought to evict her partner. The defendant claimed that she had an equitable interest. The House of Lords held that the defendant had a right to assert her equitable ownership. The principle that a litigant cannot rely on an illegal purpose to rebut the presumption of advancement was confirmed, but, in this case, the equitable presumption of the resulting trust was held to apply. Thus, the defendant did not need to rely on her own illegal conduct and the equitable maxim that 'he who comes to equity should come with clean hands' did not have to be invoked. This case, seeking to balance illegality and unjust enrichment, has created difficulties in application. In *Tribe v Tribe* [1996] Ch 107, a case concerning a transfer of shares from father to son, the matter was complicated by the effect of the presumption of advancement. (Note that, when s. 199 of the Equality Act 2010 comes into effect, it will abolish the presumption of advancement.) *Tinsley v Milligan* had confirmed the principle that a litigant cannot rely on his or her own fraud or illegality to rebut this presumption except where there is some act of repentance. But in *Tribe v Tribe*, the Court of Appeal held that, in the circumstances of this particular case, the father would be able to rely on an illegal purpose to rebut the presumption of advancement because the illegality (the avoidance of the cost by the tenant of a schedule of dilapidations) had not proved necessary and had not been carried out. This result meant that the two cases were consistent: the defendant (Miss Milligan) had recovered her interest in the house even though she had acted fraudulently; the father (David Tribe) had also recovered his shares although he had planned a fraudulent act. To have come to a different result simply because the relationship between the parties in *Tribe v Tribe* gave rise to the presumption of advancement, was not considered appropriate by the Court of Appeal. This area of illegal transactions has also been the

subject of a Law Commission consultation: (see Law Com Consultation Paper No. 154 (1999) *Illegal Transactions: The Effect of Illegality on Contracts and Trusts*).

Thus, the systems are administered in the same courts, but in general the distinction remains relevant and continues to produce conflicts.



Question 2

Equity is not past the age of child bearing (per Lord Denning MR, *Eves v Eves* [1975] 1 WLR 1338, CA).

Discuss.



Commentary

This question may sometimes appear as an assessed essay. Confronted in the examination room, it may seem daunting. What should be included? Clearly the source of the quotation should be considered. In context, it is being used to justify a new development in equity, that is, in the particular case cited, the new model constructive trust. It would be justifiable to limit the answer to this particular topic, but, on the other hand, it could be broadened to include all the new developments over recent years in the field of equity. To select one or the other approach cannot be wrong. However, as in many situations, in attempting to produce the answer the examiner wants, you should consider the approach in lectures. Did the lecturer use this as a general theme throughout the course? This might indicate the wide-ranging approach. Or was particular attention paid to the new model constructive trust and subsequent case law?

If the question is set as coursework there is a greater argument for adopting the broad approach. There is scope for a powerful dissertation. In the examination room it may be safer to adopt the narrow approach rather than attempt to be too ambitious. It could, of course, be a gift of a question if you know a little about everything, rather than a lot about a limited subject.

The answer suggested here takes the broad approach.



Answer plan

- Discussion of equity and its flexible nature
- List of equitable innovations
- Judicial justifications of equitable innovations
- Equitable remedies: search orders; freezing injunctions
- Constructive trusts: the new model
- Proprietary estoppel
- Undue influence in mortgage cases

**Suggested answer**

When equity originally developed as a gloss on the common law it was innovative; it developed new remedies and recognised new rights where the common law failed to act. The efficacy of equity was largely due to its ability to adapt and innovate, yet inevitably, this development itself became regulated in a similar way to the development of the common law. There are maxims of equity which may determine the outcome of disputes. Although the judge has a discretion in the granting of an equitable remedy, that discretion is exercised according to settled principles. Thus, it might be said that equity can develop no further; the rules of precedent predetermine the outcome.

Yet, this is belied by a number of new developments in equity, for example, the recognition of restrictive covenants, the expansion of remedies, the development of doctrines such as proprietary estoppel, the enhanced status of contractual licences and, as referred to in the quotation from the judgment of Lord Denning MR, the new model constructive trust, are all illustrations of developments in equity.

There is an attempt, however, to justify these new developments, which are all examples of judicial creativity, by precedent. As Bagnall J said in *Cowcher v Cowcher* [1972] 1 WLR 425 at p. 430: 'This does not mean that equity is past childbearing; simply that its progeny must be legitimate—by precedent out of principle. It is well that this should be so; otherwise no lawyer could safely advise on his client's title and every quarrel would lead to a law-suit'.

Equity developed the remedies of the injunction, specific performance, account, rectification, and rescission. The injunction has been a growth area. The search order (developed in the case *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55), reflects the growth of new technology and the need to protect ownership rights in that property. Intellectual property such as video and audio tapes and computer programs can easily be destroyed before an action for breach of copyright can be brought. Confidential information relating to industrial processes can disappear leaving a claimant with no means of proof. The search order developed to allow a claimant to enter a defendant's premises to search for and seize such property where there was a clear risk that such property would be destroyed before trial. As an area of equitable creativity, it is still being refined by the judges, with cases such as *Columbia Picture Industries Inc. v Robinson* [1986] 3 All ER 338 and *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840 laying down guidelines for the exercise of such a Draconian order.

The freezing injunction is another example of a refined application of an established remedy developed in the case of *Mareva Compañía Naviera SA v International Bulk Carriers SA* [1975] 2 Lloyd's Rep 509 following *Nippon Yusen Kaisha v Karageorgis* [1975] 1 WLR 1093. While a claim may succeed, if it is impossible to enforce a judgment because there are no assets, then the judgment is worthless. In international disputes, assets may be transferred abroad to make the judgment debt impossible, or at least, very difficult, to follow. Recognising this dilemma, the judges in the *Mareva* case were prepared to grant an order freezing the defendant's assets. Further cases have demonstrated that the courts are prepared to make this order available worldwide in certain circumstances (see, for

example, *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2008] EWCA Civ 303; *Dadourian Group International Inc v Simms* [2006] EWCA Civ 399; *Derby & Co. Ltd v Weldon (No. 3 and No. 4)* (1989) 139 NLJ 11; *Republic of Haiti v Duvalier* [1990] 1 QB 202 and see Civil Procedure Rule r. 25.1(1)(f).

Equity initially recognised the trust. This was one of the original developments of equity. However, the protection granted to equitable owners behind a trust has developed significantly over the last 30 years with the new model constructive trust, the contractual licence and the doctrine of proprietary estoppel.

The constructive trust of a new model developed largely because of the creative activity of Lord Denning MR. In *Hussey v Palmer* [1972] 1 WLR 1286, CA, Lord Denning described the constructive trust as one 'imposed by law wherever justice and good conscience require it'. Cases such as *Eves v Eves* [1975] 1 WLR 1338, CA, where the woman was given an equitable interest in the property representing her contribution in terms of heavy work, and *Cooke v Head* [1972] 1 WLR 518, CA, a similar case, took this development further. Several cases, including *Lloyds Bank v Rosset* [1991] 1 AC 107, sought to re-establish less flexible principles in this field relating to the existence of a common intention that an equitable interest should arise, and the existence of a direct financial contribution. Nevertheless, the House of Lords in *Stack v Dowden* [2007] UKHL 17, followed by the Supreme Court in *Jones v Kernott* [2011] UKSC 53, have re-introduced some of the earlier flexibility into the constructive trust showing that equity is alive and well.

The new model constructive trust has been most alive in the field of licences. At common law, a contractual licence was controlled by the doctrine of privity of contract, and failed to provide protection against a third party. Equitable remedies have been made available to prevent a licensor breaking a contractual licence and to enable a licence to bind third parties. It has been accepted that certain licences may create an equitable proprietary interest by way of a constructive trust or proprietary estoppel. In *Binions v Evans* [1972] Ch 359, CA, it was held by Lord Denning MR that purchasers were bound by a contractual licence between the former owners and Mrs Evans, an occupant. A constructive trust was imposed in her favour as the purchasers had bought expressly subject to Mrs Evans' interest and had, for that reason, paid a reduced price. Also in *Re Sharpe* [1980] 1 WLR 219, a constructive trust was imposed on a trustee in bankruptcy in respect of an interest acquired by an aunt who lent money to her nephew for a house purchase on the understanding that she could live there for the rest of her life.

The fluidity of these developing areas is shown in case law which appears to hold back from a development which may have pushed the frontiers too far. Obiter dicta by the Court of Appeal in *Ashburn Anstalt v W. J. Arnold & Co.* [1989] Ch 1, approved in *Habermann v Koehler* (1996) 73 P & CR 515, suggest that a licence will only give rise to a constructive trust where the conscience of a third party is affected. It will be imposed where their conduct so warrants. Judicial creativity in equitable fields is thus made subject to refinements by judges in later cases.

Proprietary estoppel is another example of an equitable doctrine which has seen significant developments in the interests of justice since its establishment in the leading

case of *Dillwyn v Llewelyn* (1862) 4 De GF & J 517. The doctrine is based on encouragement and acquiescence whereby equity was prepared to intervene and adjust the rights of the parties. Its application has been further enhanced by the Court of Appeal in *Gillett v Holt* [2001] Ch 210, where a broader approach to the doctrine was taken that depended, ultimately, on the unconscionability of the action. Two House of Lords' decisions in *Yeoman's Row Management v Cobbe* [2008] UKHL 55 and *Thorne v Major* [2009] UKHL 18 also injected new approaches into the doctrine with later decisions in *Crossco No 4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619 and *Herbert v Doyle* [2010] EWCA Civ 1095, evaluating the use of the equitable doctrine in commercial contexts. Again, it is a development which stands outside the system of property rights and their registration established by Parliament.

Cases such as *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8, *Matharu v Matharu* (1994) 68 P & CR 93, *Costello v Costello* (1995) 70 P & CR 297 and *Durant v Heritage* [1994] EGCS 134 show that the doctrine of proprietary estoppel and the protection of licences by estoppel remain an effective method used by the judges for the protection of licences and equitable rights. The degree to which the right receives protection is variable depending on the circumstances of the particular case. For instance, in *Matharu v Matharu*, the licence did not confer a beneficial interest but gave the respondent a right to live in the house for the rest of her life. In *Durant v Heritage* the court ordered the house to be transferred to the applicant under the doctrine of proprietary estoppel. In *Jennings v Rice*, by contrast, the equity was satisfied by monetary compensation.

Another development in equity resulted from the decisions of the House of Lords in *Barclays Bank plc v O'Brien* [1994] 1 AC 180 and *CIBC Mortgages plc v Pitt* [1994] 1 AC 200. These two cases heralded the re-emergence in a broad sense of the equitable doctrine of notice. They provide that, where there is undue influence over a co-mortgagor or surety, this may give rise to a right to avoid the transaction. This right to avoid the transaction amounts to an equity of which the mortgagee may be deemed to have constructive notice. This resurrection of the equitable doctrine of notice in a very modern context demonstrates clearly the flexibility of equity. A number of cases followed these two decisions. In *Royal Bank of Scotland v Etridge (No. 2)* [2001] 4 All ER 449 (a case in which eight conjoined appeals were heard), the House of Lords laid down general guidelines for the application of the doctrine of notice in this context.

So, although there may be setbacks and refinements in the development of new doctrines when later judges seek to rationalise and consolidate new principles, nevertheless it is clear that equity maintains its traditions.



Question 3

Explain and discuss the maxim, 'equity looks upon that as done which ought to be done'. To what extent (if any) does this maxim operate to impose a trust on any person?



Commentary

This discussion question requires an examination of the various applications of the maxim. It touches upon a number of different fields. In relation to trusts of land, its operation was affected by the **Trusts of Land and Appointment of Trustees Act 1996**. On the application of the doctrine in the context of ***Williams & Glyn's Bank Ltd v Boland* [1981] AC 487, HL**, see Stuart Anderson (1984) 100 LQR 86.

Some aspects of this are esoteric, for example, the rule in ***Lawes v Bennett (1785) 1 Cox 167***. Many lecturers do not cover this rule in their courses. If that is the case then you may not be expected to deal with it in a question of this sort. The guidance on the suggested content of this answer offered here must be tempered by what you have been expected to cover in your syllabus.



Answer plan

- Explanation of maxims of equity as body of principles
- Explanation of maxim 'equity looks upon that as done which ought to be done'
- Examples of contracts of sale for land; specifically enforceable agreements; contracts for leases and rule in ***Walsh v Lonsdale***; doctrine of conversion; rule in ***Lawes v Bennett***; conditional contracts; rule in ***Howe v Earl of Dartmouth***



Suggested answer

The maxims of equity operate as guidelines for the exercise of judicial discretion. Although equity did not acquire the rigidity of the common law, it did develop a body of principles. An equitable remedy is available at the discretion of the judge. The judge is assisted in the exercise of this discretion by these principles. They provide, for example, that for claimants to be granted equitable remedies, they must come to court with clean hands; they must have behaved equitably and must not have delayed in seeking the intervention of equity. These principles, known as maxims, do not operate as binding precedent but provide a basis for the development of equity. Some of them have, however, formed the basis for certain rules which are binding. There are 12 maxims in addition to some general principles.

The maxim 'equity looks upon that as done which ought to be done' demonstrates the principle that, where there is a specifically enforceable obligation, equity will enforce it as though the obligation had been carried out. The common law is rigid in that, if the proper formality has not been carried out (for example, the execution of a deed for the transfer of an interest in land) then it will not recognise the interest. Equity is prepared, nonetheless, to enforce the obligation as though all due formalities are present.

For example, a contract for the sale of land is specifically enforceable if it has been effected in accordance with the rules laid down in the **Law of Property (Miscellaneous Provisions) Act 1989, s. 2**. It is an estate contract which creates an equitable interest in

favour of the purchaser, and is binding on third parties if protected by registration. Until completion, the vendor holds the legal estate upon constructive trust for the purchaser.

It is arguable, on the authority of *Oughtred v IRC* [1960] AC 206, HL, and *Re Holt's Settlement* [1969] 1 Ch 100, that, once an agreement has been entered into which is specifically enforceable, then the equitable interest passes without the need for formalities, as provided by the *Law of Property Act 1925*, s. 53(2). This view was held to be sound in *Neville v Wilson* [1997] Ch 144, CA.

A contract for a lease, provided it complies with the contractual requirements, is enforceable in equity under the rule in *Walsh v Lonsdale* (1882) 21 ChD 9. Although the due formality of a deed required at law has not been complied with, equity sees as done that which ought to be done, and enforces the contract for the lease.

The maxim underlies the doctrine of conversion. Before the implementation of the *Trusts of Land and Appointment of Trustees Act 1996*, this doctrine stated that where there was a trust for the sale of land, equity assumed that the sale had already taken place. This meant, therefore, that the beneficiaries' interests were deemed to have been converted into personalty already, even if the land had not been sold. Since many trusts for sale arose where couples purchased a home for their joint occupation, their interests were frequently held in this manner long before the property was sold. The problem was considered in *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487, HL. Mrs Boland was deemed to have an interest behind a trust for sale. The contest arose between her equitable interest and the interest of the bank, as mortgagee of the legal estate. If Mrs Boland had an interest in land then she would have an overriding interest under the *Land Registration Act 1925*, s. 70(1)(g) (now repealed and replaced by the *Land Registration Act 2002*). However, if her interest had already been converted into personalty, she would not have an overriding interest since the sub-section only protects rights in land. It was held that the purpose of the doctrine was to simplify conveyancing in cases where the intention was to sell the land immediately. The doctrine should not be extended beyond that to a case where it was clearly a fiction.

The *Trusts of Land and Appointment of Trustees Act (TLATA) 1996* provides that trusts for the sale of land are replaced by trusts of land with the power of sale. This means that the interest behind the trust is an interest in land until the power is exercised (s. 3(1)). This applies to trusts for sale arising before or after the commencement of the *TLATA 1996*, except in relation to trusts created by will where the testator died before commencement (s. 3(2), (3)).

A more obscure application of the doctrine is the rule in *Lawes v Bennett* (1785) 1 Cox 167, which applies to the exercise of an option. If a leaseholder is granted an option to purchase the freehold and the freeholder dies before the option is exercised, then the disposition of the rents pending the exercise of the option, and the eventual purchase price, must be determined. The rents will go to the person entitled to the freehold. This would be either a residuary or a specific devisee. The proceeds of sale, however, which are payable when (and if) the option is exercised, pass to the residuary legatee as conversion into personalty is deemed to have taken place.

The maxim was applied to conditional contracts in *Re Sweeting (deceased)* [1988] 1 All ER 1016. A contract for the sale of land, subject to conditions, was not completed

until after the vendor's death. It was held that the proceeds of sale went to the residuary legatee as the interest had already been converted into personality.

The maxim also underlies the rule in *Howe v Earl of Dartmouth* (1802) 7 Ves 137, which relates to the duty to convert (*inter alia*) wasting assets. The rule is limited in that it only applies to residuary personality settled by will in favour of persons with successive interests. The duty is that, where there are hazardous, wasting or reversionary assets they must be converted into authorised investments. Where there is a duty to convert, there is also a duty to apportion between the life tenant and remainderman until sale. The scope of the rule in *Howe v Earl of Dartmouth* is now of more limited significance, however, as the **Trustee Act 2000** has greatly widened the range of investments that are available to trustees.

So, the maxim applies to a variety of cases where equity is prepared to act as though the common law requirements had been fully complied with, or to convert property where it is equitable to do so.



Question 4

What is equity?



Commentary

This question requires an historical and jurisprudential analysis of the meaning and position of equity in the legal system.

The approach suggested here is to deal with the historical side first, using this as a vehicle for a discussion of the contribution which equity has made to the legal system.



Examiner's tip

In a broad essay question make good use of examples to avoid an undirected discussion.



Answer plan

- Explanation of the term 'equity'
- Equitable maxims
- Contrast between the development of equity and the common law
- Principle in cases of conflict established in **Senior Courts Act 1981, s. 49**
- Equitable remedies
- The development of common law courts and courts of equity

**Suggested answer**

Equity to the layman means fairness and justice, but in the legal context its meaning is much more strictly defined. There are rules of equity: it must obey the rules of precedent as does the common law, and its development may appear equally rigid and doctrinal.

Yet, because of its historical development and the reasons underlying this, there does remain an element of discretion and the potential for judges to retain some flexibility in the determination of disputes.

There are well-established principles which govern the exercise of the discretion but these, like all equitable principles, are flexible and adaptable to achieve the ends of equity, which is, as Lord Selborne LC once remarked, to 'do more perfect and complete justice' than would be the result of leaving the parties to their remedies at common law: *Wilson v Northampton and Banbury Junction Railway Co.* (1874) LR 9 Ch App 279, 284 (and see Lord Hoffmann, *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1). Principles of unconscionability underpin much of equity in its modern context. In *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, Lord Browne Wilkinson described the operation of equity in relation to the trust as working on the conscience of the legal owner.

Equity developed as a result of the inflexibility of the common law; it 'wiped away the tears of the common law' in the words of one American jurist. When the common law developed the strictures of the writ system through the twelfth and the thirteenth centuries and failed to develop further remedies, individuals aggrieved by the failure of the common law to remedy their apparent injustice petitioned the King and Council. The King was the fountain of justice and if his judges failed to provide a remedy then the solution was to petition the King directly. The King, preoccupied with affairs of state, handed these petitions to his chief minister, the Chancellor. The Chancellor was head of the Chancery, amongst other state departments. The Chancery was the office which issued writs and, therefore, when the courts failed to provide a remedy, it was appropriate to seek the assistance of the head of the court system. Originally the Chancellor was usually an ecclesiastic. The last non-lawyer was Lord Shaftesbury who retired in 1672. Receiving citizens' petitions, the Chancellor adjudicated them, not according to the common law, but according to principles of fairness and justice; thus developed equity.

Early on, each individual Chancellor developed personal systems of justice giving rise to the criticism that equity had been as long as the Chancellor's foot. The Lord Chancellor did indeed sit alone in his court of equity, or Chancery, as it became known. It was not until 1813 that a Vice-Chancellor was appointed to deal with the volume of work. Equity began to emerge as a clear set of principles, rather than a personal jurisdiction of the Chancellor, during the Chancellorship of Lord Nottingham in 1673. By the end of Lord Eldon's Chancellorship in 1827 equity was established as a precise jurisdiction.

But the development of a parallel yet separate system of dispute resolution was inevitably bound to create a conflict. An individual aggrieved by a failure of the common law to remedy a gross injustice would apply to the court of equity. The Chancellor, if

the case warranted it, would grant a remedy preventing the common law court from enforcing its order.

The catharsis occurred in the *Earl of Oxford's Case (1615)* 1 Rep Ch 1, where the court of common law ordered the payment of a debt. The debt had already been paid, but the deed giving rise to the obligation had not been cancelled. The court of equity was prepared to grant an order preventing this and rectifying the deed.

The clash was eventually resolved in favour of equity; where there is a conflict, equity prevails. This rule is now enshrined in the **Senior Courts Act 1981**, s. 49.

A series of maxims underlies the operation of equity, establishing a series of principles. For example: 'equity looks upon that as done which ought to be done'; 'he who comes to equity must come with clean hands'; 'equity will not allow a statute to be used as a cloak for fraud', are all examples of the maxims.

The remedies developed by equity, such as injunctions and specific performance, are, unlike the common law remedy of damages, subject to the discretion of the judge. Thus a judge may decide that, although a breach of contract has been established, the conduct of the claimant is such that an equitable remedy should not be granted. In addition, if damages are an adequate remedy, then there is no need to substitute an equitable remedy.

In substantive law, equity has frequently reflected the reality of transactions between private citizens. It recognised the trust when the common law had refused to acknowledge the existence of a beneficiary and provide remedies for breach of trust against a defaulting trustee. The concept of the trust has been the vehicle for much creative activity on the part of the courts of equity. The trust has developed from an express agreement between parties to situations where the conduct of parties has led the courts to infer or to impose a trust.

So, equity remains a separate system of rules operating independently of the common law. Until the late nineteenth century it operated in a separate set of courts. So, a plaintiff seeking both legal and equitable remedies would be obliged to pursue an action in separate courts. Much delay and expense ensued. The position was eventually resolved in the **Judicature Acts 1873 and 1875** which established a system of courts in which both the rules of equity and common law could be administered. The position had already been ameliorated to some degree by the **Common Law Procedure Act 1854**, which gave the common law courts power to grant equitable remedies, and the **Chancery Amendment Act 1858 (Lord Cairns' Act)**, which gave the Court of Chancery power to award damages in addition to, or in substitution for, an injunction or a decree of specific performance. A claimant can, therefore seek both damages and an injunction in the same court.

The equitable jurisdiction is, in fact, a personal jurisdiction operating against the conscience of the individual, whereas the common law jurisdiction operates against real property. Thus, an order from a court based on equitable principles preventing a legal order being enforced operates against the conscience of the defendant. In theory, therefore, there is no clash between the jurisdictions. In practice, there is a significant constraint on the common law jurisdiction. The historical distinction does remain, however, in the existence of separate divisions of the High Court, viz., the Chancery

Division (which deals primarily with matters which involve equitable rights and remedies) and the Queen's Bench Division (which deals primarily with matters involving rights and remedies at common law).

So, equity represents a later development of law, laying an additional body of rules over the existing common law which, in the majority of cases, provides an adequate remedy: 'Equity, therefore, does not destroy the law, nor create it, but assists it' (per Sir Nathan Wright LJ in *Lord Dudley and Ward v Lady Dudley* (1705) Pr Ch 241 at p. 244).

Further reading

- Anderson, S., 'The proper narrow scope of equitable conversion in land law' (1984) 100 LQR 86.
- Ashburner, W., *Principles of Equity*, 2nd edn, Butterworths, 1933.
- Buckley, R., 'Social security fraud as illegality' (1994) 110 LQR 3.
- Delaney, V. 'Equity and the Law Reform Committee' (1961) 24 MLR 116.
- Gardner, S., 'Two maxims of equity' [1995] CLJ 60.
- Holdsworth, W., *History of English Law*, 7th edn, Sweet & Maxwell, 1966.
- Lord Denning, 'The need for a new equity' (1952) CLP 1.
- Lord Denning, *Landmarks in the Law*, Butterworths, 1984.
- Lord Evershed, 'Equity after fusion: federal or confederate' (1948) JSPTL 180.
- Lord Evershed MR, 'Reflections on the fusion of law and equity after 75 years' (1954) 70 LQR 326.
- McGhee, J., *Snell's Equity*, 32nd edn, Sweet & Maxwell, 2010.
- Macnair, M., 'Equity and conscience' (2007) OJLS 659.
- Mitchell, C. and Mitchell, P., (eds) *Landmark Cases in Equity*, Hart, 2012.
- Maitland, F. W., *Equity*, 2nd edn, Cambridge University Press, 1936.
- Pettit, P. H., 'He who comes to equity must come with clean hands' [1990] Conv 416.
- Pollock, F., *Jurisprudence and Legal Essays*, Macmillan, 1961.