



Equitable interests in land

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Foley's List

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Development of equity

- Evolution from the Court of Chancery
- Flexible remedy when compared to common law
- Central issue is prevention of acts against 'good conscience'
- Widespread use today
 - Partnerships
 - Breach of confidence
 - Fraud
 - Appointment of receivers
 - Specific performance

Why is equity relevant to family law?

- Property ownership and purchase by third parties
 - Claims against parents' properties are common
 - Intermingling of finances, particularly in time of increasing house prices
 - Influx of money from overseas
- Prominent use of trust structures
- Financial agreements

Consider equitable remedies when

- Claims against or by third parties
- Presence of a family trust
- Setting aside financial agreement
- Death
- Out of time
- Bankruptcy

Preliminary
matters -
legislative
provisions and
accrued
jurisdiction

- s.79 - alteration of property interests
 - Definition of property
 - Existing legal and equitable interests (*Stanford v Stanford*)
 - s.79 does not define an existing interest
- s.78 - declaratory power
- Part VIII AA (and s.90TA) - orders and injunctions binding third parties
- Accrued jurisdiction
 - See *Warby & Warby* (2002) FLC 93-091

Part VIII AA – Third parties

- Relevant considerations in ss.90AE and 90AF:
 - Prerequisites:
 - Making of the order is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties
 - If the order concerns a debt of a party—it is not foreseeable at the time that the order is made that to make the order would result in the debt not being paid in full
 - Procedural fairness
 - Just and equitable
 - Considerations:
 - Taxation effect on parties and the third party
 - Social security effect on parties to relationship
 - Third party's administrative costs in relation to order
 - Economic, legal or other capacity of third party to comply
 - Any other relevant matter

Preliminary matters - caveats

- Section 89 *Transfer of Land Act 1958* (Vic):
 - “*Any person claiming any estate or interest in land ...may lodge with the Registrar a caveat ...*”
- Caveatable interests
- Section 89A applications
- Consequences of inappropriate caveats
 - Costs
 - Compensation
 - Disciplinary action

Preliminary matters - pleadings and preliminary challenges

- Pleadings
 - Material facts
 - Importance of pleading equitable causes of action
- Preliminary challenges
 - Joinder (r.6.02)
 - Summary dismissal (rr 10.12, 10.13)
 - *El Saeid & Masih And Ors* [2015] FamCA 516

Types of equitable proprietary claims

- *Tory v Jones* (1990) DFC 95-095 approach
- Types:
 - Express trust
 - Implied trust (or resulting trust)
 - Common intention constructive trust
 - Baumgartner constructive trust
 - Proprietary estoppel

Resulting trust

- Where parties contribute unequally to purchase of property which is not reflected in legal title, equity presumes parties hold interests on trust in accordance with proportions of contributions
- Rebuttable
 - Evidence of contrary intention
 - Presumption of advancement
- *Calverley v Green* (1984) 155 CLR 242
- See e.g. *Kawada & Kawada* [2012] FamCA 273

Constructive trusts

- Prevents legal proprietor from behaving unconscionably
- Construed from circumstances
- Two types to date:
 - *Baumgartner* (or joint venture) constructive trust
 - *Muschinski v Dodds* (1985) 160 CLR 583
 - *Baumgartner v Baumgartner* (1987) 164 CLR 137
 - Common intention constructive trust
 - *Ogilvie v Ryan* [1976] 2 NSWLR 504

Baumgartner Constructive Trust

- Intention of parties not necessarily relevant
- Requires pooling of money or resources in a relationship or joint venture
- *Baumgartner v Baumgartner* (1987) 164 CLR 137
- Elements:
 - Joint relationship or endeavour,
 - Expenditure is shared for the common benefit (i.e. a ‘pooling’ of resources to purchase property)
 - Joint relationship or endeavour terminated “without attributable blame”
 - Unconscionability
- See also *Crafter & Crafter* [2012] FamCAFC 199.

Common Intention Constructive Trust

- Elements:
 - Actual common intention that claimant will have interest in the property
 - Detrimental reliance
 - Unconscionability
- *Ogilvie v Ryan* [1976] 2 NSWLR 504
- See also *Sivritas v Sivritas* (unreported) [2008] VSC 374

Proprietary estoppel

- A type of equitable estoppel
- *Waltons Stores (Interstate) Limited v Maher* (1988) 164 CLR 387 at [404] (per Mason CJ and Wilson J):
 - “... a person whose conduct creates or lends force to an assumption by another that he will obtain an interest in the first person’s land and on the basis that expectation another person alters his position or acts to his detriment, may bring into existence an equity in favour of that other person, the nature and extent of the equity depending on the circumstances.”
- Elements:
 - Assumption
 - Inducement
 - Detrimental reliance
 - Unconscionability
- *Inwards v Baker* [1965] 2 QB 29
- *Giumelli v Giumelli* (1999) 196 CLR 101
- Relief?
 - See recent decision of *Harris v Harris* [2021] VSCA 138

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