Concentrate Questions and Answers Equity and Trusts: Law Q&A Revision and Study Guide (3rd edn)

Rosalind Malcolm

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2. Nature of Equity and the Law of Trusts

Rosalind Malcolm, Barrister, Professor of Law, University of Surrey

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Abstract

The Concentrate Questions and Answers series offer the best preparation for tackling exam questions. Each book includes typical questions, bullet-pointed answer plans, suggested answers, and author commentary. This book offers advice on what to expect in exams and how best to prepare. This chapter covers questions on the nature of equity and the law of trusts.

Keywords: equity, trusts, common law, Lord Diplock, equitable innovations, constructive trusts, proprietary estoppel, Senior Courts Act, equitable remedies, common law courts

Are You Ready?

In order to attempt the questions in this chapter you will need to have covered the following topics:

- The nature of equity
- The development of equity and its relationship to the common law
- The maxims of equity
- The nature of the trust

Key Debates

Debate: The fusion argument.

Have the rules of common law and equity fused? This argument deals with the historical foundations of equity and raises the challenging question as to whether it has fused with common law. The **Judicature Acts 1873** and **1875** are at the heart of the argument insofar as it relates to administrative questions. But of more interest is the substantive side. There is a lot written about this such as: Burrows, 'We do this at Common Law but this in equity' (2002) 22 OJLS 1; Lord Millett, 'Proprietary Restitution' in *Equity in Commercial Law* (Degeling and Edelman, eds), Law Book Co of Australasia, 2005, chapter 12; Worthington, *Equity*, Oxford University Press, 2006, chapter 10; Martin, 'Fusion, fallacy and confusion: a comparative study' [1994] Conv 13—to name just a few. The area requires wide reading.

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 Rhône and the Saône, 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.

Caution!

■ The structure of your answer is critical here to avoid an overly discursive approach. Strict observance of the PEA approach will help to keep your structure tight.

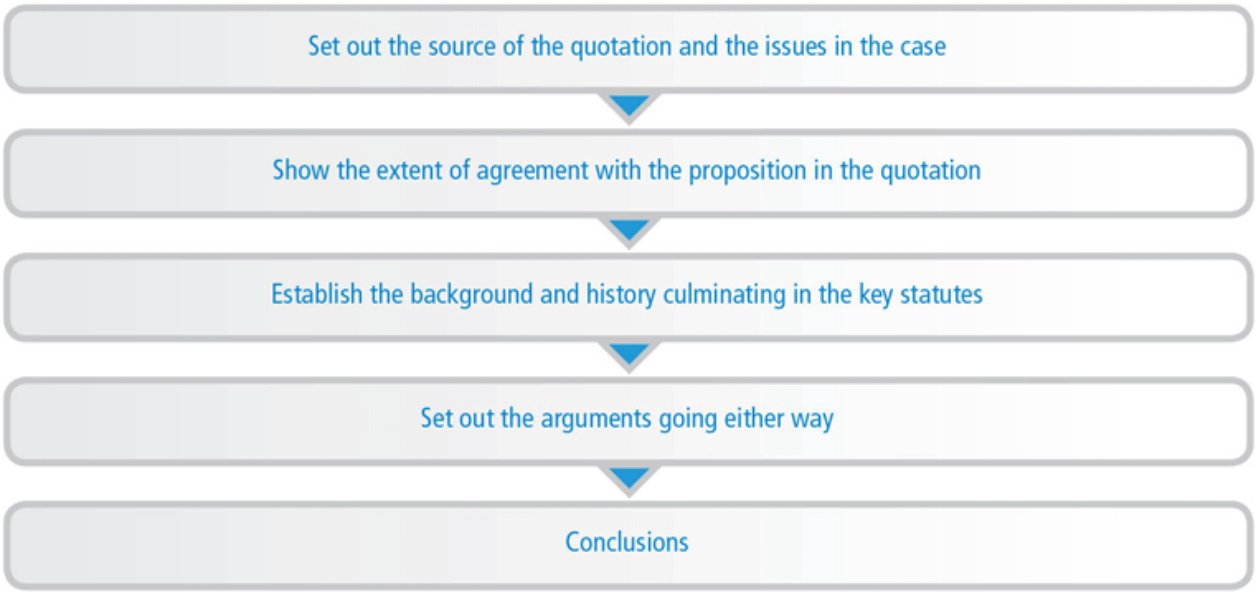
■ You need to have covered all the literature in order to engage fully with this question—the answer needs to have full referencing to the various statements made by the judiciary and academics.

■

If, when you are in the exam room, this is the first time you have come across the quote, or indeed any quote in a question (it is a key one on this topic), then you may want to consider whether this is the question for you.

■ Some students tend to address equity as though it is a 'free-for-all' so don't fall into that trap. When answering any general questions on equity show you understand that it is as rule-bound as the common law!

Diagram Answer Plan



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Suggested Answer

The statement by Lord Diplock was accepted unanimously by the judges in the House of Lords.[1] The case concerned the timing of the service of a notice triggering a rent-review clause which had been served late. 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 become fused and no distinction was to be drawn between law and equity.[2]

[1] Start with the source of the quotation. A weakness is to ignore the source of the quote and to go straight into the arguments.

[2] It is good to make reference to the judge in this way to show familiarity with the argument.

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** and **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.' Carnwath LJ concurred 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]. The approach of Lord Goff in ***Napier and Ettrick (Lord) v Hunter [1993] AC 713*** is in accord with this:[3] 'No doubt our task nowadays is to see the two strands of authority, at law and in equity, moulded into a coherent whole.'

[3] Although this looks a bit like listing—often hated by examiners—it actually shows wide reading and support for the proposition made in the quotation.

The Development Phase

The difficulty originates from the early development of equity as a separate system from the common law.[4] Intervention by the Lord Chancellor into the common law gradually developed into a separate body of law, known as equity, which, by the fifteenth century, become well established eventually through 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. 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
p. 8 ↵ Chancery to award damages instead of (or in addition to) injunctions or specific performance.

[4] This paragraph sets out the historical background which helps to give depth and context to the arguments about fusion.

The Judicature Acts[5]

[5] The **Judicature Acts** need a paragraph to themselves—such is their importance in the story you are telling.

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 which consisted of the Court of Appeal and the High Court. The Supreme Court could administer both rules of common law and equity. Thus, there is no question as to the fusion of the courts.[6] The two distinct sets of courts fused on 1 November 1875. Sir George Jessel MR 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.

[6] This sentence sets out a strong viewpoint which is borne out by the preceding discussion about the **Judicature Acts**.

The Arguments

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.[7] 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 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 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.

[7] This paragraph begins to set out the counter-argument.

It is possible to cite examples, however, where the distinction has become irrelevant.[8] In registered land, the categories of registered, minor and overriding interests (**Land Registration Act 2002**) cut across the distinction.

[8] This is a balancing paragraph showing the other side to the story.

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

p. 9 ↵ 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. 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).

In ***Tinsley v Milligan [1994] 1 AC 340***, which was, until the Supreme Court decision in ***Patel v Mirza [2016] UKSC 42***, the leading case, the conflict between law and equity again became apparent. 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, 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. This area of illegal transactions has 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* which resulted in 2010 in a final report: *The Illegality Defence*, Law Com No. 320). ***Tinsley v Milligan*** has unsurprisingly been much criticised and has since been overturned by the Supreme Court in ***Patel v Mirza [2016] UKSC 42***—a case where the transaction between the parties involved insider dealing which amounted to a criminal conspiracy. The Supreme Court decided that the decision should rest upon a range of factors and that the court, when dealing with an instance of illegality, should make a more flexible assessment of whether the public interest would be harmed by enforcement of the illegal contract. Relevant factors included (a) the underlying purpose of the prohibition which was illegally contravened, (b) public policy, and (c) whether denial of the ↵ claim would be proportionate, bearing in mind that punishment was a concern of the criminal courts. In turn, of course, it is quite possible to criticise ***Patel v Mirza*** for introducing discretion and uncertainty into the mix. Nevertheless, it does provide a more rational basis for decisions as to property where it has passed on the basis of an illegal purpose. It also demonstrates the way in which the courts are able to deal equally within the same forum with matters concerning the common law and equity.

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By contrast, Worthington argues that equity and the common law should now be fully integrated. But her arguments rest upon odd analyses of cases which introduce the concept of reasonableness such as ***Donoghue v Stevenson [1932] AC 562***. The objective standard of reasonableness can hardly be equated with the use of discretion in equity. There is no need in practice for such an argument. The fusion of the courts was all that was necessary to enable the judges to use the full range of common law and equity.

Conclusion

Thus, the systems are administered in the same courts, but in general the distinction remains relevant. While it may continue in some instances to produce conflicts, in general it enables the full use of remedies to be available.[9]

[9] If you can reach a clear statement summarising briefly what you have reviewed and discussed then do so. This final paragraph does just that.

Looking For Extra Marks?

■ The statement is provocative—even controversial—so be prepared to argue for or against it. Don't be afraid to take and argue a position on the issue.

■ Provide a clear analysis of the case mentioned in the question—some students ignore the source of the quote and that is nearly always a mistake.

■ You could expand the reference to Worthington (Worthington, S., *Equity*, 2nd edn, Oxford University Press, 2006). There is, also, a nice discussion of illegality and cases such as ***Patel v Mirza*** in R. N. Nwabueze, 'Illegality and trusts: trusts-creating primary transactions and unlawful ulterior purposes' [2019] Conv 29–46 which could be incorporated into this answer for extra marks.

Question 2

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

Discuss.

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Caution!

■ This question may sometimes appear as an assessed essay. Confronted in the examination room, it may seem daunting. Take care to plan the points before you start writing.

■ It may be difficult to decide what should be included. Take your cue from the source of the quotation and what your lecturer covered in lectures. You could take a broad approach and cover a range of examples here or focus on one example but address it in more depth. This suggested answer takes the broad approach.

■ If you were taking a narrow approach here, i.e. focusing on one aspect in depth, you could include a broad list and then state that it is your intention to address one example to show in detail the operation of equity in the context of this question. That displays your broad grasp of the point made by the question.

Diagram Answer Plan

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Suggested Answer

Introduction: Equity and Its Flexible Nature

When equity originally developed as a gloss on the common law it was innovative;[1] 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[2] which may determine the outcome of disputes. Although the judge has discretion in the granting of an equitable remedy, that discretion is exercised according to settled principles.[3] Thus, it might be said that equity can develop no further; the rules of precedent predetermine the outcome.

[1] There needs to be an explanation at the start of the development of equity—why did it develop? How did it develop?

[2] The maxims are sometimes thought to be a bit outdated but they do still underpin the operation of equity so make mention of them in the introduction.

[3] This ties in one of the maxims with the whole way in which it operates—discretion but not without rules. It is good to show you have grasped this early on.

Yet, this is belied by various new developments in equity, for example: restrictive covenants, remedies, proprietary estoppel, contractual licences, and the new model constructive trust.[4]

[4] This listing can be used to establish the structure of your answer.

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.'

Development of Equitable Remedies[5]

[5] The equitable remedies form a nice example so you can devote a good paragraph to them. You need to address the examples of search and freezing orders here as the latest developments.

Equity developed the remedies of the injunction, specific performance, account, rectification, and rescission. The injunction has been a growth area. The search order (***Anton Piller KG v Manufacturing Processes Ltd [1976] Ch 55***), reflects the growth of new technology and the need to protect ownership rights. Intellectual property can easily be lost before an action for breach of copyright can be brought. Confidential information 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 property where there was a clear risk that it would be destroyed before trial. Cases such as ***Columbia Picture Industries Inc. v Robinson [1986] 3 All ER 338*** and ***Universal Thermosensors Ltd v Hibben [1992] 1 WLR 840*** laid down guidelines for the exercise of such a draconian order.

The freezing injunction is another example of a refined application of an established remedy (***Mareva Compañía Naviera SA v International Bulkcarriers 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, very difficult, to follow. Recognising this dilemma, the judges in ***Mareva*** 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 (***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 Rules, r. 25.1(1)(f)**).[6]

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[6] If this were coursework then you could develop these cases there. In general, you shouldn't set out lists of cases but it would be justified here—lack of space and time—yet still displays your knowledge—for 'extra marks'.

The Trust and Other Equitable Creations[7]

[7] This section groups the trust development which is the new model constructive trust plus other areas which go with that—proprietary estoppel and licences.

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 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***, and ***Cooke v Head [1972] 1 WLR 518***, 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*** and the Privy Council in ***Marr v Collie [2017] UKPC 17***, have reintroduced some of the earlier flexibility into the constructive trust showing that equity is alive and well.

The new model constructive trust is notable in the field of licences. Equitable remedies have been used 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***, 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's interest and had, for that reason, paid a reduced price. 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.

p. 14 ↵ 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***. Its application was further enhanced in ***Gillett v Holt [2001] Ch 210***, where a broader approach 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 ***Thorner 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.

Undue Influence in Mortgages[8]

[8] It is possible that you didn't cover this area in lectures. But this paragraph is an example of another illustration of the point. If you omitted this paragraph you would still have enough for a good answer.

Another development in equity resulted from the decisions 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

p. 15 ↵ 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 modern context demonstrates the flexibility of equity. This was followed in ***Royal Bank of Scotland v Etridge (No. 2) [2001] 4 All ER 449*** (eight conjoined appeals), where 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.

Conclusion[9]

[9] A tight conclusion. There is no point in repeating what you have said. In an essay question your conclusion is a concise summary to round off the argument.

So equity is still developing and forms an important aspect of the legal system providing new remedies and rights where no established route to satisfy the demands of good conscience and order exists.

Looking For Extra Marks?

■ In the context of the quotation, the judge is seeking to justify a new development in equity, that is, in the particular case cited, the new model constructive trust. Be prepared to critique that justification to get extra marks.

■ Be topical. If there is a new case or area of development which signals a new direction then show how this ancient area of law is vibrant and modern.

Question 3

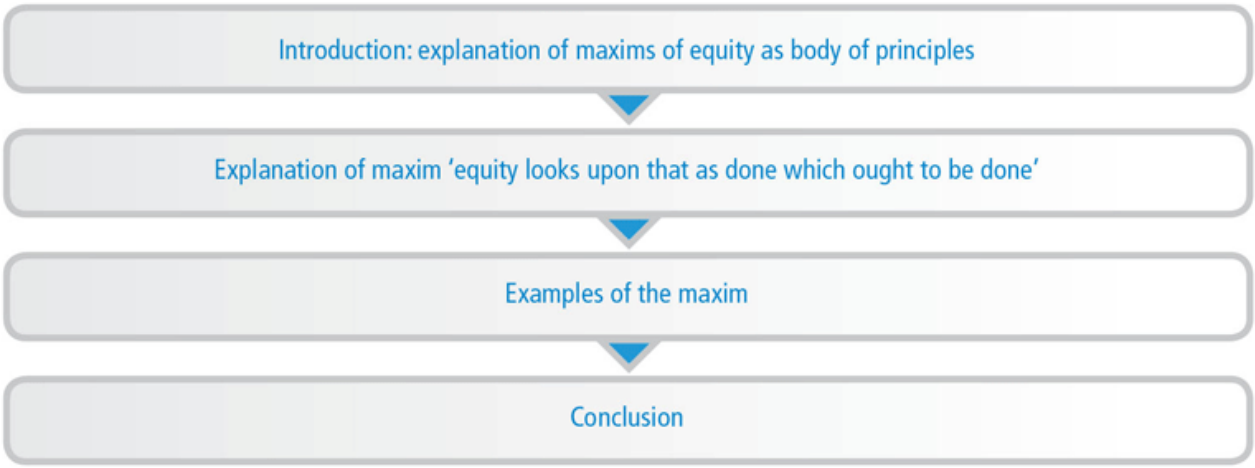
Explain and discuss the maxim, 'equity looks upon that as done which ought to be done'. To what extent (if any) does this maxim operate to impose a trust on any person?

Caution!

■ Some aspects of this answer 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 the answer offered here must be tempered by what you have been expected to cover in your syllabus.

■ As ever, plan your points before starting writing.

Diagram Answer Plan



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Suggested Answer

Introduction: The Maxims of Equity[1]

[1] Start with a straightforward explanation as to what the maxims are, what they do, and why they developed.

The maxims of equity[2] 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.[3] 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.[4]

[2] Don't start by going straight into an explanation of the particular maxim as you need to set it in context.

[3] You can choose any example of the maxims.

[4] Don't list them all! That would be a waste of words. It is better to explain some of the key ones as in the earlier part of this paragraph.

'Equity Looks Upon That as Done Which Ought to Be Done'

The maxim 'equity looks upon that as done which ought to be done' demonstrates the principle that,[5] 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.

[5] This paragraph starts the explanation of the subject maxim.

For example,[6] 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.

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[6] Now give some examples of how this maxim works.

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 Doctrine of Conversion

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)**).

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A more obscure application of the doctrine is the rule in ***Lawes v Bennett (1785) 1 Cox 167***,[7] 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.

[7] You may not have covered this—but, its inclusion would be quite impressive in any event and might earn extra marks.

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 personalty.

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 personalty 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.

Conclusion[8]

[8] A summarising conclusion to an essay question.

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.

Looking For Extra Marks?

■ 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**. Showing your knowledge of how it was affected by this statute will earn extra marks.

■ For extra marks, when dealing with the application of the doctrine in the context of ***Williams & Glyn's Bank Ltd v Boland [1981] AC 487, HL***, see the arguments made by Stuart Anderson (1984) 100 LQR 86.

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Question 4

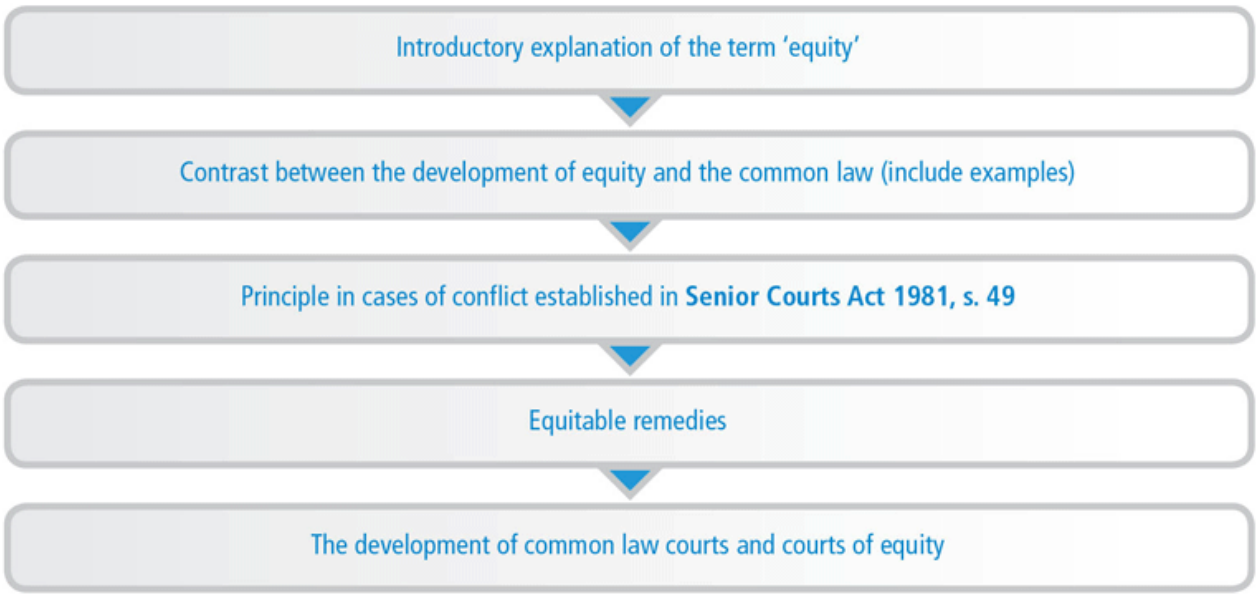
What is equity?

Caution!

■ This question requires an historical and jurisprudential analysis of the meaning and position of equity in the legal system. Being fascinated by this concept will help in answering the question.

■ It is tricky to structure an answer to a question of this sort. 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.

Diagram Answer Plan



Suggested Answer

The Meaning of 'Equity'

Equity to the layman means fairness and justice, but in the legal context its meaning is much more strictly defined.[1] 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.

[1] It is worth drawing this contrast between the lay meaning of equity and the legal one so as to show your understanding of the distinction.

p. 20 ↵ 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.[2]

[2] This introductory paragraph opens out the discussion which follows.

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***, p. 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. Likewise, in ***Pennington v Waine [2002] 1 WLR 2075***, Arden LJ based her decision on the grounds that it would be unconscionable for the shares not to be transferred in breach of the testatrix's promise (at pp. 66, 67).[3]

[3] This paragraph focuses on what might be described as the modern approach where unconscionability is deemed to be the basis for the operation of equity.

Equity developed as a result of the inflexibility of the common law;[4] 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. Receiving citizens' petitions, the Chancellor adjudicated them, not according to the common law, but according to principles of fairness and justice; thus developed equity.

[4] By contrast to the preceding paragraph, the next few paragraphs deal with the historical development.

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.

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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 made an order which the court of equity was prepared to reverse.

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: '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. Equity's operation can be well observed in the decision in ***Rochefoucauld v Boustead [1897] 1 Ch 196*** where the courts determined that, despite the absence of written evidence of a declaration of trust in compliance with statutory requirements, the trust would take effect as intended. Equity's intervention could override the will of Parliament.

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.[5] 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.

[5] This paragraph introduces the trust.

Structural Questions[6]

[6] This section covers the structural and institutional position of equity.

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.

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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).

Conclusion

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'[7] (per Sir Nathan Wright LJ in ***Lord Dudley and Ward v Lady Dudley (1705) Pr Ch 241*** at p. 244).

[7] This rounding up paragraph ends with a nice quote which neatly summarises the role of equity.

Looking For Extra Marks?

- Take a specific area of development and use it to demonstrate your points.
- Include strong academic references.
- A discussion of 'unconscionability' as the modern descendant of the maxims would make for an unusual approach. It would need to be supported by an effective analysis of the cases where this has been discussed as the underlying principle. These could include cases on proprietary estoppel as well as cases such as ***Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 669*** and ***Pennington v Waine [2002] 1 WLR 2075***.

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Taking Things Further

- Lord Denning, 'The need for a new equity' (1952) 5 CLP 1.
- Lord Denning, *Landmarks in the Law*, Butterworths, 1984.

A chapter on equity would not be complete without reference to some of Lord Denning's many works in this field.

- Lord Evershed MR, 'Reflections on the fusion of law and equity after 75 years' (1954) 70 LQR 326.

A classic article from a leading judge on the fusion debate.

- Macnair, M., 'Equity and conscience' (2007) 27 OJLS 659.

This article discusses the role of conscience in equity.

- Martin, J. E., 'Fusion, fallacy and confusion' [1994] Conv 13.

This article argues there is confusion around this topic and sets out the arguments.

■ Mitchell, C. and Mitchell, P. (eds), *Landmark Cases in Equity*, Hart Publishing, 2012.

This is a good text to read which covers some leading cases which usefully raise the issues covered by the key topic in this chapter covering the nature of equity.

The next two articles consider cases such as ***Patel v Mirza*** *where the trust arose from ulterior activities which were unlawful.*

■ Virgo, G., '*Patel* v *Mirza*: one step forward and two steps back' (2016) 22(10) Trusts & Trustees 1090.

■ Nwabueze, R. N., 'Illegality and trusts: trusts-creating primary transactions and unlawful ulterior purposes' [2019] Conv 29–46.

Online Resources

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