

SECTION 1 INTRODUCTION

A. Concurrent administration of Equity and the common law

18.1.1 Singapore, being a former British colony, has inherited the common law legal system. One of the unique features of the common law model is the dualism which is inherent in the legal system. Common law legal systems are largely precedent-based and the precedents can be divided roughly by their origins, namely, Law and Equity. Equity may be defined as a body of rules, principles and remedies initially developed and administered in the English High Court of Chancery before 1873. Both branches of the law are historically distinct although both are now administered by the same courts concurrently (see section 3 of the Civil Law Act (Cap 43, 1999 Rev Ed) and section 26 of the State Courts Act (Cap 321, 2007 Rev Ed).

B. Reception of equity in Singapore

18.1.2 English principles of Equity were introduced to Singapore through the Second Charter of Justice 1826 (see *R v Willans* (1858) 3 Ky 16). Section 3 of the Application of English Law Act (Cap 7A, 1994 Rev Ed) stipulates that the 'common law of England (including principles and rules of equity), so far as it was part of the Law of Singapore immediately before the commencement of this Act, shall continue to be part of the law of Singapore' subject to modification and suitability to the circumstances of Singapore (see A. Phang (gen ed), *The Law of Contract in Singapore* (Academy Publishing, 2012) at p40–41).

C. Relationship between Law and Equity

18.1.3 Although there has been a merger of administration of Law and Equity, the traditional view is that there is no fusion of equitable and common law rules and principles. A familiar metaphor used to describe this state of affairs is as follows: 'the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters' (see W. Ashburner, *Principles of Equity* (Butterworths, 1933), 18. Cf. *United Scientific Holdings v Burnley Borough Council* [1978] AC 904 at 944). However, in recent times this view has been challenged by some distinguished scholars who call for greater integration of Equity and the Law (see A. Burrows, 'We Do This at Common Law But That in Equity' (2002) 22 OJLS 1).

SECTION 2 THE CONSCIENCE OF EQUITY AND EQUITABLE MAXIMS

A. Equity operates on the conscience of the litigants

18.2.1 One of the central themes of Equity is that: 'Equity is dynamic. A great attribute, thus an advantage, of equity, is its flexibility to achieve the ends of justice' (per *Chao JA Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 at 528). It has often been said that one of the basic principles of Equity is that it operates on the conscience of the litigants (see *Riverlate Properties Ltd v Paul* [1975] Ch 133 at 141 cited in *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 at 525 - 526). However, this does not mean that cases are decided on the subjective view of the judge of what is 'just' in the case without reference to principles and case law. Whether a litigant's conscience is tainted is determined by a careful examination of the facts of the case and relevant precedent. The theoretical basis of the existence of equity is to function as a "body of principles which has evolved progressively to mitigate the severity sometimes occasioned by the rigid application of the rules of the common law" (per *Rajah JA in Lau Siew Kim v Yeo Guan Chye Terence* [2008] 2 SLR(R) 108 at [24]). This branch of jurisprudence serves as a "rectification of law where the law falls short by reason of its universality" (*Rajah JA in Lau Siew Kim v Yeo Guan Chye Terence* [2008] 2 SLR(R) 108 at [24]).

B. Equity is a source of legal innovation

18.2.2 Another outstanding characteristic of Equity has been its capacity to be a fertile source of legal innovation. It has been said that Equity is not past the age of childbearing but that its 'progeny must be legitimate – by principle out of precedent' (per Bagnall J *Cowcher v Cowcher* [1972] 1 WLR 425 at 431). An example of Equity's innovation in the Singapore context is the line of cases whereby the courts have granted injunctions on abusive calls of performance bonds based on the equitable notion of unconscionability. (See e.g. *GHL Pte Ltd v Unitrack Building Construction Pte Ltd and Another* [1999] 4 SLR 604; *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352). There is a desire to develop equity in a principled and certain manner and avoiding "palm tree" justice where the law is dispensed based on the subjective notion of an individual judge's view of fairness. At the same time, care must be taken so as not to calcify equity so much so that it is incapable of developing in a way which mitigates the rigours of the common law. These policy concerns present an inherent tension in equity. In balancing these competing concerns, it has been said "courts should be principled and pragmatic when resolving the tension of applying an unguided and untrammeled discretion as an antidote to the blind acceptance of inflexible hard and fast rules" (*Rajah JA in Lau Siew Kim v Yeo Guan Chye Terence* [2008] 2 SLR(R) 108 at [28]). Four primary perspectives as guidance for the court in the future development of equitable principles namely: (a) precedent; (b) principle; (c) policy; and (d) pragmatism. "[P]rincipled pragmatism should be the key to the court's approach in the application of equitable principles" (*Rajah JA in Lau Siew Kim v Yeo Guan Chye Terence* [2008] 2 SLR(R) 108).

C. Equitable maxims

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

18.2.4 Some significant maxims of Equity are:

Equity looks on as done which ought to be done.

Equity follows the law.

He who comes to Equity must come with clean hands.

He who seeks Equity must do Equity.

Where Equities are equal the law prevails.

Where Equities are equal, the first in time prevails.

Equity is equality.

Equity assists the diligent, not the tardy.

Equity looks to the intent, rather than to the form.

Equity will not assist a volunteer.

Equity acts in *personam*.

Equity will not suffer a wrong without a remedy.

Equity will not allow a statute to be made an instrument of fraud.

SECTION 3 EQUITABLE OBLIGATIONS

A. Introduction

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

B. Fiduciary obligations arise from a position of trust and confidence

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

(1) Identifying fiduciary relationships

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

- Trustee-Beneficiary (see *Keech v Sanford* (1726) 25 ER 223).
- Company directors vis-à-vis their companies (see *Hytech Builders Pte Ltd v Tan Eng Leong and another* [1995] 1 SLR(R) 576).
- Solicitor-client (see *The Law Society of Singapore v Khushvinder Singh Chopra* [1998] 3 SLR(R) 490).
- Agent – principal (see *ERA Realty Network Pte Ltd v Puspha Rajaram Lakhiani and another* [1998] 2 SLR(R) 721; *Yuen Chow Hin and another v ERA Realty Network Pte Ltd* [2009] 2 SLR(R) 721).
- Partners (see *Lee Hiok Ping @ Mitr Dephanphongs and Others v Lee Hiok Woon and Others* [1992] SGHC 11. See also H.Y. Yeo, *Partnership Law in Singapore* (Butterworths, 2000) at 167-186).

18.3.4 The categories identified above are by no means exhaustive. Courts have been known to impose a fiduciary obligation in other relationships when the relationship is one of trust and confidence (see *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109; Meagher, *Gummow and Lehane's Equity: Doctrines and Principles* (Butterworths, 2002) at 158–159).

(2) Identifying the content of fiduciary obligations

18.3.5 It has been said the 'standard of duty imposed by law on a fiduciary is the highest standard known to the law. It is a duty to act for someone else's benefit by sacrificing one's own personal interest to that of the other. If the fiduciary is not prepared to make such sacrifice he will never be able to protect and advance the interest of the other. Selfishness is the antithesis of selflessness. The office of a fiduciary is founded on selflessness. Selfishness is absolutely prohibited' (per *GP Selvam in Kumagai-Zenecon Construction Pte Ltd and Another v Low Hua Kin* [1999] 3 SLR(R) 1049 at [13]; upheld by the Court of Appeal in *Low Hua Kin v Kumagai-Zenecon Construction Pte Ltd (in liquidation) and another* [2000] 2 SLR(R) 529). Thus, a fiduciary has a duty not to put himself in a position of conflict of interests, not to misuse trust property and confidential information, and not to make an unauthorised profit by reason of his position as a fiduciary. It has been suggested that the test of "mere possibility" of conflict is the preferable test (per Rajah JA in *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109).

(3) Context is important in determining breach of fiduciary obligations

18.3.6 In determining whether a fiduciary obligation has been breached, it is important to consider the context of the relationship (see *Singapore River Cruises & Leisure Pte Ltd v Phun Teow Kie* [2000] 1 SLR(R) 22; J.D. Davies, 'Keeping Fiduciary Liability within Acceptable Means' [1998] Sing JLS 1 at 5–7). The strict fiduciary rules which apply to trustees might not apply with regard to other fiduciary relationships which might arise in a commercial context. For example, where there is a contract between the fiduciary and the principal, the scope of the fiduciary duties are defined by the agreement (see *ERA Realty Network Pte Ltd v Puspha Rajaram Lakhiani and another* [1998] 2 SLR(R) 721). Also, different rules of causation and remoteness may apply in cases of trustees and non-trustee fiduciaries. The position on causation and remoteness is unsettled (see *Maryani Sadeli v Arjun Permanand Samtani and another and other appeals* [2014] SGCA 55).

(4) Distinguishing breaches of fiduciary duties and negligence

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

(5) Causation and remoteness of loss

18.3.8 Even where a breach of fiduciary has occurred, the plaintiff must show that the consequences complained of flowed from the breach of fiduciary duty (see *Ohm Pacific Sdn Bhd v Ng Hwee Cheng Doreen* [1994] 2 SLR(R) 633; *Target Holdings v Redfern* [1996] AC 421). However, in *Kumagai-Zenecon Construction Pte Ltd another v Low Hua Kin* [1999] 3 SLR(R) 1049 it was said that the principles of causation, foreseeability and remoteness do not readily apply in considering the fiduciary's liability to make restitution. But on appeal in *Low Hua Kin v Kumagai-Zenecon Construction Pte Ltd (in liquidation) and another* [2000] 2 SLR(R) 689, the Court of Appeal while not commenting on this part of the judgment, embarked on a careful analysis of whether the chain of causation had in fact been broken. It would seem that the Court of Appeal's approach implicitly recognises that matters of causation do come into play in deciding the fiduciary's obligation to make restitution (see also *John While Springs (S) Pte Ltd and another v Goh Sai Chuah Justin and others* [2004] 3 SLR 596). The position on causation and remoteness is unsettled (see *Maryani Sadeli v Arjun Permanand Samtani* and another and other appeals [2014] SGCA 55).

(6) Remedies

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

C. Obligations in relation to confidential information

18.3.10 A person breaches a duty of confidence if it can be shown that: (a) there was unauthorised use of information to the detriment of the person communicating it; (b) the information had the necessary quality of confidence; and (c) the information was imparted in circumstances importing an obligation of confidence (see *X Pte Ltd and Another v CDE* [1992] 2 SLR(R) 596) and *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd and another* [2014] 2 SLR 1045).

(1) Need to particularise the confidential information

18.3.11 It has been said in the context of an allegation of a breach of confidence by an employer against an employee, 'an employer must particularize the confidential information which he seeks to protect. It is oppressive for him to rely on a general statement that the information is confidential or to delay the giving of particulars until after discovery' (per Lai J in *Tang Siew Choy and Others v Certact Pte Ltd* [1993] 1 SLR(R) 835). See also *Chiarapuk Jack and others v Haw Par Brothers International Ltd and another and another appeal* [1993] 2 SLR(R) 620; *Flamelite (S) Pte Ltd v Lam Heng Chung* [2001] SGHC 66 ("Flamelite"). An appeal in Flamelite was lodged to the Court of Appeal on other grounds: see *Flamelite (S) Pte Ltd and Others v Lam Heng Chung and Others* [2001] 3 SLR(R) 610.

(2) Remedies

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

D. Knowing receipt: where property is transferred in breach of trust with the defendant's knowledge

18.3.13 "The elements required to establish knowing receipt are: (a) a disposal of the plaintiff's assets in breach of fiduciary duty; (b) the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and (c) knowledge on the part of the defendant that the assets received are traceable to a breach of fiduciary duty" (see *George Raymond Zage III and another v Ho Chi Kwong and another* [2010] 2 SLR 589 at 23, per VK Rajah JA).

(1) Competing theories on knowing receipt

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

- a. Knowing receipt is premised on the principle of unjust enrichment and hence liability is strict upon proof of receipt of trust property. 'It would be confined to restoring an unjust gain. Change of position would be available as a defence accordingly' (per Lord Nicholls, "Knowing Receipt: The Need for a New Landmark" in *Restitution Past Present and Future* (Cornish et. al. (eds.)) (Hart, 1998) at p244);
- b. Knowing receipt is premised on the concept of unconscionability. Nourse LJ in *Bank of Credit and Commerce International (Overseas) Ltd v Akindale* [2001] Ch 437 at 455 (noted H Tjio, "No Stranger to Unconscionability" (2001) JBL 299) said that '[a]ll that is necessary is that the recipient's state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt'; and
- c. Knowing receipt is better viewed as equity's cousin to the common law action of conversion. It is a response to the interference with the plaintiff's equitable title (see L. Smith, 'W(h)ither Knowing Receipt?' (1998) 114 LQR 394; L. Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (2000) 116 LQR 412). Since an equitable title is always susceptible to being defeated by a *bona fide* purchaser for value without notice, some degree of knowledge must be present before liability attaches.

(2) Position in Singapore based on unconscionability

18.3.15 In Singapore, relevant test was that was laid down by Nourse LJ in *Bank of Credit and Commerce International (Overseas) Ltd v Akindale* [2001] Ch 437 at 455E who said: "[T]he recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt" has been accepted (see *George Raymond Zage III v Ho Chi Kwong* [2010] 2 SLR 589). The salient points on knowing receipt are as follows:

- a. "The degree of knowledge required to impose liability will necessarily vary from transaction to transaction." *George Raymond Zage III v Ho Chi Kwong* [2010] 2 SLR 589 at [32].
- b. In situations where there is no settled practice of making routine enquiries and prompt resolution of the transaction is required, clear evidence of the degree of knowledge and faulty must be demonstrated (at [32]).
- c. Unconscionability does not mean actual knowledge. The test of unconscionability is a flexible and factually based inquiry (at [32]).
- d. In the absence of actual knowledge, a defendant may be found liable for knowing receipt if "there are circumstances... that are so unusual, or so contrary to accepted commercial practice, that it would be unconscionable to allow a defendant to retain the benefit of receipt" (at [32]).
- e. Constructive notice in the context of knowing receipts should not be understood as the doctrine of constructive notice as developed in transactions in real estate. However, the court should not be precluded from considering "the objective circumstances and peculiar practices, if any, of each type of commercial transaction (bearing in mind the need for expediency and certainty in commerce) when assessing liability for knowing receipt" (at [39]). Thus, in certain circumstances, liability may still attach even if actual knowledge of a breach of trust is missing.
- f. Liability for knowing receipt may also be imposed if a person possessing all the relevant facts to a given matter fails to appreciate or infer their factual or legal significance (at [40]).
- g. "[C]ourts should be slow in imputing knowledge of wrongdoing when assessing the propriety of commercial transactions. In the absence of established commercial practices or obviously questionable conduct on the part of a counter-party, merchants are not

ordinarily expected to make searching inquiries into their customers' source of funds. To demand such diligence in the course of ordinary commercial transactions would unduly constrict trading activities." (at [52])

E. Dishonest assistance

18.3.16 The elements which must be proved to establish dishonest assistance are: (a) that there has been a disposal of the plaintiff's assets in breach of trust or fiduciary duty; (b) the defendant assisted or procured that breach of duty; (c) the defendant acted dishonestly; and (d) the plaintiff suffered a loss (*Caltong (Australia) Pty Ltd v Tong Tien See Construction* [2002] 3 SLR 241; *George Raymond Zage III v Ho Chi Kwong* [2010] 2 SLR 589).

18.3.20 In Singapore for a defendant to be liable for dishonest assistance: "he must have knowledge of the irregular shortcomings of the transaction that ordinary honest people would consider it to be a breach of standards of honest conduct if he failed to adequately query them" (per VK Rajah JA *George Raymond Zage III and another v Ho Chi Kwong and another* [2010] 2 SLR 589 SGCA 4).

SECTION 4 EQUITABLE REMEDIES AND DEFENCES

A. Specific performance of a promissory obligation

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

B. Injunctions: restraining a wrongful act or ordering a particular act to be done

18.4.2 An injunction is a discretionary equitable remedy whereby the court restrains the doing of a wrongful act (a prohibitory injunction), or orders a particular act to be done (a mandatory injunction). An injunction is usually only ordered if damages are an inadequate remedy (see *Bengawan Solo Pte Ltd and another v Season Confectionery Co (Pte) Ltd* [1994] 1 SLR(R) 448).

C. Declaratory relief: declaring the rights and obligations of the parties

18.4.3 A declaratory relief is an order made by a court which declares with finality the rights and obligations of the parties with regard to the dispute before it. Although this remedy historically originated in Equity, the modern declaratory remedy is governed by statute (see e.g. *Lim Kim Cheong v Lee Johnson* [1992] 2 SLR(R) 688; *Salijah bte Ab Latif v Mohd Irwan bin Abdullah Teo* [1995] 3 SLR(R) 233; *Cheong Yoke Kuen and others v Cheong Kwok Kiong* [1999] 1 SLR(R) 1126).

D. Anton Piller orders: made to preserve property or documents before action is concluded

18.4.4 An Anton Piller order is an order of court made to preserve property or documents which are the subject of a proposed or pending action. The name of this order is derived from the case of *Anton Piller v Manufacturing Processes* [1976] Ch 55. It has been said that the Anton Piller order is a draconian remedy and has very drastic effect and far-reaching consequences. As such, it should be granted only in exceptional cases (see *Computerland Corp v Yew Seng Computers* [1991] SLR(R) 379; *Asian Corporate Services (SEA) Pte Ltd v Impact Pacific Consultants Pte Ltd and Others* [2005] 4 SLR 61).

E. Mareva injunctions restraints a defendant from dealing with his assets

18.4.5 A Mareva injunction restrains a defendant from dealing with his assets to prevent their dissipation from the jurisdiction of the courts. The name of this order is derived from the case of *Mareva Compania Naviera v International Bulkcarriers SA* [1980] 1 All ER 213n. See e.g. *Guan Chong Cocoa Manufacturer v Pratiwi Shipping SA* [2003] 1 SLR(R) 157 for guidance on the factors that are relevant to the granting of a Mareva injunction.

F. Delivery up and cancellation: destruction of relevant property

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

G. Monetary compensation: unclear if local courts have jurisdiction

18.4.7 With regard to equitable damages, it is not entirely clear whether the Singapore courts have the jurisdiction to order such damages (see *Shiffon Creations (Singapore) Pte Ltd v Tong Lee Co Pte Ltd* [1987] SLR(R) 730. Cf. K.B. Soh, "Jurisdiction to Award Equitable Damages in Singapore" (1980) 30 Mal. L. Rev. 79).

H. Rescission: setting aside tainted transactions ab initio

18.4.8 Rescission is an equitable remedy enabling transactions like contracts or other dispositions of property to be set aside at the instigation of one party, if the transaction was tainted by a vitiating element like misrepresentation, undue influence, mistake, duress or fraud. Rescission operates retrospectively and avoids the transaction ab initio (see e.g. *Forum Development Pte Ltd v Global Accent Trading Pte Ltd and another appeal* [1994] 3 SLR(R) 1097).

I. Rectification: correcting instruments that do not accurately reflect the intention of the parties

18.4.9 Rectification is an equitable remedy to correct instruments or deeds which do not accurately reflect the continuing common intention of the parties. The plaintiff must show convincing proof of a continuing common intention that contradicts the written instrument (see *Kok Lee Kuen and another v Choon Fook Realty and others* [1996] 3 SLR(R) 182). In exceptional circumstances, rectification may be allowed on a party's unilateral mistake e.g. the other party was guilty of fraud, or the other party knew of the mistake, or the transaction is a voluntary transaction.

J. Promissory estoppel: rights cannot be enforced if inequity results

18.4.10 The doctrine of promissory estoppel is classically stated in two well-known passages. The first of these is that 'it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results – certain penalties or legal forfeiture – afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties'. The second passage is that 'if persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time [has] elapsed, without at all events placing the parties in the same position as they were before' (see *Halsbury's Laws of Singapore* vol 9(2) (LexisNexis, 2003) at para 110.277). This passage was cited in *QBE Insurance (International) Ltd v Winterthur Insurance (Far East) Pte Ltd* [2005] 1 SLR(R) 711.

K. Estoppel by convention: where both parties transact on a shared assumption and it is unjust for one party to go back on that assumption

18.4.11 Estoppel by convention operates '[w]hen the parties to a transaction proceed on the basis of an underlying assumption – either of fact or law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so' (see *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84, 122). The following are elements to estoppel by convention: (a) that there must be a course of dealing between the two parties in a contractual relationship; (b) that the course of dealing must be such that both parties must have proceeded on the basis of an agreed interpretation of the contract; and (c) that it must be unjust to allow one party to go back on the agreed interpretation (see *Singapore Island Country Club v Hilborne* [1996] 3 SLR(R) 418). See also *MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd* [2005] 1 SLR 379).

L. Issue estoppel

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

M. Laches: disentitling a plaintiff from relief due to unreasonable delays or negligence

18.4.13 Laches is an equitable doctrine which disentitles a plaintiff to relief in circumstances when there has been unreasonable delay or negligence in pursuing a right or claim. Two important factors in laches are: the length of the delay and the acts done during that time. It has been said that laches is an equitable doctrine which only applies to equitable claims (see *Syed Ali Redha Alsagoff (administrator of the estate of Mohamed bin Ali bin Faraj Basalamah, deceased) v Syed Salim Alhadad bin Syed Ahmad Alhadad and others and another matter* [1996] 3 SLR 410; *eSys Technologies Pte Ltd v nTan Corporate Advisory Pte Ltd* [2013] 2 SLR 1200). However, the Court of Appeal has considered the applicability of laches in a restitution claim which is a common law claim (see *Management Corporation Strata Title Plan No 473 v De Beers Jewellery Pte Ltd* [2002] 1 SLR(R) 418). This position may not be tenable the next time this matter is seriously re-considered by the Court of Appeal (see *eSys Technologies Pte Ltd v nTan Corporate Advisory Pte Ltd* [2013] 2 SLR 1200).

N. Unclean hands and illegality bar a person from equitable remedies

18.4.14 A person seeking to invoke an equitable discretionary remedy must come to the court with clean hands (see generally *EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd and others and another appeal* [2012] 1 SLR 32). A person guilty of serious misconduct is precluded from obtaining such equitable remedy. Where a person seeks to assert a legal or equitable title, 'he is entitled to recover if he is not forced to plead or rely on the illegality, even if it emerges that the title on which he relied was acquired in the course of carrying through an illegal transaction' (per Lord Browne-Wilkinson *Tinsley v Milligan* [1994] 1 AC 340 at 376 ("Tinsley"). This case was followed in *Top Ten Entertainment Pte Ltd v Lucky Red Investments Ltd* [2004] 4 SLR(R) 559 and *Chiang Sing Jeong and another v Treasure Resort Pte Ltd and others* [2013] SGHC 126. It must be noted that *Tinsley* has come under severe criticism and has not been followed in Australia (see *Nelson v Nelson* (1995) 70 ALJR 47; A. Phang, "Of Illegality and Presumptions – Australian Departures and Possible Approaches" (1996) 11 JCL 53).

O. Set off

18.4.15 Equitable set off is a substantive defence and is exercisable as a form of self-help remedy. A person is not obliged to wait for legal proceedings to be brought against him to deduct his cross-claim. The right of equitable set off arises where there are good equitable grounds for directly impeaching the title to the legal demand which the creditor is seeking to enforce. Equitable set off must arise out of the same transaction or is so closely connected with it that it would be manifestly unjust to allow the creditor to enforce payment without taking into account the cross-claim which could be deducted (see *Pacific Rim Investments Pte Ltd v Lam Seng Tiong and another* [1995] 2 SLR(R) 643).

SECTION 5 EQUITY AND PROPERTY

A. Equitable interest distinct from legal interest

18.5.1 One of the unique features of the common law system is the existence of a dual ownership of property. Ownership of property can be divided into the following: a legal interest and an equitable interest. A legal interest is enforceable against the whole world while an equitable interest is enforceable against the whole world except for the bona fide purchaser for value without notice. For example, where the property is held on trust, a trustee holds the legal title of the trust property, whereas the beneficiary has the equitable interest in the trust property. It must be noted that in matters of priority, the position might be decided by the relevant statute e.g. the Land Titles Act (Cap 157, 2004 Revised Ed.) will govern issues of priority with regard to registered land. The duality of property ownership also enables the creation of security interests such as mortgages, floating charges and fixed charges. Usually in these security interests, the debtor is the legal owner whereas the creditor is the equitable owner of the property. The equitable ownership can be asserted as a proprietary claim if the debtor becomes insolvent. It must be noted that some security interests must be perfected under the relevant statutory regime (see e.g. Companies Act (Cap 50B, 2006 Revised Ed.).

B. Express trust: created by the Settlor

18.5.2 An express trust is a trust which is expressly created for the benefit of another person to achieve certain desired consequences (see J. H. Langbein, "The Secret Life of the Trust: The Trust as an Instrument of Commerce" (1997) 107 Yale Law Journal 165; S. Worthington, "The Commercial Utility of the Trust Vehicle" in Extending the Boundaries of Trusts and Similar Ring-Fenced Funds (Kluwer, 2002), at 135). The usual pattern of an express trust is as follows: a settlor transfers trust property to the trustee on trust for the beneficiaries and specifies the terms of the trust. A settlor can also declare himself to be a trustee for the beneficiaries. It is also possible for a beneficiary to be a corporate entity (see *Goi Wang Firm v Chee Kow Ngee Sing (Pte) Ltd* [2014] SGHC 261). Quite apart from wealth management, the trust is also used in commerce such as the Real Estate Investment Trust (see J. Koh, "Singapore Chapter" in Real Estate Investment Trusts, (Globe Business Publishing, 2006), (Booth and Boyle, eds), 175). In Singapore, it is also possible to settle a business trust (see Business Trusts Act (Cap 31A, 2005 Revised Ed.; see also H.W. Tang, "The Resurgence of "Uncorporation": The Business Trust in Singapore" (2012) Journal of Business Law 283).

(1) Elements of an express trust: the 'three certainties'

18.5.3 The initial transfer of the trust property must comply with the relevant formalities (e.g. see section 7 of the Civil Law Act (Cap 43, 1999 Rev Ed) which requires a trust in respect of immovable property to be manifested and proved in writing signed by some person who is able to declare such trust) (see *Goi Wang Firm v Chee Kow Ngee Sing (Pte) Ltd* [2014] SGHC 261). In order to be a validly constituted trust, the 'three certainties' must be met (see *Joshua Steven v Joshua Deborah Steven and others [2004] 4 SLR(R) 216; Chiang Sing Jeong and another v Treasure Resort Pte Ltd and others* [2013] SGHC 126; *Guy Neale v Nine Squares Pty Ltd* [2014] SGCA 64). First, the intention of the settlor to create the trust must be certain. Second, the identity of the trust property must be certain. Finally, the identity of the beneficiaries must be certain.

C. Resulting trust: Absence of Intent to Benefit the Transferee

18.5.4 "[A] resulting trust may arise independently of the presumption of resulting trust so long as it can be shown that the transfer was not intended to benefit the recipient, and conversely, a resulting trust may not arise if it can be shown that the transfer was indeed intended to benefit the recipient. The intention of the recipient is therefore irrelevant to the question of whether a resulting trust has arisen" (*Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 at [43])

D. Constructive trust: declared by the court according to equitable principles

18.5.5 A constructive trust is a trust which is declared by operation of law in certain circumstances according to equitable principles (see generally Tang, "The Constructive Trust in Singapore: Five Persistent Puzzles" (2010) 22 SacLJ 136). For example, where a fiduciary in breach of his duties accepts bribes, the court will declare that the fiduciary holds the bribes on constructive trust for the benefit of the principal (see *Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR(R) 312). It has been held in the following circumstances that a mortgagee of a property holds a property on constructive trust for a claimant where: (a) the mortgagee had knowledge of the claimant's unregistered beneficial interest in the property; (b) the mortgagee made an allowance of that interest and discounted it in the evaluation of the property; and (c) in the agreement between mortgagee and registered owner acknowledged and committed to honour the unregistered beneficial interest (see *Ho Kon Kim v Lim Gek Kim Betsy and others and another appeal* [2001] 3 SLR(R) 220). A constructive trust was also declared in respect of money mistakenly paid to a company where the recipient knew of the mistaken payment and the money was held in a separate account (see *Re Pinkroccade Educational Services Pte Ltd (formerly known as PDS Pink Elephant Pte Ltd) (in creditors' voluntary winding up)* [2002] 2 SLR(R) 789). A constructive trust over a trade mark may be declared if it was registered in breach of fiduciary duty (see *Guy Neale v Nine Squares Pty Ltd* [2014] SGCA 64).

E. Proprietary estoppel arises when there is detrimental reliance on an assurance given by the plaintiff

18.5.6 The elements of proprietary estoppel are that there must be an assurance by the plaintiff which results in reliance to the detriment of the defendant (see e.g. *Goh Swee Fang and others v Tiah Juah Kim* [1994] 3 SLR(R); *Hong Leong Singapore Finance Ltd v United Overseas Bank* [2007] 1 SLR(R) 292). Once these elements are present, an equity is said to arise in favour of the defendant against the plaintiff. The underlying philosophy of proprietary estoppel is an endeavour to ensure the 'minimum equity to do justice' (see *Crab v Avon District Council* [1976] Ch 179 at 198; *Gillett v Holt* [2001] Ch 2001). The equity can be satisfied either by an order of monetary compensation or the transfer of property (see *Hong Leong Singapore Finance Ltd v United Overseas Bank* [2007] 1 SLR(R) 292 for the relevant factors in the award of remedies in this area).

F. Tracing

18.5.7 It has been said '[t]racing is thus neither a claim nor a remedy. It is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property' (per Lord Millett in *Foskett v McKeown* [2001] AC 102 at 128. See also *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801). The law of tracing is plagued by a perceived difference between common law tracing and tracing in equity. It is often said that the common law was only capable of tracing property when a clean substitution of property was involved and could not trace through a mixed fund. Equity, on the other hand, had no such difficulty in tracing into mixed funds. However, Lord Millett in *Foskett v McKeown* [2001] AC 102 at 128 opined that 'there is nothing inherently legal or equitable about the tracing exercise. There is thus no sense in maintaining different rules for tracing at law and in equity' (see also Lord Steyn in *Foskett v McKeown* [2001] AC 102 at 113). *Foskett v McKeown* [2001] AC 102 has been cited by the Singapore Court of Appeal in *Caltong (Australia) Pty Ltd v Tong Tien See Construction Pte Ltd and another appeal* [2002] 2 SLR(R) 94. For detailed rules of tracing see L. Smith, *The Law of Tracing* (Oxford, 1997).