



Bar Practice Course

Common Equity Problems - Principles

Michael Meek, Revised 31 May 2002

Updated August 2007, Carol Webster

Introduction

Basics

- Civil Procedure Act 2005, Uniform Civil Procedure Rules & Practice Notes
- Supreme Court Act & Rules & Practice Notes
- Be aware of the overriding purpose of the Rules in their application to Civil proceedings – “to facilitate the just, quick and cheap resolution of the real issues in such proceedings”: (s 56 Civil Procedure Act (formerly Pt 1 r3 SCR))
- Exercise Common sense
- To know where to start when litigation is contemplated there must be focus on the objectives to be achieved. This will guide the decision to litigate at all and the relief that is sought.

Equity Division

- As to what work is assigned to the Equity Division: see Uniform Civil Procedure Rules rr 1.16, 1.19 & 1.20 (formerly Pt 12 r.3&4 & Pt 77 SCR)
- Be aware of the specific Lists within the Equity Division (including Commercial, Probate, and Protective)

Text & Sources

Principles

- “Equity Doctrines & Remedies” Meagher, Gummow & Lehane, Butterworths 3rd Ed (1992)
- Jacob’s “Law of Trusts in Australia” Butterworths 6th Ed (1997)
- Geddes, Rowland & Studdert “Wills, Probate and Administration Law in New South Wales (1996) LBC

Practice

- “Equity Proceedings with Precedents”, Nevill & Ashe, Butterworths (1981)

Services

- “Supreme Court Procedure NSW” Ritchie – (2 vol), Butterworths.
- “Wills Probate and Administration Service – New South Wales”, Mason & Handler (1 vol), Butterworths
- “Court Forms Precedents & Pleadings New South Wales” (3 vols), Butterworths.



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- “Leslie’s Equity and Commercial Practice” (4 vols), Legal Books/ Prospect.
- “Principles of the Law of Trusts” Ford & Lee 3rd Ed (1996) LBC

Specific Applications

Conveyancing Act 1919

s.66G

- Formal documents: - see Nevill & Ashe pp.68-72 + precedents 10(12) – 10(24)
- Generally no defence – but relief is discretionary. Historically only certain types of matters have provided a defence such as some proprietary right, or some contractual or fiduciary obligation with which an order for sale would be inconsistent : Williams v. Legg (1992) 29 NSWLR 687. Matters based on hardship or general unfairness do not provide a defence: Hogan v. Baseden (1997) 8 BPR 15,723.

s.89

- Variation of covenants:- see Nevill & Ashe pp72-75 + precedents 10(26) – 10(34)
- Property rights are important – Courts do not lightly infer that valuable property rights have been abandoned or are obsolete.

Partnership Dissolution

- General – entitlements
 - Higgins & Fletcher “The Law of Partnership in Australia & New Zealand” LB
 - Lindley & Banks “On Partnership” 17th Ed (1995)
- Partnership Act 1898
- Utility in litigation – financial separation
- Use of partnership property after dissolution
- Work in progress
- Accounts
 - Notoriously one of most time consuming and expensive of litigious processes : Davey v Lee (1990) 13 Fam LR 688
- Procedure + precedents
 - Kraft v Kupferwaser (1991) 23 NSWLR 236
 - Nevill & Ashe chapter 4 + precedents 4(1) – 4(9)

Appointment of Receivers and Managers

- Practice and procedure: Nevill & Ashe Chapter 2 + precedents 2(1) – 2(19)
- Undertaking as to damages required on ex parte application
- Cost – judges are reluctant to make orders appointing receivers & managers because of the financial burden which follows such an appointment – one should consider whether undertakings (perhaps mutual) may achieve the same practical result until the parties’ rights can be fully determined.
- Principles
 - Meagher Gummow & Lehane chapter 21



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- Blanchard & Gedye “The Law of Company Receiverships in Australia & New Zealand” 2nd ed (1994) Butterworths (Wellington)
- Picarda “The Law Relating to Receivers, Managers & Administrators” 3rd Ed (2000) Butterworths (London)

Interlocutory Injunctions

- Duty judge
- Undertaking as to damages: UCPR r 25.8 (formerly Part 28 r7 (2) SCR)
- Principles: Meagher Gummow & Lehane chapter 21
- Practice and procedure: Nevill & Ashe chapter 1 + precedents 1(1) –1(36)

Wills Probate & Administration Act

- s.84
- Payment of legacy
- Pre-conditions
- Practice and procedure: Mason & Handler paras [1429], [8061], [8065]

Specific Performance of Contract

- Principles: Meagher Gummow & Lehane chapter 20; Jones & Goodhart “Specific Performance” (2nd Ed.) (1996)
- Practice and procedure: Nevill & Ashe chapter 6 + precedents 6(1)-6(11)
- Family Provision Act claims
- Procedure (former) Pt 77 rules 54-69, Supreme Court rules; Practice Note 63 (now repealed)
- Principles see Leslie’s Equity & Commercial Practice + Mason & Handler tab card “Family Provision”

Some Common Orders

General

- Agreements reduced to writing
- Roache v B & W Steel Pty Ltd (1991) 23 NSWLR 110

Liberty to Restore

- “Liberty to have a matter restored to the list” – refers to the capacity to re-list an existing application – this can be effected by request to an Associate or the list clerk on notice to the other parties.
- Toben v Len Sadlier Productions Pty Ltd (1993) 30 NSWLR 374 at 375B



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Liberty to Apply

- “Liberty to apply” in the proceedings – refers to liberty to make an application in the proceedings.
- Liberty to apply on less than 3 days’ notice operates as an abridgement of the usual time for service of the notice of motion: see *Toben v Len Sadlier Productions Pty Ltd*.

Liberty to Apply (as to the working out of an order)

- See *Phillips v. Walsh* (1990) 20 NSWLR 206 (McLelland J)

Reserve Further Consideration

- Where it is not intended that court finally determine the parties’ rights and it is intended that the court is to keep the whole of the proceedings before it, it is customary to “reserve further consideration” rather than give liberty to apply.
- As to the meaning of “reserve further consideration” see: *Kraft v Kupferwaser* (1991) 23 NSWLR 236; *Rosser v Maritime Services Board (No 2)*, unreported Young J 17 September 1996
- *Daniel’s Chancery Practice* 7th Ed Vol 1 Chap XVII

Forthwith

- “Forthwith” generally means immediately. It is preferable to specify hours or days by which an order is to be done.
- By UCPR r 36.5(2) (formerly Pt40 r4(2) SCR) where a judgment or order requires a person to do an act forthwith or forthwith upon a specified event or to do an act but does not specify a time within which the person is required to do the act, the Court may, by order require the person to do the act within a specified time.
- An omission to fix the time does not make the order ineffectual, but until it is fixed by a subsequent order the order may well be enforceable: see *Freeman v. Trimble* (1906) 6 SR(NSW) 133; *ASC v Macleod (No. 2)* (1993) 40 FCR 461 at 465; *Carter v Roberts* [1903] 2 Ch 312; *In the Marriage of Rubie* [1991] 15 FamLR 47
- As to fixing of timing to do an act where none is fixed see UCPR r 1.13 (formerly Pt 2 r4 SCR)

Terms not to be disclosed

- Generally it is not proper for the court to order that “Terms not to be disclosed”. However the court may note the agreement between the parties that the terms are not to be disclosed.
- *S Hoffnung & Co Ltd v Hesky* [1977] 2 NSWLR 669

Conclusion

- If you are in doubt – ask another Barrister – remember the “Open Door” policy
- Fair dealing with others (judges & practitioners) is paramount
- See Dal Pont “Lawyers’ Professional Responsibility in Australia and New Zealand” 2nd Ed (2001) LBC