



# JOURNAL OF EQUITY ANNUAL CONFERENCE 2019

*EQUITABLE FRAUD*

## Journal of Equity Annual Conference 2019 - Equitable Fraud

### Synopsis

The 2019 Journal of Equity Annual Conference, co-organised with the Centre for Cross-Border Commercial Law in Asia (Singapore Management University), will take place on 14 February 2019 at Singapore Management University, School of Law. The 2019 conference will address the theme 'Equitable Fraud' and feature five papers that examine current developments of 'equitable fraud' in a variety of contemporary contexts as well as its evolving interplay with common law and statutory regimes:

- Rebecca Lee (University of Hong Kong, Faculty of Law), 'Relief for Bribes in Equity'
- Rick Bigwood (TC Beirne School of Law, University of Queensland), 'Undue Influence as Constructive Fraud'
- Lee Pey Woan (Singapore Management University, School of Law), 'The Abuse of Organisational Forms: Trusts and Companies Compared'
- Tham Chee Ho (Singapore Management University, School of Law), 'Equitable fraud and the "equitable jurisdiction of the common law courts"'
- Elise Bant (University of Melbourne, Melbourne Law School), 'Estoppel, Misleading Conduct and Equitable Fraud'

The Guest of Honour for the conference is Judge of Appeal, Justice Andrew Phang. This conference will be of interest to judges, academics and practitioners working in the areas of equity and commercial law.

**Fee**

S\$200 inclusive of GST  
(includes lunch and coffee breaks)

**Date**

14 February 2019 (Thursday)

**Time**

9.00am to 4.20pm  
(Registration starts at 8.30am)

**Venue**

Singapore Management University  
School of Law  
Room B1.09, Level B1

**Public CPD Points:** 5

**Practice Area:** Corporate / Commercial

**Training Category:** Advanced

Please click [here](#) to register.

**Accredited CPD Activity**

Participants who wish to obtain CPD Points are reminded that they must comply strictly with the Attendance Policy set out in the CPD Guidelines. For this activity, this includes signing in on arrival and signing out at the conclusion of the activity in the manner required by the organiser, and not being absent from the entire activity for more than 15 minutes. Participants who do not comply with the Attendance Policy will not be able to obtain CPD Points for attending the activity. Please refer to <http://www.sileCPDcentre.sg> for more information.

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## Conference Conveners



**Professor Simone Degeling**  
University of New South Wales Law School  
Editor, Journal of Equity



**Professor Elise Bant**

University of Melbourne, Melbourne Law School

Editor, Journal of Equity



**Professor Matthew Harding**

University of Melbourne, Melbourne Law School

Editor, Journal of Equity



**Associate Professor Yip Man**

Singapore Management University, School of Law

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## Programme

8.30am - 9.00am

*Arrival and registration*

9.00am - 9.20am

**Welcome Address**

by Guest of Honour, Judge of Appeal, Justice Andrew Phang

9.20am - 10.20am

**Relief for Bribes in Equity**

by Associate Professor Rebecca Lee (University of Hong Kong, Faculty of Law)

10.20am - 10.40am

*Morning Break*

10.40am - 11.40am

**Undue Influence as Constructive Fund**

by Professor Rick Bigwood (TC Beirne School of Law, University of Queensland)

11.40am - 11.50am

*Stretch Break*

11.50am - 12.50pm

**The Abuse of Organisational Forms**

by Associate Professor Lee Pey Woan (Singapore Management University, School of Law)

12.50pm - 1.50pm

*Lunch*

1.50pm - 2.50pm

**Equitable Fraud and the 'Equitable Jurisdiction of the Common Law Courts'**

by Professor Tham Chee Ho (Singapore Management University, School of Law)

2.50pm - 3.10pm

*Afternoon break*

3.10pm - 4.10pm

**Estoppel, Misleading Conduct and Equitable Fraud**

by Professor Elise Bant (University of Melbourne, Melbourne Law School)

4.10pm - 4.20pm

**Closing Remarks**

by Professor Simone Degeling

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## Speakers



### Guest of Honour

#### **Judge of Appeal, Justice Andrew Phang (Supreme Court)**

Dr Andrew Phang was appointed Judge of Appeal on 28 February 2006. He was appointed Vice-President of the Court of Appeal by Chief Justice in 2018.

Born in Singapore, he received his Bachelor of Laws from the National University of Singapore (NUS) in 1982. He pursued his postgraduate studies at Harvard University, where he was conferred his Master of Laws and Doctor of Juridical Science degrees in 1984 and 1988, respectively. In 1990, he was admitted as an advocate and solicitor in Singapore.

He taught at the NUS Law Faculty from 1982 to 2000. In 2000, he was appointed Professor of Law at the Singapore Management University (SMU), and a year later, became Chair of the Department of Law at SMU's Business School. He was appointed Senior Counsel in 2004.

Dr Phang was appointed Judicial Commissioner of the Supreme Court on 3 January 2005 and elevated to a Judge on 9 December 2005, before his appointment as Judge of Appeal.

Dr Phang is the Vice-President of the Singapore Academy of Law and co-chairs the Legal Publishing & Knowledge Cluster.

His extensive publications include the local edition of *Cheshire, Fifoot and Furmston's Law of Contract* and (together with Prof Goh Yihan) *Contract Law in Singapore* (Wolters Kluwer Law and Business, 2012). He is also General Editor of, as well as a contributor to, *The Law of Contract in Singapore* (Academy Publishing, 2012).



**Associate Professor Rebecca Lee (University of Hong Kong, Faculty of Law)**

Rebecca Lee is an Associate Professor at the Faculty of Law of The University of Hong Kong. She received her LLB and BCL from The University of Hong Kong and University of Oxford respectively. She teaches and researches in Equity and Trusts (including comparative trusts and special needs trusts), Contract and Non-profit Law. She has published articles in leading English and American law journals. She is co-editor of *Trust Law in Asian Civil Law Jurisdictions: A Comparative Analysis* (CUP, 2013) and *Special Needs Financial Planning: A Comparative Perspective* (CUP, forthcoming 2019).



**Professor Rick Bigwood (TC Beirne School of Law, University of Queensland)**

Rick Bigwood is a Professor in the TC Beirne School of Law at the University of Queensland, Australia. He publishes mainly in the area of contract law, including co-authoring, with Nick Seddon, the tenth and eleventh editions of *Cheshire and Fifoot Law of Contract* for LexisNexis in Australia. He teaches both contract law and property law at the University of Queensland.





**Associate Professor Lee Pey Woan (Singapore Management University, School of Law)**

Associate Professor Lee Pey Woan is currently Associate Dean (Undergraduate Teaching and Curriculum) of the School of Law and Academic Director for Faculty Affairs. Pey Woan teaches Corporate Law but her research interests encompass company, private and commercial law. She has published widely in local as well as leading international journals including the *Modern Law Review*, *Oxford Journal of Legal Studies*, *Law Quarterly Review*, *Lloyd's Maritime and Commercial Law Quarterly* as well as *Journal of Business Law*. She has also co-authored text books on Contract Law, Tort Law and Company Law. Pey Woan graduated with from King's College London and subsequently obtained the Bachelor of Civil Law from Oxford University.



**Professor Tham Chee Ho (Singapore Management University, School of Law)**

Professor Tham Chee Ho received his LL.B. from the National University of Singapore in 1994, and the BCL and D.Phil from Oxford University in 1998, and 2017, respectively. He joined the Singapore Management University (SMU) in 2001. He was Associate Professor of Law at the SMU School of Law from 2007 to 2018, and was the Associate Dean (Research) in the SMU School of Law in 2012 and 2013. He has written on private law topics ranging from contract remedies, to cross-border insolvency, to equitable and statutory assignment.



**Professor Elise Bant (University of Melbourne, Melbourne Law School)**

Professor Bant joined Melbourne Law School (MLS) in 2008 and is the Co-convenor (with Professor Andrew Robertson) of the Obligations Group. Her main areas of teaching and research interests lie in the fields of unjust enrichment and restitution law, property, civil remedies, contract and consumer law, equity and trusts. She is author of *The Change of Position Defence* (Hart Publishing, Oxford 2009) and co-author (with Justice James Edelman) of *Unjust Enrichment* (Hart Publishing, Oxford, 2016), editor of two collections of essays, co-author of a leading Australian casebook on Remedies and has published over 80 articles, chapters and other scholarly works in her specialist fields. Professor Bant is also a general editor of the *Journal of Equity* with Professor Simone Degeling (UNSW) and Professor Matthew Harding (MLS). She is currently working on Australian Research Council grant research with Professor Jeannie Paterson (MLS), which examines the regulation of misleading conduct at common law, in equity and under statute.

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## Abstracts

### **Relief for Bribes in Equity**

**Speaker: Associate Professor Rebecca Lee (University of Hong Kong, Faculty of Law )**

As Lord Templeman remarked in *AG of Hong Kong v Reid* [1994] 1 AC 324 at 300, 'bribery is an evil practice which threatens the foundations of any civilised society'. After the UK Supreme Court decision in *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] 1 AC 250, it is now settled, at least in English law, that a fiduciary who receives a bribe in breach of fiduciary duty holds that bribe on constructive trust for his principal. This paper examines the other relief that may be available where a bribe is involved in the fiduciary's breach of fiduciary duty.

First, the briber who profits by dishonestly inducing or assisting a breach of fiduciary duty may be liable as an accessory. The exact measure of relief, however, remains unclear. In particular, judicial opinions differ on the nature of the accessory's liability and the proper causal criterion required to hold him liable. In *Novoship (UK) Ltd v Nikitin* [2014] EWCA Civ 908, [2015] QB 499, for example, where a bribe was involved, the English Court of Appeal held that an account of profits is available against a dishonest assister even if the principal suffered no loss and the fiduciary made no gains from his breach. It also held that common law rules of causation may apply to limit recovery from certain accessories. This paper reviews how this controversial decision conflicts with

subsequent cases such as *Akita Holdings Ltd v Attorney General of the Turks and Caicos Islands* [2017] UKPC 7, [2017] AC 590 and *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* [2018] HCA 43 and considers whether the moral indignation expressed by Lord Templeman justifies the relief.

Second, the fiduciary's principal has a right to rescind a transaction between himself and a third party which was completed in connection with a bribe received by the fiduciary, even though the fiduciary is not a party to the resultant transaction, so long as the counterparty to the transaction has knowledge of the conflicted fiduciary's wrongdoing: *Logicrose v Southend United Football Club Ltd* [1988] 1 WLR 1256 at 1261 per Millett J; *Ross River Ltd v Cambridge City Football Club Ltd* [2008] 1 All ER 1004 at [205] per Briggs J. Drawing upon Millett J's observation in *Logicrose* that there is a close parallel between bribery cases and dishonest assistance cases, this paper explores the possibility of analysing bribes involving multi-parties based on the accessory liability framework, particularly in light of recent English cases such as *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA Civ 1567, [2017] 2 Lloyd's Rep 621 and *Conway v Prince Eze* [2018] EWHC 29. It also considers the possible conceptual difficulties of such an analysis and its implication for the nature and scope of the doctrine of dishonest assistance.

## Undue Influence as Constructive Fraud

**Speaker: Professor Rick Bigwood (TC Beirne School of Law, University of Queensland)**

Undue influence has long been branded as a species of 'equitable' or 'constructive' fraud — as comprising a 'breach of the sort of obligation which is enforced by a ... Court of conscience'. Specifically, such fraud has been said to involve 'the victimisation of one party by the other', which in turn implies that what occurred inter partes to produce the transaction of which complaint is subsequently made was "an unconscientious use of the power arising out of the circumstances and conditions" of the ... parties'. While some modern courts have distanced themselves from conceptualizing undue influence in terms of 'a vague "public policy"', in favour of an 'actual victimization' approach, five members of the High Court of Australia in *Thorne v Kennedy* recently asserted that, for undue influence to be established, proof of victimization 'is not always required'. In this paper, I present and assess three curial approaches to the setting aside of *inter vivos* transactions on the ground of 'undue influence': the 'public-policy approach', the 'actual-victimization approach', and the 'impaired-consent approach'. I argue for a return to the public-policy approach, whereby the 'fraud' involved must be seen as 'constructive' in the fullest possible sense of that term, or else a credible rational rejection of that approach in favour of a properly theorized actual-victimization approach that absorbs the impaired-consent approach.

## The Abuse of Organisational Forms: Trusts and Companies Compared

**Speaker: Associate Professor Lee Pey Woan (Singapore Management University, School of Law)**

The express trust and the company are distinct organisational forms widely employed in the commercial context. An important reason for their popularity lies in their ability to facilitate asset partitioning, which allows one to ringfence a pool of assets against one's personal creditors by designating those assets for a specific enterprise or purpose. The ability to segregate assets in this way is generally beneficial and desirable as it incentivises productive activities by facilitating the efficient allocation of risks and reducing monitoring and transaction costs. However, the use of trusts and companies as asset protection devices has raised questions of legitimacy when they are employed principally to shield assets from trade creditors, former spouses and tax commissioners. Such

abuses may take the form of equitable fraud where those entrusted with power over assets act disloyally or for improper purposes or otherwise act unconscionably, or they may take the form of fraudulent designs in concealing or disguising the true nature of a legal relationship. This paper considers the interaction of the doctrines developed to counteract such abuses of trusts and corporate structures. It seeks to understand the reasons that underpin the divergent doctrinal developments in the two contexts and considers how, if at all, these developments should cohere and complement in the quest for an optimal solution.

## **Equitable Fraud and the 'Equitable Jurisdiction of the Common Law Courts'**

**Speaker: Associate Professor Tham Chee Ho (Singapore Management University, School of Law)**

Suppose B owes a debt of money to A, such debt being repayable upon the giving of a written demand by A. A equitably assigns the debt to C, and notice of the assignment is given to B. Despite the notice of assignment, A serves a written demand of payment to B, and B tenders payment to A, without making any further inquiries of C as to whether A was authorized to accept such paper on C's behalf. A then accepts the tender of payment, notwithstanding that C had not directed A to do so, and absconds with the monies tendered by B in breach of her duties to C as assignor, leaving no traceable residue in her wake.

In these circumstances, it is possible to characterize B's acts to have been a form of 'equitable fraud' on C, and B may be made liable in equity to C. B may have committed the equitable wrong of dishonest assistance, given that B's act of tendering payment to A would have been a necessary causal step in order for A to breach her duty to C as assignor, namely, to preserve the debt that had been assigned, until such time as C required A to reduce it into possession. C's interests may, therefore, be protected to an extent by reason of an equitable remedy arising within the court's equitable jurisdiction.

C may have, however, another remedy – one derived from the 'equitable jurisdiction of the common law courts'. Within this jurisdiction, before the administrative changes effected by the Supreme Court of Judicature Act 1873 came into force, the English common law courts could bar a defendant to an action at law from pleading the facts as would otherwise support a substantive defence to the action. So barred, the action would then proceed to judgment by default, and a judgment debt would then arise in favour of the claimant.

This procedural 'remedy' is of particular interest in cases where the causal link establishing the assistive effect of B's actions cannot be demonstrated. In this paper, an attempt will be made to review this common law remedy as a matter of English law, and it will suggest that it may have languished in the shadows for quite long enough.

## **Estoppel, Misleading Conduct and Equitable Fraud**

**Speaker: Professor Elise Bant (University of Melbourne, Melbourne Law School)**

The ancient doctrines of equitable fraud now cohabit an environment in which statute is a growing presence. The doctrines of estoppel and statutory regimes that regulate misleading conduct provide striking examples of the increasingly complex ways in which equitable fraud and statute interact. This paper will consider a series of cases which highlight the powerful gravitational influence that statute can bring to bear on such ancient equitable principles, guiding their operation and development in quite distinct ways, and causing their divergence from traditional limitations. The paper offers the opportunity to consider the value and dangers of an increasingly integrated common law, equitable and statutory legal framework.

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## Registration

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## Location Map

### Address

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School of Law  
55 Armenian Street  
Singapore 179943

SMU School of Law Carpark can be accessed via Fort Canning Link.  
If you are taking a taxi, you may alight before the entrance of the carpark.





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- CC2 Bras Basah MRT, Exit B
- EW13 NS25 City Hall MRT, Exit A
- DT21 Bencoolen MRT, Exit C

**NEAREST BUS STOP**

- A SMU School of Accountancy (04121)
- B Cathedral of the Good Shepherd (04151)
- C After CHIJMES (04159)
- D Stamford Court (04143)

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## Contact Us

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## Conference Summary

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