LAWS303: EQUITY & TRUSTS

Required Readings

2016

LAWS 303: Equity and Trusts

Textbook: Equity and Trusts in Australia by M.W. Bryan and V.J. Vann

Week 1: Introduction and Equitable Remedies

Chapter 1: An Overview of Equity

What is equity?

- *Elders Pastoral Ltd v Bank of new Zealand* [1989] 2 NZLR 186, 193: Most obvious meaning of equity is 'objective concepts such as fair, reasonable and just'.
- Equity can also refer to the principles applies by judges where the law is deficient.
- Equity corrects or supplements the law; it does not replace it.
- Equity follows the law.
- Aristotle contrasted law which is said to be 'universal', with equity which was said to be 'a correction of law where it was defective owing to its universality'.
- Equitable doctrines can be explained in terms of the dilemma of universality: a soundly based legal rule of general application can on occasions be exploited for improper purposes.
- Equity solves the dilemma of universality.
- What I own in a business after I have subtracted what I owe to the bank.
- In every system of law there needs to be a way that harsh and unjust effects can be ameliorated.

Institutional equity

- Essence of institutional equity is the creation of a special court, distinct from courts administering the general law, having the power to modify or correct the general law.
- Court of Chancery in England existed until the mid-nineteenth century.
- General courts have now inherited the jurisdiction of the Chancery Court.
- The paradox of institutional equity is that it is premised on the existence of a court which no longer exists.
- *Supreme Court of Judicature Act 1873* (Imp) s 3 abolished Chancery Court in all states except NSW.
- NSW abolished Chancery Court in 1972.
- Equitable principles are flexible and respond to changes in social and economic conditions.
- The Chancery Court never had any general power to correct a common law rule when the rule caused injustice.

The emergence of institutional equity: medieval origins

- Has origins in the 14th century English common law and the rigidity of procedures for initiating writs to commence a common law action.
- Medieval common law processes were initiated by a writ by Chancery.
- The issue of writs was the basis of formulary system of law.
- Claims could only be brought before a common law court if the facts fitted within the formula, or wording of a writ.
- The complaint would be heard by jury at trial.
- The strictness meant not all complainants could obtain a writ.
- If the complaint did not fit within a writ (match the list of required facts), complainants could petition the king.

- The king investigated some complaints himself but often referred them to the Chancellor.
- Chancellor eventually began to hear petitions in his own right.
- Sir Thomas More was a chancellor with a common law background.
- No question of chancellor correcting or modifying common law, since there was little meaningful common law.
- Any doctrinal issues raised by the plaintiff's proof of the matters alleged in the write were in practice settle by the jury verdict, not judicial ruling.
- Chancery was a court of conscience in which defendants could be compelled to do whatever conscience required.
- Chancellor summoned defendant by issuing writ.

Competition between common law and equity

- Chancellor's Court caught up in great constitutional struggles of the age (Civil War 1642-1651 and Glorious Revolution 1688).
- Chancery jurisdiction rested on the sovereign's prerogative power to administer justice, which was challenger by a parliament inclined to test the limits of the prerogative.
- The resolution of the dispute between he Chancellor and common lawyers established the basis of the relationship between the common law and equity which still exists today.
- Chancellor had power to grant a 'common injunction' to prevent the enforcement of a judgement obtained in a common law court. (See *Throckmorton v Finch* (1598) Co Third Instit 124.
- *Earl of Oxford's Case* (1615) 1 Ch Rep 1: Chief Justice Coke challenged the jurisdiction of the Chancellor to award a common injunction. Coke had the law on his side as common injunctions were contrary to statute and had been held illegal in *Throckmorton*. However, King James I rules in favour of equity and established the supremacy of the Chancery/equity over the common law.
- Equity of redemption: right to repay debt after debt had fallen due. Stop bank from foreclosing and redeem property.

Reform and the judicature legislation

- Early 19th Century the Chancery Court attracted criticism due to delays in hearing and disposing of cases.
- *Judicature Acts 1873-6* enacted reforms which improved the administration of common law and equity but which, with exceptions, did not change the substantive law of either.
- *Judicature Act 1873* made the following 4 major changes:
  - Old superior common law courts were abolished and replaced by divisions of a new High Court of justice including common law and Chancery divisions;
  - A unified code of procedure applied to both common law and equitable claims. Equity's discovery and interlocutory procedures were extended to the common law.
  - S 24 made a provision for giving effect to the equitable estates, interests and defences in legal proceedings in the manner that the Chancery Court would have done. It also abolished the common injunction, while preserving the

power to issue injunction in cases in which the jurisdiction to do so was established.
    - S 25 resolved a number of conflicts between common law and equity by providing that the equitable rule was to prevail or by enacting new law.
- The legislation was not intended to fuse or integrate legal and equitable rights.