Week 1 – Chapter 1: History of Equity

Equity and Conscience:

- Equitable principles were administered by the Court of Chancery
- Aristotle asserted that the nature of equity was to rectify the limits of the law, in so far as the law is defective on account of its generality
- The concept of conscience underpinned the emergence of equitable principles

History of equity in England:

- Equity emerged as a result of various defects in medieval common law
- McNair: "a sort of sclerosis of the common law has set in, as a result of which it failed to adapt to new developments in society and economy, and the Chancery provided remedies for these problems"

The sclerosis of the common law:

- Henry II centralised the administration of justice in England into the hands of the Kings Council or Curia Regis
- By the reign of Edward II the administration of justice was distributed between three common law courts which developed out of and eventually separated from the Kings Council. They were the Courts of Common Please, Kings Bench and Exchequer.
- In their early history, the common law courts adhered very much to the idea that should be administered fairly, granting remedies and relief on the basis of principles of abstract justice. In this sense, equitable principles were imbued within the common law system
- The interests of precision eventually overcame the common laws concern for redressing all wrongs. Discretionary powers were largely abandoned and the doctrine of precedent was strictly adhered to. This effectively necessitated the creation of a separate court of equity (Court of Chancery).
- The equitable principles that emerged from the Chancery recognised common law principles and rights, and were largely concerned with the manner in which parties exercised their common law rights.

Early Court of Chancery:

- When common law failed, people petitioned to the King. Petitions were free.
- By the mid 14th century the king delegated his authority to the Lord Chancellor, who was the 'keeper of the king's conscience'
- The sheer amount of cases that the Chancery dealt with transformed it into one of the central courts of the realm
- Baker: "the chancellors court was a court of conscience, in which defendants could be coerced into doing whatever conscience required in the full circumstances of the case"
- In the early years of the Chancery's operation:
  1. Precedent was rarely followed
  2. Case reports were rarely published

- Judges in the court, usually coming from ecclesiastical background, tended to base their judgements on principles of abstract justice and general canon law principles. In the court of chancery 'the law of God or of nature or of reason must be obeyed; and these laws require, and through the agency of conscience, enable abstract justice to be done in each individual cases, even at the cost of dispensing with the law of the state'
- Most cases dealt with procedural concerns, such as the impartiality of the jury. As time progressed, cases concerned more substantive matters such as the defectiveness of a particular common law principle

Uses and Trusts:

- Recognition and enforcement of uses led to the increased growth of the Chancery's jurisdiction.
- The system of uses related to transfers of land for the benefit of others.
- Uses were common features of the legal system throughout the 15th century and thereafter
- The use eventually evolved into the trust
- The origin of the concept of a trust is elusive. It could be an entirely Anglo-Saxon concept derived from the fidei commissum, which was a system of passing benefits to an heir through the medium of a trusted friend.
- The main purpose of a trust was to avoid taxes, to avoid confiscation of property by the sovereign and to avoid the structures of the laws od bequest and inheritance.
- When the uses became enforced, a transfer of land was called a feoffment. A transferee of land for use of some other person was called a foefee to use. The feofee to use was required to hold the title to land for the benefit of that other person, the cestui que use.
- Common law did not recognise the rights of the cestui que use – *MCC Proceeds Inc v Lehman Bros.*
- By recognising the rights of the cestui que use, the chancery does not deny the rights of the feoffee to use. It just prevents the unconscientious exercise of common law rights by the foeffee to use and compels him to exercise such rights for the benefit of the cestui que use.
- A third party who took a conveyance of land for the foeffee to use with the knowledge of the existence of the use was bound by the use
- The use allowed men to circumvent the rules primogeniture and to circumvent a wife's dower rights
- The use also enabled land owners to avoid paying feudal incidents. Feudal incidents were taxes payable when land passed from an owner to his or her heir. Land could be conveyed to a number of feoffees to use as joint tenants, resulting in no taxed being paid until the last of them died. If T sells to A, S and G to hold for his use, he could avoid taxes. The owner would become the beneficiary. This was because the legal title of a deceased tenant did not descent to his or her heir but merged with the title of the surviving joint tenants. This loophole was reversed with the *Statute of Use in 1535*. To circumvent this the use upon a use was used which was recognised valid in *Sambach v Dalston (1634).* The feudal incident was eventually abolished.

- Later the trust was used as a device to protect the power of the landed aristocracy. It also became a device for women to preserve their property rights upon marriage. In the absence of a trust, the law gave the husband rights over his wife's property in exchange for the legal obligation assumed upon marriage, to provide for and support his wife: *Countess of Strathmore v Bowes*. The *Married Women's Property Act 1882 (UK)* changes the status of married women, thereby negating the need for marriage settlements.
- Trusts were also used in the context of the English rule in Ireland, where legislation enacted in the early 18th century restricted the ownership of land by catholic. By conveying land to trusted Protestants to be held on trust for them, catholic could undermine the legislation's stated purpose.
- *Statute of Wills 1540* – created freedom in leaving property. Use is no longer necessary to get around of rules of primogeniture
- *Tenures Abolition Act 1660* – abolishes feudal dues. Trust no longer used as a tax dodge.

The Common Injunction:

- Began to be used in the mid 15th century. An injunction would be used to order a plaintiff to common law to discontinue proceedings, or if a verdict at common law had already been obtained, to prevent it being enforced. Disobedience led to imprisonment
- A defendant to common law proceedings could obtain a common injunction if it could be established that the plaintiff's enforcement of common law rights such as to amount to having acted unconscientiously
- The remedy was impersonum in that it attached to the person of the common law plaintiff
- The remedy was discretionary. Unless the petitioner in equity could establish unconscientious behaviour by the common law plaintiff, the common injunction was not ordered
- The enforcement of injunctions created greater tension between the common law and equity
- Attempts by the common law to avoid equity included making order in court that forbid any party resorting to any other jurisdiction for relief once a particular matter was already in the jurisdiction of the common law. A second was to release any person imprisoned for failing to obey a common injunction upon an application for a writ of habeas corpus – *Russell's case*
- *Finch v Throckmorton* – Throckmorton's lease was terminated for being one day late on payment. He sought an injunction from Chancery, however on appeal to the queen (who deferred back to all judges) it was held that the chancellor could not examine the case.
- *Glanville v Courtenay* – Courtenay was purchasing goods from Glanville despite being defrauded. Courtenay appealed to the Chancery, which order Glanville to repay the money. He refused, and was imprisoned by order of the chancellor. However, he was released pursuant to a writ of habeas corpus. These cases represent the conflict between equity and common law.
- In the *Earl of Oxford's case* in Chancery, the power of Chancery was reaffirmed. It was held that the office of the chancellor is to correct men's consciences for frauds, breach

of trusts, wrongs and oppressions of what nature soever they be, and to soften and mollify the extremity of the law.

The systemisation of equity:

- Chancery began to reform itself in light of the criticism. Under Lord Nottingham's chancellorship the chancery had become fixed and determinate both in matters over which jurisdiction was exercised and the principles that were applied.
- The idea that subjective notions of conscience were the proper basis for equitable jurisprudence was rejected – *Cook v Fountain*
- It had become clear that law and equity must recognise the fact that they were not rival but complementary systems, and that consequently common lawyers and equity lawyers must work together in partnership – Holdsworth

The Judicature Acts Reforms:

- Following the systemisation, the Chancery remained plagued by administrative issues. To address this, common law and equity courts were fused into single court with separate divisions
- Fusion first occurred in New York 1847
- *Common Law Procedure Act 1854* – gave to common law courts some power to grant injunctions and specific performance as well as to hear and consider equitable pleas
- *Chancery Amendment Act 1858 (Lord Cairns Act)* – enabled Chancery to order damages in favour of plaintiff, or in addition to a decree of specific performance or an injunction
- *Judicature Acts of 1873 and 1875* – abolished the historic courts of common law and equity and replaced them with one court, the High Court of the Judicature. The court was divided into a number of divisions including the Kings Bench Division and Chancery Division. Under s24, judges in either division could give effect to both common law and equitable principles.
- As a result of these reforms, the two streams of jurisdiction though they run in the same channel, run side by side and do not mingle
- The legislation clarified inconsistencies, the equitable rule was to prevail – s25(7). Generally, when there is a clash between equity and common law that is not considered in the legislation, equity prevails – s25(11). The rule was affirmed in *Lowe & Sons v Dixon & Sons.*

Equity in the Post Judicature Acts Era:

- Despite the prevalence of equity as evinced in the Acts, this eroded in the late 19th century
- *Milroy v Lord* – an intended, but ineffectual transfer of property could not be saved by being treated as a declaration of trust. For a declaration of trust to arise there had to be an intention on the part of X to declare a trust of the property for Y. Originally, a transaction that failed due to non compliance with formalities would be treated as the creation of a trust – *Ex Parte Pye.*
- *Maddison v Alderson* – narrowed down the circumstances in which the doctrine of part performance could overcome writing requirements as stipulated in the Statute of Frauds.

- The disproportionate presence of common law judges in these courts led to a general preference of common law principles
- After world war 2, an equity renaissance occurred. This mainly related to principles concerning confidential information, fiduciary obligations and estoppel.
- Law without support in values is ineffective because it is static rather than dynamic. It is from a thriving equity jurisdiction based in a thorough understanding of its principles their necessity and the circumstances of the individual case, that judge made law continues to draw much of its sustenance.

Equity in Australia:

- There are four phases to the development of equity in Australia:
  1. First Charter of Justice and the Court of Civil Jurisdiction – created by the Court of Civil Jurisdiction. This was created by Royal Prerogative. This was constituted by a Judge Advocate and two fit and proper purposes. The power given under the First Charter was purely based on common law and did not include an express power to decide equitable claims or defences. However, equitable principles were applied anyway.
  2. Second Charter of Justice and First Supreme Court of New South Wales – the second charter of 1814 abolished the Court of Civil jurisdiction and enabled the new Supreme Court to administer justice 'in a summary manner according or as near as may be to the Rules of our High Court of Chancery in Great Britain'. Court did not effectively start work until 1817 due to the ineptitude of Justice Bent. Proceedings were cumbersome due to the use of parchment for the engrossment of proceedings, with cases such as: Howe v Underwood.
  3. Third Charter of Justice and the Australian Courts Act 1828 – common law and equity were dealt with by the same judges. Equitable jurisdiction is relatively quiet. *Australian Court Act 1929* cemented many of the principles of the 1823 Act but made clear that the laws of England as at the time were to be applied in NSW and Van Diemen's Land. *Administration of Justice Act 1840* gave statutory recognition to the separate operation of law and equity within the Supreme Court, but it did not create any separate tribunal. The Administration of Justice Act created the office of the primary judge in equity who was to sit alone on equitable matters. *Equity Practice Act 1853* tried to make some improvements by removing the necessity of engrossing parchments. Despite these changes, equity proceedings remained cumbersome. Eventually all colonies adopted the separation of law and equity.
  4. Judicature System Reforms – judicature reforms began to be adopted. Queensland first to do so in 1876. NSW last to do so in 1970 by passing legislation, coming into effect in 1972. All Australian jurisdictions have in force provisions to the effect that in the event of conflict between the rules of equity and the rules of common law, the rules of equity prevail – *Law Reform (Law and Equity) Act 1972 (NSW*).

Week 1 – Chapter 2: The Nature of Equity

- *Dudley v Dudley* – now equity is no part of the law but a moral virtue, which qualifies moderates and reforms the rigour, hardness and edge of the law, and is an universal truth; it does also assist the law where it is defective and week in the constitution and defends the law from crafty evasions, delusions and new subtleties, invented and contrived to evade and delude the common law, to support and protect the common law from shifts and crafts contrivances against the justice of the law. Equity therefore does not destroy the law, nor create or assist it.
- *Life Capital Partners Pty Ltd v Merrill Lynch International* – unconscionability was a remains the fulcrum upon which entitlement to equitable relief turns.
- *Legione v Hartley* – relief granted forfeiture and penalties due to the unconscionable behavior of the defendant. This ruling conforms to the fundamental principle according to which equity acts, namely that a party having a legal right shall not be permitted to exercise it in such a way that the exercise amounts to unconscionable conduct.
- *Baumgartner v Baumgartner* – legal title to land was subject to a constructive trust due to the unconscionable conduct of the legal owner
- *Commonwealth v Verwayne* – unconscionability is the driving force behind equitable estoppel
- *Lift Capital v Merrill Lynch* – unconscionability was the basis of the equitable rule against clogging a mortgagor's equity of redemption
- *ING Bank v O'Shea* – something is not necessarily against the conscience just because a judge might subjectively consider conduct unfair.
- *Tanwar Enterprises v Cauchi* – the term unconscientious is more accurate term than unconscionable to describe the basis for equitable intervention
- As equity intervenes where the common law is insufficient, it can be seen as a gloss on the common law.
- Equity's influence has been most potent in the areas of contract and property law, not so much tort or criminal
- Parkinson suggests that equitable principles and doctrines fall within one or more of five not entirely distinct categories of unconscientious conduct. They are:
  1. Exploitation of vulnerability or weakness
  2. Abuse of positions of trust or confidence
  3. Insistence upon rights in circumstances which make such insistence harsh or oppressive
  4. Inequitable denial of obligations
  5. Unjust retention of property

Equitable Jurisdictions

- Three jurisdictions:
  1. Exclusive – matters in which equity has an exclusive cognizance because no relief can be found at common law. This can be seen with obligations arising under a trust

2. Concurrent – matters in which both the equity and common law courts have jurisdiction to make order (example: enforcement of contracts, where the primary common law remedy is damages whereas the equitable remedy is specific performance). Equity's concurrent jurisdiction is one that commonly supports common law rights
3. Auxiliary – this is also an instance of equitable jurisdiction in support of common law rights. It is exercised when a person goes to equity merely in order to obtain its assistance in proceedings which they are taking or about to take in courts of law. (example: it could be by means of quia timet injunction to prevent irreparable injury to property pending a decision at law.)

- It has been argued that the only real jurisdiction is between exclusive jurisdiction and jurisdiction in aid of legal rights. The former would be a trust, the latter would be seeking an injunction to restrain the breach of a common law obligation, and would only be available if damages were adequate. Conversely, the issue of the adequacy does not arise in equity's exclusive jurisdiction as damages are a common law remedy and the common law does not recognize such obligations
- Irrespective of which of the jurisdiction a case falls into, it was state in *Helou v Nguyen* that an exercise of the court's jurisdiction requires it to consider whether its remedial response to unconscionable conduct is a measure of one having regard to the availability of other remedies and the balancing of competing interests to which, in particular circumstances weight is to be given.

Maxims of equity:

- Maxims are principles upon which the rules of equity have been established
- A maxim is not a specific rule, but provides general principles as points of departure, and not to capsule answers to specific problems
- *Corin v Patton* – a maxim is a summary of a broad theme which underlies equitable concepts and principles. Its precise scope is necessarily ill defined and somewhat uncertain.
- Equity will not suffer a wrong to be without a remedy. Equity meet deficiencies in the common law.
- The extent to which the maxim is reflected is dependent on the circumstances of the case. Whether novel circumstances can be remedied is dependent on the Court. Generally, for a claim to success there must be some precedent
- *Re Diplock's Estate: Diplock v Wintle* – if the claim in equity exists, it must be shown to have an ancestry founded in history and in practice and the precedents of the courts administering equity jurisdiction. It is not sufficient that because we may think that the justice of the case requires it, we should invest such jurisdiction for the first time.
- *Cowcher v Cowcher* – so in the field of equity the length of the Chancellor's foot has been measures or is capable of measurement. This does not meant equity is past childbearing; simply that its progeny must be legitimate.
- *Stewart v Atco Controls Pty Ltd (in liquidation)-* '[W]hile the rules of equity are not rigid or inflexible when faced with novel situations, this does not mean that courts should proceed on general notions of justice without regard to settled principles. A principle should be applied when the circumstances of a case fall within it'.
- At the same time, equity has not remained static. It evolves, but slowly.

- *Australian Broadcasting Corporation v Lenah Game Meats* – 'it is commonplace that equity is a living force and that it responds to new situations. It must do so in ways that are consistent with equitable principles. If it were to respond, it would atrophy'.
- *Mercedes Benz AG v Leiduck* – 'the court may grant an injunction against a party properly before it where this is required to avoid injustice, just as the statute provides and just as the Court of Chancery did before 1875. The court habitually grants injunctions in respect of certain types of conduct. But that does not mean that the situations in which injunctions may be granted are now set in stone for all time...as circumstances in the world change, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions. The exercise of the jurisdiction must be principled, but the criterion is injustice. Injustice is to be viewed and decided in the light of today's conditions and standards, not those of yester year'.
- *In re Wait (1927)* – Atkin LJ asserted that equity had no place in commercial dealings, this has since been rejected.
- The application of equitable principles will be less certain in commercial dealings.
- *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* – 'courts should be careful to conserve relief so that they do not, in commercial matters, substitute lawyerly conscience for the hard headed decisions of business people'
- *Farrah Constructions v Say-Dee Ltd* – trial judges and intermediate appellate courts should not depart from decisions of intermediate appellate courts in other Australian jurisdictions, nor radically change existing law unless such decisions or existing law were plainly wrong. This is the role of the High Court.

Equity follows the law:

- Recognizes the validity of common law rights, estates, interests and titles
- *Graf v Hope Building Corporation (US)* – 'equity follows the law, but not slavishly or always'
- Equity will not allow an owner of common law rights and interests to act unconscientiously in enforcing such rights and interests.
- *DKLR Holding Co v Commissioner of Stamp Duties* – 'where the trustee is the owner in fee simple, the right of the beneficiary although annexed to the land, is a right to compel the legal owner to hold and use the rights which the law gives him in accordance with the obligations which equity has imposed upon him. The trustee, in such a case, has at law all the rights of the absolute owner in fee simple, but he is not free to use those rights for his own benefit in a way he could if no trust existed. Equitable obligations require him to use them in some particular way for the benefit of other persons'.
- In the case of joint tenancies and tenancies in common, *Delahunt v Carmody*, where 2 people contributed equally to the purchase price there was a presumption of joint tenancy. This ensured that the wife lost everything as the other joint tenant died and left the property to his ex wife.
- In the case of time stipulations in a contract, equity will not regard breach of time stipulation (time is of the essence) as validating termination unless:
  1. Contract explicitly stipulates – *Parkin v Thorold*
  2. Contract implicitly stipulates – *Parkin v Thorold*
  3. Notice to complete is served – *Carr v J A Berryman*

- A party in breach of a non essential time stipulation can still seek an order for specific performance – *Michael Realty v Carr*. However, if any losses occur as a result of this breach, he will be liable for damages at common law – *Canning v Temby*.
- Whilst at common law, for consideration to be valid it need only be sufficient (enabling nominal consideration) in equity consideration need be VALUABLE. As such, if the court deems the consideration inadequate, it may not grant specific performance – *Falcke v Gray*. Such situations are rare.
- **WHERE EQUITIES ARE EQUAL, THE FIRST IN TIME SHALL PREVAIL, AND WHERE THERE IS EQUAL EQUITY, THE LAW SHALL PREVAIL** Where A, and subsequently B, obtain equitable mortgages in relation to the same property, in the absence of some postponing conduct by A, A will gain priority. Where an earlier equitable interest and a later legal interest clash, the later legal interest will take priority if the legal interest was acquired in good faith, for valuable consideration and without notice of the earlier equitable interest.
- **ONE WHO SEEKS EQUITY MUST DO EQUITY**
- *Hanson v Keating* – 'the court giving the plaintiff the relief to which he is entitled will do so only upon the terms of his submitting to give the defendant such corresponding rights as he or she may be entitled to in respect of the subject matter of the suit'
- *Verduci v Golotta* – a mortgage that was entered into as the result of undue influence could be set aside in equity, but only on the condition that the borrower repaid the sum together with reasonable interest.
- If you want an injunction you need to take an undertaking for damages.
- **ONE WHO COMES TO EQUITY MUST COME WITH CLEAN HANDS**
- *FAI Insurances Ltd v Pioneer Concrete Services* - Similar to the above
- Requires a plaintiff in equity not to be guilty of some improper conduct, or else relief will be denied.

Delay defeats equity:

- A plaintiff must act promptly and diligently – *Smith v Clay*
- Often manifests itself in defence, applied in the principles of laches

Equality is equity:

- Equity will distribute profits and losses in proportion to the claims and liabilities of the parties concerned (equity will attempt to find for a tenancy in common rather than a joint tenancy because the latter favors younger persons – *Lake v Craddock*

Equity will not assist a volunteer:

- *Colman v Sarrel* – a plaintiff seeking equitable relief has to have a 'valuable or at least meritorious consideration'
- *Reef & Rainforest Travel v Commissioner of Stamp* Duties – maxim does not require that the consideration be paid or executed.
- Rationale is that it is not unconscientious for equity to decline to assist a volunteer – *Redman v Permanent Trustee*
- *Director of Public Prosecutions for Victoria v Le* – it is the presence of valuable consideration that will attract the intervention of equity.

- *Conlan v Registrar of Titles* – Owen J found this indiscrepancy to be a little strange
- *Roxborough v Rothmans of Pall Mall Australia* – specific performance will not be ordered in relation to a promise unsupported by any consideration at all, but contained in a deed
- *Nurdin & Peacock plc v DB Ramsden & Co* – specific performance will not be ordered in relation to a contract to purchase land or an interest for the nominal consideration of $1.
- *Cannon v Hartley* – in the above cases, the promisors promise is enforceable at common law by an award of damages.

Valuable consideration:

- In *re Abbott; ex parte Trustee of the Property of the Bankruptcy v Abbott* – a consideration that has real and substantial values, and not one which is merely nominated trivial or colorable. Approved in *Barton v Official Receiver*.
- However, it need not be adequate in the sense that the consideration is reasonably equivalent to the value of what was promised or given by the defendant. It will depend on circumstances.
- *Bell Group v Westpac Banking Corporation* – if parties are at arms length and the transaction can be fairly described as commercial in nature, valuable consideration will generally be present.

Comment [NR1]: TUTORIAL 1 – QUESTION 3

Where the Maxim does not apply:

- *Morris v Hanley* – 'the real truth is that equity rarely helps a volunteer'
- *T Choithram International SA v Pagarini* – Equity will not 'strive officiously to defeat a gift'
- *Corin v Patton* – the maxim is 'subject to certain clearly established exceptions'
- *Blackett v Darcy* – the maxim is only relevant where 'the donee requires the assistance of a court of equity in order to gain the property. Where the donee has gained the property (at least where he or she has not done so illegally) then there is usually no equity in the donor to recover back the money'.
- *Corin v Patton* - The most notable exception to this maxim is in relation to the beneficiary of a trust. However the trust must be 'completely constituted...by s present declaration of trust or by transfer by the settlor of the legal title to the intended trustee'.
- *Duffield v Elwes* – another exception to the maxim is in relation to donation mortis causa. This occurs where (*Cain v Moon*)
    1. the gift is made in contemplation, though not necessarily expectation, of death
    2. the property must be delivered to the donee. Delivery, delivery in the form of delivery of subject matter or transfer of the means or part of the means of getting at the property or the essential indicia of title.
    3. the gift must be made under such circumstances as to show that the thing is to revert to the donor in case the donor should recover. Conditional on death but otherwise unconditional.
- Although it is clear that the doctrine applies to personal property, its application to real property has not been clearly determined. English law has, since the decision in *Sen v Headley [1991] Ch 425*, extended the operation of this doctrine to gifts of land.

However, in Australia, the issue is in some doubt, with the weight of authority suggesting that the doctrine does not extend to real property: *Hobbes v New South Wales Trustee & Guardian [2014] NSWSC 570*

- *Strong v Bird* – if a donor has attempted to make an immediate inter vivos gift of property to a donee, or a purported immediate voluntary release of debt owed by the donee to the donor, but the gift fails because of failure to comply with the necessary legal formalities, then, if the donee subsequently becomes the executor of the donor's estate, the gift is considered to have been perfected by the vesting of the legal title in the donee.
- *Rutledge v Sheridan; Matthews v Matthews* - For this rule to apply, there must be an intention, continuing up to the donor's death, to make an immediate gift.
- *Stone v Registrar of Titles* – this rule applies to land.
- *Blackett v Darcy* – applies where there are two donees, but only one of them is appointed executor of the donor's estate.
- *Stone v Registrar of Titles* – does not apply to gifts of joint tenant interests

Comment [NR2]: TUTORIAL 1 – QUESTION 3

EQUITY LOOKS TO INTENT RATHER THAN FORM

- *Parkin v Thorold* – 'if it find that by insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form'.
- *Stickney v Keeble* – if time is not of the essence by express or implicit implication, equity will allow completion of contract to take place within a reasonable time after the stipulated date.
- *Carter v Wake* – equitable mortgages are treated in equity as legal mortgages, allowing equitable mortgagee to pursue the same remedies available to a legal mortgage
- *Theodore v Mistford* – 'by looking at intent rather than form, equity is able to treat as done that which in good conscience ought to be done'
- Also applies to express trusts in relation to the use of precatory words.

Equity looks on that as done which ought to be done

- *Frederick v Frederick* – where one for valuable consideration agrees to do a thing, such executory contract is to be taken as done, and the man who made the agreement shall not be in a better case than if he had fairly and honestly performed what he agreed to do.
- *De Beers Consolidated Mines v British South Africa* – this maxim is limited in the context of contracts. 'the doctrine cannot in its application to contracts...be permitted to turn the conditional into the absolute, the optional into the obligatory, or to make for the parties contracts different from those who have made for themselves. What a party to a contract ought to do, within the true meaning of the doctrine, is what he has contracted to do, and nothing more and nothing less is to be taken, in equity, as done'.
- *Walsh v Lonsdale* – a person who enters into possession of land under a specifically enforceable contract for a lease is regarded, by a court having jurisdiction to enforce the contract, as being in the same position as between itself and the other party to the contract, as if the lease had actually been granted.
- *Industrial Properties (Barton Hill) v Associated Electrical Industries* – A sold property to B. Transfer not registered. A remained legal owner. B leased to C. C defaulted,

claimed he had no liability to B. Court applied Walsh v Londale and held that even though the lease was defective at law, it was nevertheless an agreement for a lease. C was liable to B.

- *Swiss Bank Corporation v Lloyd's Bank* – 'under a specifically enforceable contract for the sale of land, the purchaser is treated in equity as the owner of the property whether or not an order for specific performance has been made ... In this way, the purchaser's rights, although founded on the ability of the court to make an order in personum against the other contracting party...became an interest in the property itself, an equitable interest'.

Equity acts inpersonam

- *Earl of Oxford's Case* – equity restrains a plaintiff 'not for any error or defect in the judgment, but for the hard conscience of the party'
- At common law, a judgment of damages was enforced against the property of the defendant. In equity, remedies attach to the person of the defendant.
- *Deputy Commissioner of Taxation v Gashi* - A defendant fails to comply with equitable orders there property is not affected, but they will be held in contempt of court and subject to coercive measures and constraints. This could include committal to prison or fine or both. Where the respondent is a corporation, the court may punish through sequestration or fine or both.
- In deciding whether to apply the penalty for contempt the court will consider:
  1. Personal circumstances of defendant
  2. Nature and circumstances of contempt
  3. Actual consequence of contempt
  4. Effect of contempt on administration of justice
  5. Contemnor (defendants) culpability
  6. The need to deter the contemnor and others from repeating the contempt
  7. The contemnor's reasons for contempt
  8. Absence or presence for a prior conviction
  9. Financial terms
  10. Whether the contemnor has exhibited general contrition and made a full and ample apology

- If there is a threat of there being a contempt of court, the court can issue an injunction, including an interlocutory injunction, to restrain the defendant from committing a contempt of court: *Tate v Duncan-Strelec [2013] NSWSC 1446 at [19].* Given the significant consequences that may flow from a finding of contempt, the burden of proof in a charge of contempt is that of beyond reasonable doubt: *Lade & Co Pty Ltd v Black [2006] 2 Qd R 531 at [65], [101]; Fitness First Australia Pty Ltd v McNicol [2013] QSC 212 at [30].*
- Finally, it must be noted that a defendant will not be punished for contempt of a court unless the order alleged to have been breached is clear and unambiguous: *Baker v Paul [2013] NSWCA 426 at [21].*
- In personam relief can only be granted provided the defendant is within the jurisdiction of the court, even if the subject matter of the case before the court is outside the jurisdiction of the court.

- *Chellaram v Chellaram* – London based trustees of shares in a Bermudan company, with assets in Africa, were capable of removal by an English court, notwithstanding the foreign location of the trust property.
- Similarly, in *Re Dion Investments Pty Ltd [2013] NSWSC 1941 at [34]-[36]*, in a case concerning a trust governed by the law of Papua New Guinea, Young AJ held that, on the basis of the in personam maxim, the Supreme Court of New South Wales had jurisdiction to hear an application to vary the terms of the trust because the trustee was based in New South Wales.
- *Oz-US Film Productions v Heath* – 'a court of equity basically exercises only in personam jurisdiction. That is, it makes orders against people who are present in the jurisdiction or who have submitted to the jurisdiction'.
- *Baker v Archer Shee* - Equitable interests can be proprietary in nature, and not merely personal choses in action