

1. OVERVIEW OF EQUITY

Introduction to Equity

- **History and Development:** Under institutional equity, equity law is a separate body of law developed in the Court of Chancery which supplements, corrects and controls the common law. (ie. parallel to common law w/ same powers but focussed on fairness and justice.)
- **Definition:** Equity in law means to apply conscience or principles of natural justice to the settlement of controversies. Categories of unconscionability include exploitation of a weakness of vulnerability; abuse of a position of confidence; insistence on a right in circumstances which are harsh or oppressive; an inequitable or unfair denial of obligations; unjust retention of property.
- **Purpose:** Equity modifies the law where the inflexible application of legal rules causes injustice in individual cases – Lord Ellesmere’s justification.
- **Equitable jurisdictions:** Power of a court to administer rules of equity including the granting of equitable relief. In all State superior courts, rules of law and equity are administered concurrently – eg *Supreme Court Act 1970* s 57. In inferior courts, equitable jurisdiction is limited to hearing of equitable defences.

Principles of Equitable Remedies

Equity is a ‘Remedial System’

- **Remedial system:** Equitable claims are ‘remedy driven;’ equitable ‘right and remedy are indissolubly connected’ – *Chase Manhattan Bank v Israel-British Bank (London) Ltd* [1981] Ch 105.
- **Equitable rights:** A right recognised in the court of equity. Eg. the right to obtain an injunction or other equitable relief; an equitable interest in property; an exception to the indefeasibility of title acquired by a proprietor of Torrens title land upon registration (usually called a ‘personal equity’) - *Garafano v Reliance Finance Corp Ltd* (1992) NSW; a ‘floating equity’ and a ‘mere equity’ – *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965)
- **Equitable remedy:** A remedy granted to a plaintiff by a court in exercise of its equitable jurisdiction. Remedies may be sought where:
 - Cause of action is itself equitable; ie. breach of trust or fiduciary obligations (**exclusive jurisdiction**)
 - Common law remedies are inadequate to right the wrong done to the plaintiff; ie. supports common law rights such as specific performance where damages inadequate (**concurrent jurisdiction**)
 - Common law remedies are not available; ie. interlocutory (*quia timet*) injunction to prevent damage to property (**auxiliary jurisdiction**)
- **Examples** – account of profits, equitable compensation, specific performance, rectification, injunctions.

Equitable Remedies are Discretionary

Remedies are Discretionary

- **Remedies are discretionary:** As current equitable practice emerged from the Chancellor’s delivery of individual justice, based on the merits of the case and circumstances of the particular parties, equitable remedies are always discretionary.
- Equitable remedies are not immediately granted once plaintiff proves their claim – in contrast, in common law, the plaintiff’s right on proof of breach or loss in contract or tort.
- According to John Seldon, equity is ‘as long as the Chancellor’s foot’; therefore, equitable remedies may be limited or denied altogether as the court sees fit.
- NB: Australian judges have not permitted basic equitable concepts to be stretched or distorted solely for the purpose of enabling a plaintiff to obtain relief which is unavailable at common law.

Social Considerations and Community Impacts

- Equitable principles are flexible and respond to changes in social and economic conditions – law of resulting and constructive trusts has been adapted to changes in patterns of family home ownership in the late 20th century brought about by the ready availability of mortgage finance.
- As a court of fairness, court's discretion is exercised after consideration of *both* parties and also effects of the remedy on other parties. I.e. equitable law considers and does not interfere with innocent people's rights
 - Innocent third parties - *Giumelli v Giumelli* (1999) 196 CLR 101 - Court exercised discretion and ordered mother pay equitable compensation and granted an equitable lien over the house, taking into consideration the brother moved in and made improvements over 7 years.
 - Public at large - *Miller v Jackson* [1977] 1 QB 966 – Court took into account the conflicting interests between the community's interest to allow cricket club continued amenity of the cricket ground and individual's private interest to prevent damage to property from stray balls. Refused to grant an injunction, but awarded £400 damage to cover past or future damage.

Remedies are Flexible

- **A 'moulded relief'**: Equity aims to put both parties in positions that reflect the merits of the case, circumstances of the parties and third parties.
 - *McKenzie v McDonald* [1927] – Court ordered equitable compensation, or restoration of property plus compensation where a fiduciary real estate agent convinced a woman to sell her farm to him in exchange for his lower value suburban shop.
 - *Nelson v Nelson* [1995] – Mother illegally transferred house to children to access a low rate loan under the Military Housing Act and advanced purchase money to assist adult children buy property (rebutted presumption of advancement to gift the house).
 - Discretion – High Court held mother not barred from her own illegal conduct from claiming proceeds of sale when children sold the property. However, mother could **not** use equitable principles of resulting trusts to obtain advantage from her illegal conduct.
 - Moulded relief – Mother was entitled to a resulting trust; Daughter ordered to give the sale proceeds to mother. If she did not repay the value of the benefit to the Commonwealth, the proceeds would be held on trust for daughter and balance to Nelson.

Application of Equitable Remedies

Account of Profits

- Allowance for skill and effort - *Victoria*
- **Equitable remuneration**: Where under equitable principles, a fiduciary must not breach the no profit rule, equitable remuneration allows payment to trustees from trust assets by order of a court of equity, for services performed for the benefit of the trust. The permission to remunerate trustees is normally granted by the settlor (expressed in the trust instrument) or by statute: *Nissen v Grunden* (1912) 14 CLR 297.

Equitable Compensation

- *Giumelli v Giumelli* (1999) 196 CLR 101 – Parents promised son a house if he stayed and helped with the family business. He left when he married a woman his parents disapproved of. HCA found son entitled to the house and land based on detrimental reliance on parent's promise.

Specific Performance

- Damages must be an inadequate remedy – i.e. uniqueness in land.
- Bars to specific performance – e.g. construction contracts; contracts for personal services (*Lumley v Wagner*)
workaround by injunction preventing employment at competitor theatre.

Injunctions

- Court power to issue injunction is not at large; can only be awarded in support of an established legal, equitable or statutory right. For example, plaintiff not entitled to injunction because no legal or equitable