

Equity & Trusts

Topic One – The Nature of Equity

- An Overview of Equity
 - Common Law
 - A system of law
 - Within the system “common law” refers to Judge made law as distinct from statute law; and
 - Within the body of judge made law we have law made in the courts of common law as opposed to “law” made in courts of equity
 - Court of Chancery
 - A separate body of courts in the UK presided over by the Chancellor
 - The job of the Chancellor was the keeper of the “great seal” and the “king’s conscience”
 - Looks at what is “fair”
 - While a decision may be lawful it may be repugnant
 - Later became the courts of equity
 - Equity will not let a decision stand when it is against good conscience for it to do so
 - Common law and equity law came into conflict
 - It was said that when the common law and equity come into conflict equity will prevail
 - That stands til this day
 - The Judicature Act merged common law and equity into one body
 - Some people will say there’s no doctrinal fusion at all
 - Equity can intervene to set aside a lawfully binding agreement
 - Just because something is legal or lawful does not mean it is equitable
 - Sayings are “at law” and “in equity”
 - NSW has a separate equitable division
 - It is the only regime to have a separate division
 - One of the main functions of the court of equity is family provision
 - If you have a loved one or close relative (you have to be an eligible person) and do not provide for them in a will, they may make a claim to the estate in equity
 - The heart of equity is it’s remedies
- Trusts
 - Uniquely a creature of equity
 - It’s not a feature of the common law
 - A concept where party A holds the legal estate but on trust for party B
 - Creates a legal interest in the trustee and an equitable interest in the beneficiary
 - A trustee has fiduciary obligations

- The Nature and History of Equity
 - Equity may be defined as the body of rules, principles and remedies which was initially developed and administered in the English High Court of Chancery before 1873
 - The Court of Chancery was the Bishop's Court
 - "You have made a promise. Promises are meant to be kept. Your immortal soul will be in danger if you do not keep your promises. I the Chancellor have a duty to safeguard your immortal soul. Accordingly for the good of your soul I am going to keep you in prison until you decide to keep your promise." – **The Original Decree of Specific Performance**
 - Court of Equity developed as a result of the numerous petitions to the King seeking relief from the numerous burdens and deficiencies of the common law
 - Petitions to the King were founded on the overriding prerogative (residual powers) of the Monarch that was not just to do justice according to law but to do justice between his subjects
 - Equity would only intervene when the common law remedy was inadequate
 - The role of equity became more settled during the 15th century. Became a distinct and autonomous body of principles
 - Equitable jurisdiction had 3 broad heads
 - Cases where there existed a common law remedy but it was unobtainable;
 - E.G. Cases where the petitioner could not expect the common law to deliver justice because of the status of the person in society and the influence they could enforce over the court
 - Cases where the common law remedy was being applied oppressively; and
 - Cases where there was no common law remedy at all
 - Lord Bacon, Lord Edgerton (Ellismere), Lord Nottingham – 3 most influential Chancellors
 - The Earl of Oxford's Case (1615)
 - A writ of ejectment was issued by Justice Coke (Cook) in the King's Court
 - The writ was obtained by fraud
 - The Court of Chancery was petitioned to intervene to prevent the Sherriff executing the writ
 - The Court granted an injunction
 - Lord Ellismere:
 - The cause why there is a chancery is, for that men's actions are so divers and infinite, that it is impossible to make any general law which may aptly meet with every particular act, and not fail in some circumstances. The office of the Chancellor is to correct mens' consciences for frauds, breach of trusts...and to soften and mollify the extremity of the law."
 - Seldon's "Chanellor's Foot"
 - Equity is a roughish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is chancellor, and as that is larger or narrower so is equity. Tis all one as if they should make the standard for the measure we call a foot, a chancellors foot, another a short foot, a third an indifferent foot: tis the same thing in a chancellors conscience."

- **Lord Francis Bacon: in cases where the rules of equity are in conflict with those of the common law, equity shall prevail.**
- *Fusion of Common Law and Equity*
 - From 1660 precedent became much more common in the law of equity
 - Judgments were recorded and doctrines started to emerge
 - Equitable enforcement of simple parole contracts
 - The trust institution
 - The first attempt to merge law and equity was 1853 with the Lord Cairns Act
 - Enabled the court of equity to award damages
 - 1873 the first of the Judicature Acts
 - The beginning of the fusion law and equity
 - Fusion fallacy
 - Reference to the decisions of the Supreme Court where the decision can only be understood in the mixing of common law and equitable principles
 - Some would argue that in such a case there has been an error made
 - Such errors are fusion fallacy's
 - Lord Ashburner 1933 Re the position of law and equity post the administrative fusion:
 - "Two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters".
 - **Fusion is a fallacy:** A fusion of administration only; this is the view taken by Meagher, Gummow and Leahane JJ
 - **Modified fusion fallacy:** A more moderate version of the above approach; it accepts limited administrative fusion, but contends the fusion is little more than a fusion of jurisdiction.
 - **The empirical approach:** As stated by Hanbury and Madsen: Modern Equity: "a century of fused jurisdiction has seen the two systems working more closely together, each developing and changing from contact with the other...they are coming closer together, but they are not fused".
 - **Fusion is fact:** Lord Denning in *Seagar v Copydex* stated "fusion is complete". In *Waltons v Maher* (at 566) Justice Deane not only accepts fusion as a reality but says to think otherwise places in jeopardy the future development of an orderly legal system.
- What is the state of equity today?
 - Equity focuses on the restraint of unconscionable conduct and on the compulsion and performance of duties
 - Equity acts in personam
- Practical Effects of the Judicature Act
 - All branches of the court have the power to order equitable remedies
 - Equitable defences may be plead in court;
 - All courts will recognize equitable rights, titles and interests

- The Maxims of Equity
 - What is a maxim? A proposition expressing a generalized truth
 - “Generalizations expressing a sort of collective wisdom of equity”. – Michael Evans
 - “They are the fruit of observation of developed equitable doctrine...the ideas embodied in them are far older than their articulate expression. But their practical value...is immense”. – H G Hanbury
 - **Equity Will Not Suffer a Wrong to be Without a Remedy**
 - Where the common law is unable to provide a satisfactory remedy the inherent flexibility of equity will provide for relief
 - Equitable relief is not available unless there is not available an appropriate common law remedy; and
 - All equitable remedies are discretionary (cf common law remedies follow as a matter of right)
 - **A Person Who Seeks Equity Must Do Equity**
 - Closely related to the ‘clean hands doctrine’
 - “He who comes to equity must come with clean hands”
 - The court will not grant the relief sought by the petitioner (plaintiff) without first examining the conduct and the conscience of that petitioner
 - All equitable remedies are discretionary as opposed to at common law where they are a matter of right
 - A person seeking equitable relief will be liable to having their own conduct examined and if they come to the court with unclean hands then they may be denied their relief in circumstances where it may otherwise have been granted
 - The court may impose conditions that may be discharged before granting relief
 - **Equity Will Not Allow Statute To Be Used As An Instrument of Fraud**
 - *But* – equity follows the law
 - Equity will always give effect to legal rights and titles
 - Maxim mainly applies to trusts
 - Equity will not permit one party to hide behind a lack of compliance when to do so would be wrong
 - **Equity Follows the Law**
 - Equity does not follow the law slavishly or always – Judge Cardozo NY Supreme Court
 - Equity has always recognized and given effect to proprietary rights and interests but it must on occasion depart from the law to give just outcomes
 - e.g. constructive trusts
 - Equity will follow the law unless it is unjust to do so
 - **Equity Acts In Personam**
 - In personam means against the conscience
 - The common law traditionally acts in rem which is against the thing
 - Perhaps the single most unifying concept of equity: equity binds the individual conscience

- **Equity is Equality**
 - In the absence of evidence to the contrary or some other disqualifying conduct equity assumes an intent to act fairly and will apportion property equally
 - Equity assumes equality
- **Equity Looks To The Intent Rather Than The Form**
 - Equity is less concerned with the formalities than is the common law
 - Lord King: “We do not always consider what the strict intent of the party was, but consider what is equitable and just; and then suppose the party meant that and so decrees it”.
- **Equity Will Not Assist A Volunteer**
 - A volunteer is a person who takes property but does not provide consideration (a gift)
 - Equity requires the conscience to be bound and in the absence of the provision of consideration – subject to some exceptions – equity will not force the performance of obligations
- **Equity Will Not Perfect An Imperfect Gift**
 - Closely related to the volunteer maxim
- **Equity Considers As Done That Which Ought To Be Done**
 - Related to equity looks to the intent rather than the form
 - Estoppel example of this maxim
 - Equity will enforce promises such as the assignment of property for consideration
 - Equity will give effect to proprietary interests and rights which cannot be provided by common law
- **Equity Aids The Diligent Not The Tardy/Delay Defeats Equity**
 - The doctrine of laches: if you sleep on your rights you may lose them
 - Related to the clean hands doctrine
 - If you acquire a right in equity to have a legal transaction set aside and you take no steps to enforce that equitable right then you lose the right to avail yourself of that
- **Equity Implies An Intent To Fulfill An Obligation**
 - Another way of saying equity considers done what ought to be done
- **Where The Equities Are Equal The Law Prevails**
 - Equities here means ‘merits’ (equity follows the law) and
- **Where The Equities Are Equal First In Time Prevails**
 - *Hotel Terrigal* and *J&H Holdings* in Topic 2 demonstrate the practical applications of these maxims
- **A Person Who Comes To Equity Must Come With Clean Hands**
 - It is more correctly a defence and then only a defence to an equitable claim
 - The conduct sought to be relied upon as a defence must be directly related to the wrongful action to the defendant; it must display “an immediate and necessary relation to the equity sued for” *Cox v Hunt* [1917] 2 Ch 71, 87.
 - The mere fact a plaintiff may have unclean hands will not necessarily defeat the claim if to do so would unjustly enrich the defendant

- The conduct of the plaintiff must be more than merely bad judgement or the taking advantage of fortuitous circumstances. It must be unconscionable or unlawful
- Like in all equitable matters the court will have regard to the entire circumstances of the matter in judging the parties behaviour
- *Moody v Cox [1917] 2 Ch 217*
 - “Equity will not apply the principle about clean hands unless the depravity, the dirt in question on the hand, has an immediate and necessary relation to the equity sued for. In this case the bride has no immediate relation to rectification.”
- Unclean hands doctrine is not related to some general naughtiness
- The conduct must directly relate to the action on foot
- *FIA Insurance Ltd v Pioneer Concrete Services (1987) 15 NSWLR 552*
 - Young CJ:
 - I think all counsel submitted when one is considering whether or not to make an order setting aside a voidable allotment of shares
 - (1) one does not make such an order if the allotted is a bona fide purchaser for value who has become registered
 - (2) one does not look at the question of the respective moral merits of the actors in the transaction globally or, as it was put during argument, one does not consider “general naughtiness”; and
 - (3) that one does not look to see whether the transaction should be set aside by considering the equitable defences such as equitable fraud, illegality, laches, acquiescence or unclean hands;
 - **(4) unless there is established one of the equitable defences, then general naughtiness or the desire of the court to censor the plaintiff’s conduct, does not enter into the equation when one is considering whether the plaintiff should get relief**