TOPIC 1: INTRODUCTION TO EQUITY; HISTORY AND NATURE OF EQUITY

HISTORY AND NATURE OF EQUITY

- "**Equity**" refers to that body of law that derives from the specific jurisdiction established and exercised by the English High Court of Chancery before 1873.
- "**Equity**" refers to the principles, doctrines and remedies applied by Australian courts exercising the jurisdiction of the English Court of Chancery prior to the enactment of judicature legislation which reformed the structure of the court system in the mid-19th C.
- Equity derives from the body of principles and remedies that developed before 1873.

'THE GREAT JURISDICTIONAL BATTLE'

- Between the **common law judges**, and the **courts of Chancery** . . . (initially Chancery was the royal secretariat).
- First: **two sides of Chancery** . . .
    - The **exclusive jurisdiction** of the ecclesiastical courts
        - About people honouring their promises
    - The **auxiliary jurisdiction** – supplementing/correcting (?) the common law.
        - Occurred when people had gone to common law courts and the solution from the common law courts, the application of strict legal justice to their matter, produced an unconscionable outcome. They would make a partition to the Chancellor, pleading that the King should intervene and override the common law decision by giving a common injunction – an order that the person who had the benefit of the common law decision should not be permitted to enforce it.
        - **An example? See Sourcebook 1.3.1b: the promise to transfer land**.
            - ***Statute of Frauds*** in connection with transfers of land: interests in land can only be effectively transferred if the transfer is in writing. In 13th and 14th C, it was not necessarily uncommon that people would agree to transfer interests in land without there being writing.
            - Someone transferred their land to trusted relatives on the basis of a promise that those people would transfer it to a son when he attained his adulthood. That promise was not a written transfer of land. Son reached his majority and cannot persuade those people to do as they promised – it goes to Chancery. Common law would say he has not complied with the Statute of Frauds so cannot help him. But, Chancery would say that is bad conscience of the people who made that promise so they would issue an injunction telling them that they must transfer that land.
- **Chancellors** were (originally) clerics (with knowledge of ecclesiastical law – **hence the notion of 'conscience'**). Using biblical sources as their source of principles.
- Until the 13th century (in the ***mediaeval period***) common law judges also exercised discretions. . . **BUT**

THE FORMATIVE PERIOD

- Throughout the 14th century the **Common Law became more rigid**, in its rules and in its procedures and remedies.
- In 1529 Henry VIII appointed Sir Thomas More (religious person) – a lawyer – as chancellor; gradually Chancellors were more usually lawyers.
- **Chancery lawyers began developing consistent equitable doctrines**.

- Chancery courts flourished.
- **Tension** arose between the **Common Law** (Lord Chief Justice Sir Edward Coke) and **Equity** (Chancellor Lord Ellesmere).
- **Resolved** in the ***Earl of Exford's Case*** **(1615)**: King James I sided with Lord Ellesmere and Equity.

EARL OF OXFORD'S CASE (1615) MICH 13 JAC 1; 21 ER 485

- **Facts:** involved land owned by Magdalene College, Cambridge. The land was initially sold to Queen Elizabeth I and leased, the lease eventually being held by Warren. The College later took the view that the original sale was void under the Ecclesiastical Leases Act 1591 and instead leased the land to Smith. Warren brought an action of ejectment at common law to evict Smith. Coke CJ held that the original transfer of land was void and that Smith could not be evicted. The Earl of Oxford, claiming to be the owner of the land following a resale of the land by Elizabeth I, later reopened the case in Chancery before Lord Ellesmere. Smith refused to respond to the equity suit and was committed to prison for contempt of court. At the same time Lord Ellesmere granted a common injunction against the enforcement of any common law judgement to release Smith from prison. The matter was referred to King James I in the Privy Council. He issued a **declaration affirming the injunction**, stating that '**it properly belongeth to our princely office to take care and provide that our subjects have equal and indifferent justice ministered to them; and that when their case deserveth to be relieved in course of equity by suit in our Court of Chancery, they should not be abandoned and exposed to perish under the rigour and extremity of our laws, we … do approve, ratifie and confirm, as well the practice of our Court of Chancery**'.
- Lord Ellesmere LC:
    - "The **Cause why there is a Chancery is, for that Mens 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, Wrongs and Oppressions, of what Nature soever they be, and to soften and mollify the Extremity of the Law…"
    - "… **when a Judgment is obtained by Oppression, Wrong and a hard Conscience, the Chancellor will frustrate and set it aside, not for any error or Defect in Judgment, but for the hard Conscience of the party**…"
    - Lord Ellesmere LC justified equity on the ground that it modifies the law where the inflexible application of legal rules causes injustice in individual cases.

THEREAFTER, EQUITY PREVAILED

- A bill introduced to parliament by common lawyers in 1690 attempting to reverse the ***Earl of Oxford's Case*** failed to pass.
    - Equity acquired a status of if equity and the common law come into conflict, the equitable rules shall prevail.
- **Two main developments of this formative period**: growth of the injunction (order from Chancery), and the recognition of the trust (notwithstanding Henry VIII's ***Statute of Uses*** to try and stop people using trusts).

A DIVISION … THE TRUST, OR 'USE'

See Jacob's Law of Trusts 5th ed, 1986), pp 3-6

- After the Norman conquests, men with property sought to avoid incidents of feudal tenure by transferring property to a trusted friend or relative 'to the use of' family members (e.g., infant heirs).

- The friend would hold legal title, but for the benefit of others (beneficiaries).
- Chancery would protect this arrangement by holding the transferee to be conscience-bound to honour the promise.
- Henry VIII (needing money) passed the ***Statute of Uses*** in 1535 – so that a use became a legal interest, subject to legal burdens. But then the clever chancery lawyers created the 'use upon a use'.
- By the time Lord Mansfield became Chancellor, the trust was well established as an instrument of family settlements and charities.
- **Today it is a common instrument used in investment strategies**.

BACK TO THE HISTORY

- The ***systematization period*** from Lord Nottingham (1673-82) to1873.
- Lord Eldon (1801-06) in particular was concerned to counter the criticism that Equity produced random results:
    - *"Equity is a roguish thing. For law we have measure… Equity is according to the conscience of him that is Chancellor, and as that is longer or narrower, so is Equity. 'Tis all one as if they should make the standard for the measure a Chancellor's foot" - John Seldon.*
- *HOWEVER,* at the same time, long delays developed – especially as a consequence of procedural separation: see Dickens' **fictional** case of *Jarndyce v Jarndyce* in ***Bleak House***:
    - Family dispute over an estate that was left on various complicated trusts so the matter was constantly before the Chancery courts and it went on for decades. The fact that Dickens wrote this at the time shows that there was an opinion at the time that Chancery was expensive jurisdiction – justice delayed is justice denied – recognition that there was a problem in this split system of the common law and equity and equity, in particular, needed reforming.

FOR EXAMPLE: KINDS OF PROBLEMS

- Common law courts would not recognise purely equitable claims.
- Common law courts would not grant equitable remedies (e.g., specific performance).
- Common law courts would not recognise equitable defences. So the defendant would have to go and seek an injunction in equity, to prevent the plaintiff from enforcing a common law award.
- Part-heard suits could not be transferred – so if you started in the wrong place, you had to start over again.
- **THUS** why, in the UK, they eventually passed a series of Acts called, collectively the ***Judicature Acts***.

THE JUDICATURE ACTS

- The relationship between legal and equitable procedures was worked out at length in ***s 24*** of the ***Judicature Act 1873 (UK)***.
    - ***s 24(1):*** gave all branches of the court power to administer equitable remedies;
        - Both common law and equity.
    - ***s 24(2)*** and ***(3):*** enabled equitable defences to be pleaded and equitable relief to be given on such defences;
    - ***s 24(4):*** required all branches of the court 'to recognise and take notice of all equitable estates, titles, and rights and all equitable duties and liabilities'.
    - ***s 24(5):*** prohibited the use of the "common injunction" within the court (however: the equitable grounds that might have provided the ground for such an injunction

prior to the passing of the Act may be relied on by way of defence in the proceedings).
    - ***s 24(6):*** provided the Court with a general power to "recognise and give effect to" all legal claims, estates, titles, rights, duties and liabilities existing by the Common Law or by custom or created by Statute.
    - ***s 25(11):*** stated that in cases where "there is any conflict or variance between the Rules of Equity and the Rules of the Common Law with reference to the same subject matter, the Rules of ***Equity shall prevail***."

WHAT ABOUT HERE IN NSW?

- ***Before* the Judicature system** civil procedure in NSW was established by the Charter of Justice in 1824. Until **1972** Equity was administered as a body of law distinct from the Common Law, by a distinct Equity jurisdiction of the Supreme Court of NSW.
- Before 1972, equitable principles and common law principles remained separate. The Judicature legislation did nothing more than allow the same administrative system to deal with both streams of law.
- The **present statutory equivalents** of ***ss 24*** and ***25*** in the English ***Judicature Act*** of 1873 are found in:
    - The ***Supreme Court Act* 1970 (NSW) ss 57-64** and
    - The ***Law Reform (Law and Equity) Act* 1972 (NSW)**
- The ***Law Reform (Law and Equity) Act s 5***:
    - "In all matters in which there was immediately before the commencement of this Act or is any conflict or variance between the rules of Equity and the rules of Common Law relating to the same matter, the ***rules of Equity shall prevail***."

THE 'FUSION FALLACY'

- **What did the Judicature legislation achieve?**
    - Merely administrative/procedural simplification?
    - Or a substantive fusion of the principles of equity and common law – including a mingling of remedies and defences?

THE ORTHODOX NSW (MGL) VIEW:

- ***Administrative fusion only:***
    - ***Salt v. Cooper (1880) 16 ChD 545*, at 549; [1874-80] All ER Rep 1204**, per Sir George Jessel MR:
        - "It has been sometimes inaccurately called 'the fusion of Law and Equity'; but it was not any fusion, or anything of that kind; it was the vesting in one tribunal the administration of Law and Equity in every cause, action, or dispute which should come before that tribunal. That was the meaning of the Act. …"
    - ***Felton v. Mulligan* (1971) 124 CLR 367 at 392**, Windeyer J referred with approval to the statement in the classic text Ashburner on Equity [2nd ed., p.18] that "the two streams of jurisdictions, though they run in the same channel, run side by side and do not mingle their waters."
    - In ***O'Rourke v. Hoeven* [1974] 1 NSWLR 622 at 626**, Glass JA said that the effect of the *Supreme Court Act* 1970 (NSW) was "not a fusion of the two systems of principle but of the Courts which administer the two systems".

SUBSTANTIVE FUSION

- Not accepted view in NSW.