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The History and Nature of Equity

The History of common law and equity

1066: William I conquered England and established the feudal system of land holding where the Crown is the true owner of all land.

- The Crown was the supreme legal authority, which could override the pre-existing laws at any time
- The King would send members of his court throughout England to dispense his justice, and the local courts began to recede in prominence
- This law thus became more common and was applied across England - 'common' law
- *The writ system*
 - o To bring an action at common law required a writ, which permitted a person to access royal justice in a common law court, and was issued by the Chancellor on behalf of the King
 - o Initially simply state a complaint and required a person to redress the complaint or come to court to defend themselves (c.f. statement of claim)
 - o However, the amount of different writs was limitless, so created limitless laws

1258: The Provisions of Oxford decreed that Chancellor was not allowed to issue any new writs without the permission of the King's Council

- Now, if a complaint did not fit within a pre-existing writ, common law could not be accessed
- The legal system was frozen in time and could not adapt, as it prioritised certainty and predictability over individual justice
 - o "It is better to suffer a mischief to one man than an inconvenience to many, which would subject the law": *Waberley v Cockerel* (1542) B&M 257 at 258

The King's Justice: The King was sworn to 'do equal and right justice and discretion in mercy and truth' (Coronation Oath of Edward II)

- This led to the creation of a new jurisdiction whose rationale was to do individual justice: equity
- The King delegates this power to their Chancellors, who are not bound by the rules and procedures of the common law, and could thus redress the failing or shortcomings in the common law
- Initially, justice was individualised and based on broad Christian notions of morality and fairness.
 - o It would act on a person's conscience (*in personam*), compelling them to use their legal rights according to the standards of equity
- Over time, equity became administered by lawyers rather than priests and became more like common law in certainty and predictability

End of 19th Century: The Judicature Acts resulted in common law and equity being dealt with by a fused judiciary

- Though they remained distinct bodies

What is Equity?

A distinct body of rules and principles that exist in all common law legal systems and presupposes the common law.

Earl of Oxford's Case (1615) 21 ER 485: 'Mens Actions are so diverse 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.' 'Law and Equity are distinct, both in their Courts, their Judges, and the Rules of Justice; and yet they both aim at one and the same End, which is, to do Right' 'when a Judgment is obtained by Oppression, Wrong and a hard Conscience, the Chancellor will frustrate and set it aside'

- *Facts:* The sale of property by College in breach of statutory requirements, which held that the sale would be void. The property passed through several hands, and one of the houses of the land was leased to Mr Warren. A later master of the College realised that since the sale was void, he could still lease it and leased Mr Warren's house to Mr Smith. Mr Warren was entitled to quiet enjoyment of the land; the original sale was not void as the legislation did not intend for a sale in this circumstance to be void.

The Effects of the Judicature Acts and the 'Fusion Fallacy'

The **Judicature Acts** (ss 24 and 25) aimed to eliminate the procedural inefficiencies of separately administering common law and equity.

There are now found in NSW in the Supreme Court Act 1970, ss 57-64, and the Law Reform (Law and Equity) Act 1972, s 5.

Section 5 LR(L&E)A: 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.

Part 1: The **fusion fallacy** is an argument that some courts have considered the fusion of procedure that resulted from the Judicature Acts as also creating a substantive fusion of legal principles.

Walsh v Lonsdale (1882) 21 Ch D 9: Until a formal lease is executed in compliance with a decree of specific performance there exists an equitable lease only, although the parties to the lease stand in the same position as if a lease had been granted.

- *Facts:* Lonsdale agreed to lease a mill to Walsh for seven years, on a written agreement that rent was payable yearly in advance, varying on the number of looms operated. However, Walsh only paid rent quarterly and not in advance. Lonsdale levied distress and sought to enforce the lease, but it was not in the form of a deed and therefore void at law. Thus, Walsh could only be holding under a tenancy from year to year so could not levy distress.
- *Held:* As Walsh was holding the property under a lease that equity would have ordered specific performance in favour of, he could not deny Lonsdale's rights.
- *An example of the fusion fallacy:* As the lease did not fit the requirements for a legal lease, but was written, it was an equitable lease, and equity would thus enforce performance of it. Therefore, it is automatically a legal lease.
 - o This eliminates a series of steps and assumed that equitable remedies are mandatory, not discretionary

Chan v Cresdon Pty Ltd (1989) 168 CLR 242: Only when the legal lease contemplated by the agreement came into existence would Chan be bound but the guarantee in it.

- *Facts:* Cresdon agreed in writing to lease land to Sarcourt, with Chan as guarantor. The agreement contained the terms of the lease as an annexure. The lease was duly executed but never registered (as required under the Torrens system). Sarcourt defaulted under the lease and Cresdon took action against Chan.
- *NOT an example of the fusion fallacy:* As it was held that a lease in equity is not equivalent to a lease at law (although they may give rise to the same rights for the lessee).

Part 2: The **fusion fallacy** is an argument that some courts have interpreted the fusion of procedure that resulted from the Judicature Acts as allowing the law of equity to develop with reference to concepts from common law.

Day v Mead [1987] 2 NZLR 443: The common law principle of contributory negligence was applied in equitable compensation for breach of fiduciary obligation.

- *Facts:* Mead had been Day's solicitor for 25 years. Mead was also a director and shareholder of Pacific Mills Ltd. Acting on Mead's advice, Day purchased 20,000 shares, at \$1 per share, in Pacific Mills, knowing that Mead was a shareholder and that his firm's nominee company had lent money to Pacific Mills. Subsequently, Day actively participated in the management of the company by regularly visiting its factory and attending a couple of meetings. Day subscribed for a further 80,000 shares in the company at a cost of \$80,000. Pacific Mills went into receivership, and Day lost both investments. Day sued Mead for his loss plus interest, claiming breach of fiduciary duty (due to conflict of interest between Mead and Day).
- *An example of fusion fallacy:* It introduced common law principles to the rational of equity without basing it on any established principles.
 - o However, it could be argued that courts are able to develop laws based off the first principles of equity.

Harris v Digital Pulse Pty Ltd (2003) 56 NSWLR 298: Are exemplary damages (*common law*) available for the breach of a fiduciary obligation (*equity*)?

- *Mason P:* Yes, by 'fusion by analogy' to tort law.
 - o However, this would be putting extra voluntary obligation on the party which they have not agreed to.
- *Majority:* Disagreed with Mason P.
 - o *Spigelman CJ:* If fusion was possible, it would be by analogy to contract.
 - [18] The heart of the "fusion fallacy" – as it has come to be called in Australia – is the proposition that the joint administration of two distinct bodies of law means that the doctrines of one are applicable to the other... That is not to say that one body of law does not influence the other. It is only to say that they remain conceptually distinct.
 - [20] The fact that exemplary damages are awarded in tort is, in my opinion, not a basis for asking "Why not?" in equity.
 - [36] I believe that the contract analogy is more appropriate. Reasoning of the highest authority has described the imposition of fiduciary obligations in terms of "undertaking" and "agreement".
 - o *Heydon JA:* Not even the contract analogy is possible, at least at State appellant level.
 - [446] If an entitlement in trial or intermediate appellate courts to grant exemplary damages for equitable wrongs arises because it is permissible to fashion and mould equitable remedies to meet the justice of the particular case, what other remedies are possible? Presumably it is not possible for those courts to grant remedies which High Court cases have ruled out.

The Maxims of Equity

Equity will not suffer a wrong to be without a remedy

Represents equity's entire rationale

- *For example: Equity of redemption*: A borrower in a mortgage can reclaim land when the loan was repaid even if repayment occurred after the due date, responding to the deficiency in common law that a borrower forfeited mortgaged land if there was a failure to pay.
- *For example: Specific performance*:

McIntosh v Dalwood (No 4), Streets CJ: It is ... a matter of common knowledge that the jurisdiction in Equity to enforce specific performance of contracts had its origin in the endeavours made by successive Chancellors in their Courts — Courts of conscience as they were called — to relieve against the rigidity and inadequacy of the common law remedy for breaches of contract.

Equity follows the law

Equity's role has always been to supplement the common law.

It presupposes the common law and its existence depends upon it.

Leech v Schweder, Mellish LJ: Where a right existed at law, and a person came only into equity because the Court of Equity had a more convenient remedy than a Court of Law ... there equity followed the law, and the person entitled to the right had no greater right in equity than at law'.

It can also mean that equity builds upon the common law: *Friend v Brooker* (2009) 239 CLR 129, 609-610

- *For example: Equitable contribution*: Where A (creditor) is owed money by B and C jointly (debtors). In seeking to recover the loan, A may sue B only and recover all of the debt from B. B, however, is entitled, pursuant to the doctrine of contribution, to recover from C an amount equal to C's share of the debt.

Where the equities are equal the first in time prevails

- *For example*: Where there are two competing equitable interest holders, the first in time prevails unless the earlier holder has engaged in some form of postponing conduct (eg unreasonable delay, etc.)

Where there is equal equity, the law prevails (earlier equitable v later legal)

- *For example*: Where the holder of a later legal interest is a bona fide purchaser without notice, that legal interest holder takes free of the earlier equitable interest.

One who seeks equity must do equity

Equity will not grant a remedy unless the person has themselves fulfilled his/her/its equitable and legal obligations to the other party in respect of the subject matter of the legal action

- *For example: Trustee's right to indemnity*: If a trustee seeks equity in being compensated from the trust, it must do equity by paying back money it owes to the trust first.
- *For example*: A beneficiary who seeks to recover trust property will only be entitled to do so if they are prepared to defray the trustee's legitimate expenses

- *For example:* In *Verduci v Golotta*, Slattery J held that 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 borrowed together with reasonable interest.

Hanson v Keating, Wigram VC: [The maxim] decides in the abstract that 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 (if any) as he also may be entitled to in respect of the subject matter of the suit.

One who comes to equity must come with clean hands

Whether a person is themselves guilty of some improper conduct that would prevent equity from granting relief

Nelson Case: Where Nelson transferred her property to her children in order to be eligible for a loan. When her child tried to assert her interest, Nelson argued that she did not hold the equitable interest as it was a resulting trust. The court agreed that there was a resulting trust, but found that Nelson needed to repay the loan before receiving her property back.

Delay defeats equity

A person seeking equitable relief must do so promptly and diligently

- *For example:* Where there is laches or acquiescence, equity may deny relief.

Equality is equity

Reflects equity's concern with apportioning losses and benefits proportionately

- *For example:* Equity prefers tenancies in common over joint tenancies.
- *For example:* A mixed fund is often split proportionately.

Equity will not assist a volunteer

Corin v Patton (1990) 169 CLR 540: Equity will not perfect the imperfect gift; the land was never legally transferred and there was no consideration.

- In order for a gift to be affected in equity, the donor must have done all that was necessary to put the gift beyond their control.
- *Facts:* Mr and Mrs Patton were the joint registered proprietors of Torrens title land. Mrs Patton was terminally ill and wished to sever the joint tenancy. She executed a memorandum of transfer to her brother, Mr Corin. However, it was not registered and Mrs Patton took no action to have the certificate of title produced to Corin.

Related rule: A voluntary covenant is not enforceable in equity

- *For example:* Specific performance not ordered for promises not supported by consideration but contained in a deed
- *For example:* Specific performance not ordered for a contract to for an interest in land for the nominal consideration of \$1

Where the maxim does not apply:

- A beneficiary of a trust can bring an action against the trustee to enforce the trust even though the beneficiary gave no consideration for their interest, provided that the trust