

# Topic 1: Origin and nature of equity and its relationship with the common law

## Introduction:

- principles derived from Equitable jurisdiction make up a significant portion of our law
- Equitable jurisdiction is a body of law that has established doctrines → now exist alongside statute and the common law.
- Equity has developed principles in a number of different areas where the common law exists inadequately or doesn't exist at all.
- **PURPOSE:** not to overwhelm the common law but to work alongside it.

## Equity and justice

- Equity refers to → intangible sense of justice rather than anything tangible or physical.
- Has both ethical and legal connotations.

## Aristotle

- Equity is a species of justice which is superior to legal justice because of its function as a 'rectification' of the law.'
- Aristotle concludes that equity and justice are effectively the same thing because they are both concerned with balance and proportionality and with what is right and good. [Book V, ch 10]
- Equity represents a superior form of legal justice because it is not absolute in nature: unlike the law, equity is not generalised and therefore it is able to correct the law by considering particular applications.
- equity justice considers proportionality of conduct and refers to individual equality and fairness

## Equity corrects the law

- operates to correct the law and **not overwhelm it**- it prescribes relief against the proscriptive operation of the common law therefore correcting the harsh nature of the common law
- Equity has a discretionary operation: it operates to meet the demands of individual circumstances and does not abide by generalised, formal doctrine (see EG St German's doctor)

## Form over substance

- Equity operates as a corrective form of justice by giving effect to the spirit and intent of the law. It ensures that the written word of the law is construed according to reason and spirit rather than according to the precise interpretation and limitation of the word.
  - see Mr Justice Blackstone
- It is not obliged to follow the letter of law
- In its function as a corrective jurisdiction, equity interprets the law according to substance rather than form. Consideration is given to the underlying intent of the law rather than its strict form.

## Standards of conduct

- Doesn't apply defined rules but evaluates specific conduct requiring it to be flexible and discretionary
- required to balance nature of the alleged unfairness with circumstances in which it occurred and compare it with existing social, domestic and commercial norms.
  - Standard of conduct varies from time to time according to changing social expectations
- courts exercising equity must assess the relational fairness between the applicants
  - ie large institutions such as banks are in a superior position with more experts etc. the question is if the party have acted fairly in light of their disproportionate circumstances
- Most equitable principles are concerned with prescribing standards of conduct; these standards are based upon the basic precepts of good faith, honesty and generosity.

## Unconscionability

- One of the most fundamental themes of equitable intervention is the concept of Unconscionability.
- Conduct can however only be characterized as unconscionable where a clear injustice is established and the court determines that it would be against the 'conscience' of a court of equity to deny relief in the circumstances

- Unconscionability is a modern derivation of the doctrine of equitable fraud. As outlined by Owen J in *The Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)* [2008] WASC 239 at [4845], **'fraud is abhorrent to the good conscience on which the principles of equity are based.'**
- needs to be proven that the circumstances are such that it would be against the conscience of a court of equity to refuse relief
- Equitable fraud has traditionally applied a notion of preventive rather than remedial justice<sup>1</sup> and also acts which have an unfair or unjust result.<sup>2</sup>
  - **The court must take into account a man who has been fraudulent in his conduct, even if done innocently because of his ignorance**
    - As Viscount Haldane LC stated in *Nocton v Lord Ashburton* [1914] AC 932 at 954:
- **Categories of Unconscionable Conduct**
  - The exploitation of vulnerability or weakness: unconscionable dealing, undue influence
  - The abuse of positions of trust and confidence: law of trusts, fiduciary obligations
  - The insistence upon rights in circumstances which make such insistence harsh or oppressive: relief from penalties and forfeiture, equitable set off, specific performance, on the discretionary ground of hardship
  - The inequitable denial of obligations, doctrine of part performance, principle of equitable estoppel
  - The unjust retention of property, constructive trusts, principles of subrogation

### Equitable relief is discretionary

- equitable jurisdiction assumed characteristically discretionary approach when awarding relief.
- There are two different levels to this discretion:
  1. Court has discretion to determine whether or not the particular circumstances warrant any relief at all.
    - Consider whether CL if applicable is adequate or not and whether it would be against the conscience of the court to deny such relief
  2. once it has been determined that relief is capable of being issued, the court has discretion to determine the type or measure of relief to be granted
- Range of different considerations may be taken into account
  - E.g. hardships on the D, laches or delay, overall conduct of the parties, the adequacy of CL relief
- Discretionary operation of equity is fundamentally different from the CL where every P has the right to relief once a cause of action can be est.
  - Equitable relief will only be granted where CL relief is deemed inadequate and the circumstances demand 'equity'
  - Underlying obj. of the eq. jurisdiction are to mitigate hardships, balance needs and promote fairness in conflict resolution

### Distrust of equity

- Taken long time for equity to be recognised and validated as a body of law existing alongside CL.
- Even today: an essential 'distrust' of the jurisdiction remains.
- Why? Because of discretionary operation of equity.
  - The courts, particularly the early common-law courts which were nurtured on doctrinal predictability, found the uncertainty of the equitable jurisdiction somewhat dubious.
- Claims that the application of the equitable jurisdiction depended 'upon the length of the Chancellor's foot' were widespread and produced a clear demarcation between common law and equitable jurisdictions.
- Discretion and uncertainty encouraged fear and doubt
- Range of different considerations may be taken into account when exercising the discretion.

### Equitable maxims

- Maxims = assist in the interpretation of the discretionary jurisdiction
- often used by the early courts of equity as guidance in the application of equitable principles

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<sup>1</sup> See J Story, 'Nature and Character of Equity Jurisprudence', art 258, in A E Randall (ed), *Commentaries on Equity Jurisprudence* (1920).

<sup>2</sup> Ibid. We consider equitable fraud in greater detail in Part II.