TOPIC 1 – INTRODUCTION TO EQUITY

1.1 EQUITY AS LAW

Classical (non-legal) meanings of 'equity'- Aristotle: A correction of law where it is defective owing to its universality (alleviate the harsh and unfair results that may follow when legal rules are strictly applied)).

Modern (legal) meanings of 'equity': The separate body of law, developed in the Court of Chancery, which supplements, corrects and controls the rules of common law

- 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 the judicature legislation

The Court of Chancery:

- From the original administrative function an adjudicative function emerged
- Over time, Chancery heard 'petitions' from those to whom the common law courts gave no recourse
- By petitioning the Chancellor, the plaintiff made a formal request for relief
    - Depending on what 'equity' was seen to demand, the Chancellor would resolve the parties' dispute accordingly
- First reason: Go to Chancery because Common law courts not interested in entertaining a plaintiff's petition → in disputes arising out of relationships of trust and confidence
- Second reason: Dissatisfied with remedies that the common law court provided (damages)
- Chancery dispensed a particular brand of justice by examining the plaintiff's conscience → what would fairness demand on the facts of the matter → this was **equity**
    - What would good conscience demand in a particular dispute? Is there a private remedy that is more satisfactory than the award of common law damages?
    - **Note:** whatever part of private law we call 'equitable' = before 1873 it was only recognised in the Court of Chancery – not the courts of common law

The early court of Chancery's unpredictable justice – one of its major shortcomings:

- **J Seldon, Table Talk (1689)**: *One Chancellor has a long foot, another a short foot, a third an indifferent foot; it is the same thing in the Chancellor's conscience* - ultimately, an arbitrary court of conscience

Conflict between early common law and equity:

- The conflict between the courts of common law and equity came to a head in the Earl of Oxford's Case (1615) judgement → Lord Ellesmere rejected that by issuing injunctions the court of Chancery was undermining the institutional integrity of the courts of common law – not functioning as a superior court that reviews judgements of common law courts but operating in a totally different sphere

Later so-called 'conflict provisions':

- Equity's 'supremacy' was affirmed → s 25 Supreme Court of Judicature Act 1873 (Imp)
- S 29(1) Supreme Court Act 1986 (Vic): Subject to the provisions of this or any other Act, every court exercising jurisdiction in Victoria in any civil proceeding must continue to administer law and equity on the basis that, if there is a conflict or variance between the rules of equity and the rules of the common law concerning the same matter, ***the rules of equity prevail***
- AKA private law can be divided into 2 bodies (one legal and one equitable) and each has a way of resolving a particular dispute – if there is a conflict between them statute provides that the equitable position shall prevail

Greater predictability of outcomes in Chancery (17th and 18th centuries):

- Chancery cases started to be reported in larger numbers and written records of cases meant that equity lawyers of the period were able to sight the cases in open court before Chancellors
- This is not a doctrine of precedent where a Chancellor would be bound by the decision of a previous Chancellor – but similar application when there was similar facts was increasingly applied and persuasive (uniform administration of equity)

Merging the two, formerly separate, jurisdictions: 1873: abolition of the court of Chancery by the Judicature legislation to bridge the gap between the common law and equity

- S 3 Supreme Court of Judicature Act 1873 (Imp) – via this provision that the courts of Chancery and common law were abolished in England
- Any equity decision decided by a court after 1873 is the decision of a court exercising the jurisdiction of the court of Chancery after the Judicature Acts

- Within this newly constituted court English judges could administer those rules that before 1873 had been separately administered either in the courts of common law of the court of Chancery

But would this lead to a substantive 'fusion' of law and equity?

- With time many believe that instead of simply fusing the formally separate common law and equitable jurisdictions there would be a substantive fusion of the rules of common law and equity
- Ultimately, Australia still holds the view that it is important to distinguish when something is an equitable remedy, action or defence – this does not just tell us something historical about the duty it tells us something of the substance and essence of the current private law

1.2 MODERN EQUITY AND COMMON LAW

Modern equity's exclusive and auxiliary jurisdictions (two jurisdictional spheres of equity) after the Judicature reforms.

- Understanding how modern equity interacts with common law requires understanding of the two key jurisdictions in which equity operates:
    1. **Equity's exclusive jurisdiction**: where equity enforces private law duties, and awards private law remedies in response to their breach, which historically were not enforced nor administered/ awarded at common law (historically only the Court of Chancery recognized and enforced). Adjudicating a dispute exclusive of the common law (hence the exclusive jurisdiction) – THE EQUITABLE DUTY OF CONFIDENCE AND THE EQUITABLE DUTY OF LOYALTY (FIDUCIARY DUTY. So this first means that the duty being enforced is an equitable one. The second part of this exclusive jurisdiction is equity administering private remedies which historically the court of Chancery only ever gave in response to breaches of equitable duties.
        - Equity has the whole answer to the dispute – it decides whether the cause of action succeeds and it decides what the appropriate remedy is – exclusive of the common law
    2. **Equity's auxiliary jurisdiction**: where equity awards its own private law remedies in response to beaches of common law duties, not equitable duties (i.e. breaches of contract and breaches of tortious duties) – equity administers remedies in response to breaches of private law duties which historically were enforced at common law
        - E.g. specific performance, injunctions in a contract claim – the contractual duty is a legal one not an equitable one but equity gets involved if the plaintiff is unlikely to be satisfied with damages
        - Only the remedy is equitable and it is being given in response to the breach of a legal duty rather than an equitable one
        - Specific performance is uniquely auxiliary as it is only a contractual remedy – injunctions are available in both of equity's jurisdictions

EQUITABLE OBLIGATIONS/DUTIES

- Equitable duties are private law duties that, historically, equity (meaning the Chancery) recognised and enforced independent of the common law
- Before the Judicature reforms, Chancery entertained private law disputes arising out of relationships of trust and confidence – common law courts were not willing to entertain these disputes
- E.g. when you bring a private action for breach of confidence you are complaining about the breach of an equitable duty for the reason that before the Judicature reforms such a duty was only recognized and enforced by the Court of Chancery

EQUITABLE REMEDIES

- Equitable remedies are responses to breaches of private law duties that, historically, were recognised and administered/dispensed in the court of Chancery
- Because Chancellors examined the consciences of defendants, the remedies they awarded are said to have broadly aimed at 'cleansing' the defendant's affected conscience
    - A practically useful way of organising equitable remedies is to know in which of equity's jurisdictions a particular equitable remedy is available ('***jurisdictional axis***' → exclusive, auxiliary or both jurisdictions of equity?)

- EXCLUSIVE JURISDICTION: Some equitable remedies are only available in equity's exclusive jurisdiction (i.e. only in aid of breaches of equitable duties). This means that such remedies are only ever available in response to breaches of equitable duties (i.e. confidence, fiduciary duty, etc). (e.g. could not

ask for these for breach of contract as you have only established the infringement of a legal right not an equitable right)

- Often people will bring an equitable claim like breach of fiduciary duties as well as a legal claim like breach of contract to open the door to these remedies rather than only damages
- Such equitable remedies (exclusive) include:
  - ➔ Equitable compensation
  - ➔ Account of profits
  - ➔ Constructive trust and Equitable lien (proprietary equitable remedies)

- AUXILIARY JURISDICTION: Other remedies are only available in equity's auxiliary jurisdiction (i.e. only in aid of breaches of common law duties)
  - Specific performance of a parties' obligations under a contract

- BOTH JURISDICTIONS: Other equitable remedies are available in both of equity's jurisdictions:
  - Injunctions (which can remedy both an equitable breach of confidence and a common law breach of tortious duty)
  - Lord Cairn's Act damages (equitable damages)

- Another practically useful way of organising equitable remedies is to know what the remedial effect of a particular remedy is (***'personal-proprietary' axis***)
  1. **Personal equitable remedies** → which requires/orders defendants to do (or not do) certain things, like pay the plaintiff a sum of money (most equitable remedies are personal) e.g. specific performance
  2. **Proprietary equitable remedies** → which recognise in the successful plaintiffs favour some rights/interest to property that is in the defendant's hands, or the hands of a third party (after they have breached confidence or loyalty)

- The discretionary 'aspect' of equitable remedies – this is something that all equitable remedies have in common regardless jurisdiction or whether they are personal or proprietary:
  - All equitable remedies are discretionary in a way that the legal remedy of damages is not
  - Plaintiffs are said to be entitled to the common law's flagship remedy - damages - as of 'right' – automatically entitled to damages upon satisfaction of the elements of the claim
  - Merely making out an equitable cause of action does not automatically entitle the plaintiff to any particular equitable remedy or combination of remedies
  - There are certain settled and general discretionary considerations according to which a court exercising the jurisdiction of equity will withhold or grant the award of equitable remedies
  - In auxiliary jurisdiction may be relegated to damages if equitable remedy is not seen as appropriate or no remedy if you are bringing a case in the exclusive jurisdiction

1.3 THE RELATIONSHIP BETWEEN AUSTRALIAN EQUITY AND THE REST OF THE COMMON LAW

Pushing back against Maitland (the opposite view): Despite the Judicature reforms, there persisted a view that, although now administered in the same courts, the jurisprudence of equity and common law **was to remain separate.**

The modern 'anti-fusionist' view:

- Believed that the integrity of equity would be well served by keeping it separate and distinct from the common law – this has taken strong root in Aus
- Two examples of fusion fallacy:
  - Awarding exemplary (punitive) damages for breaches of fiduciary duty – Harris v Digital Pulse (2003)
  - Applying the doctrine of contributory negligence to reduce a fiduciary wrongdoer's liability – Pilmer v Duke Group
  - Appellate courts had to step in and correct these mistakes – could not award punitive damages in Harris
- 'Those who commit the fusion fallacy (judges who attempt to merge common law and equity) announce or assume the creation by the Judicature system of a new body of law, containing elements of law and equity. The fallacy is committed explicitly, covertly, and on occasion with apparent indifference. But the state of mind of the culprit cannot lessen the evil of the offence'
- Merger of the courts (common law & equity) is merger of the law → this is false - is the fusion fallacy