

PART 1 - HISTORY AND NATURE OF EQUITY

Chapter 1 - The History of Equity

- Aristotle in *Nicomachean Ethics*: This is the essential nature of equity; it is a rectification of law in so far as law is defective on account of its generality.
- 'A sort of sclerosis of the common law had set in, as a result of which it failed to adapt to new developments in society and economy, and the Chancery provided remedies for these problems'.
- As time progressed, the interests of precision in the legal system began to outweigh the concern for the universal redress of wrongs.
 - The resultant formalism and insistence on technicalities removed the inherent equitable principles from the common law and necessitated a new system that could respond to the changing demands of society.
 - This need was met by what eventually emerged and was known as the court of Chancery, which administered what emerged as the principles of equity.
 - By the late Middle Ages, the Chancery Court had become 'a responsive, quick, inexpensive and desirable avenue of recourse for those who felt that they had been wronged in ways that no other jurisdiction could remedy.'
- Use: 'on behalf of' - the system of uses related to transfers of land for the benefit of others and pre-dates the enforcement of uses by the Chancery.
 - Over time, the use was transformed into the modern trust.
- A transfer of land was called a *feoffment*.
 - a transferee of land for the use of some other person was called a *feoffee to use*.
 - The *feoffee to use* was required to hold the title to land for the benefit of that other person, the *cestui que use*.
 - A conveyance of land to a *feoffee to use* would direct the transferee to hold the land for the benefit of the *cestui que use*.
 - The common law did not recognise the rights of the *cestui que use*, holding that the *feoffee to use* was the owner of the land:
 - *MCC Proceeds v Lehman Bros International*.
 - However, the chancellors, by focusing upon the conscience of the feoffee to use, recognised the claim of the *cestui que use* and enforced the use against the feoffee to use
 - Rather, he was preventing the unconscientious exercise of common law rights by the feoffee to use and compelling him to exercise such rights for the benefit of the *cestui que use*.
 - Furthermore, a third party who took a conveyance of the land from the feoffee to use, with the knowledge of the existence of the use, was bound by the use.
- Common Injunction:
 - The effect was to order a plaintiff at common law to discontinue proceedings, or, if a verdict at common law had already been obtained, to prevent it being enforced.
- Following the decision in the *Earl of Oxford's Case*, the dispute between the common law courts and Chancery was referred to James I who, in June 1616, by Royal Decree ruled

in favour of Ellesmere's approach, thereby upholding the validity of the common injunction and establishing the supremacy of equity over the common law.

- In the event of conflict between the rules of equity and the rules of common law, the rules of equity shall prevail:
 - *Supreme Court Act 1935 (SA)* s 28.

Chapter 2 - The Nature of Equity

- *Dudley v Dudley*: Equity does not destroy the law, nor create it, but assist it.
- *Legione v Hateley*: A party having a legal right shall not be permitted to exercise it in such a way that the exercise amounts to unconscionable conduct.
- *ING Bank v O'Shea*: something is not necessarily against the conscience just because a judge might subjectively consider conduct 'unfair'.
- *Tanwar v Cauchi*: the term unconscientious is to be preferred over unconscionable.

Equitable Jurisdictions

- Exclusive:
 - Matters in which equity has 'an exclusive cognizance' because no relief can be obtained at common law. (Cognizance means knowledge or awareness).
 - EG. obligations arising under a trust
- Concurrent:
 - Matters in which both the equity and common law courts have jurisdiction to make orders.
 - EG. the enforcement of a contract where the primary equitable remedy is the order for specific performance and the common law remedy is an order for damages. Thus, equity's concurrent jurisdiction is one that supports common law rights.
- Auxiliary:
 - Also in support of common law rights.
 - Exercised when a person goes to equity 'merely in order to obtain its assistance in proceedings which they are taking or about to take in courts of law'.
 - EG. it could be by means of a quia timet injunction to prevent irreparable injury to property pending a decision at law, or, it could be an order for discovery to provide better evidence and thereby facilitate proceedings already commenced at law.
- The only distinction worth drawing between auxiliary and concurrent equitable jurisdictions is the distinction between the exclusive jurisdiction, on the one hand, and the jurisdiction in aid of legal rights, on the other hand.
 - The effect: when an injunction is sought to restrain the breach of a common law obligation (jurisdiction in aid of legal rights), such as a negative contractual stipulation, equity will only provide relief if damages at common law are inadequate.
 - If common law damages are adequate as a form of relief to the plaintiff,

equity will not intervene - it has not jurisdiction to do so

- However, if the injunction is sought to restrain a breach of an equitable obligation (exclusive jurisdiction), such as a breach of trust, the question of equity's jurisdiction to enforce such a right does not arise because only equity can enforce equitable obligations.
 - The adequacy or inadequacy of damages at common law does not, and cannot, arise because the common law does not recognise such obligations nor does it claim any jurisdiction in relation to their enforcement.

Maxims of Equity

- The maxims of equity reflect and represent fundamental moral ideas or theories that lie at the heart of equitable jurisdiction.
 - The function of a maxim is to provide general principles as points of departure, and not to capsule answers to specific problems.
- Equity will not suffer a wrong to be without a remedy
 - *In re Diplock's Estate; Diplock v Wintle*:
 - If the claim in equity exists, it must be shown to have an ancestry founded in history and in the practice and precedents of the courts administering equity jurisdiction. It is not sufficient that because we may think that the 'justice' of the present case requires it, we should invent such a jurisdiction for the first time.
 - *Mercedes Benz AG v Leiduck*:
 - As circumstances in the world change, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions. The exercise of the jurisdiction must be principled, but the criterion is injustice. Injustice is to be viewed and decided in the light of today's condition and standards, not those of yester-year.
 - *Austotel v Franklins Selfserve*:
 - the court will exercise restraint in applying equitable principles in the context of commercial dealings.
 - *Farah Construction v Say-Dee*:
 - trial judges and intermediate appellate courts should not depart from decisions of intermediate appellate courts in other Australian jurisdictions, nor radically change existing law unless such decisions or existing law were plainly wrong.
 - Within the domain of the HC only.
- Equity follows the Law
 - *Leech v Schwedeer*:
 - 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.

- *AMEV-UDC Finance v Austin*:
 - equity followed and built upon the common law, adding its remedies by way of enforcement of the common law in some cases and granting its relief against the harshness of the operation of the common law in others.
- *Graf v Hope Building Corporation*:
 - equity follows the law, but not slavishly nor always.
- *DKLR Holding (No. 2) v Commissioner of Stamp Duties*:
 - Equity will not permit an owner of common law rights and interests to act unconscientiously in enforcing such rights and interests.
 - Where the trustee is the owner in fee simple, the right of the beneficiary although annexed to the land, is a right to compel the legal owner to hold and use the rights which the law gives him in accordance with the obligations which equity has imposed upon him. The trustee, in such a case, has at law all the rights of the absolute owner in fee simple, but he is not free to use those rights for his own benefit in the way he could in no trust existed. Equitable obligations require him to use them in some particular way for the benefit of other persons.
 - An equitable interest is not carved out of a legal estate but impressed upon it.
- At common law time is regarded to be as of the essence but this is not the case in equity.
 - *Parkin v Thorold*: only recognised if it is expressly or impliedly of the essence in the contract.
 - *Carr v J A Berryman*: or, if not of the essence, is made so by the service of a notice to complete.
 - *Stickney v Keeble*: Outside of these circumstances, equity regards it as unconscientious to exercise the common law right to terminate for a breach of a time stipulation.
 - *Michael Realty v Carr*: A party in breach of a non-essential time stipulation is not by reason of that breach precluded from seeking an order for specific performance of the contract at a later date, although he or she will be liable to the other party for damages at common law in relation to losses arising from the breach (*Canning v Temby*).
 - *Zaccardi v Caunt*: time stipulations are now an intermediate term.
- Equity follows the law in relation to consideration (consideration need not be adequate, it need only be sufficient) but equitable remedies will not be available in enforcement of a contract unless it is a contract supported by *valuable* consideration.
 - *Falcke v Gray*: Inadequacy of consideration can amount to hardship and result in a court refusing an application for specific performance of a contract.

- Where the equities are equal, the first in time shall prevail, and where there is equal equity, the law shall prevail.
 - Where A, and subsequently B, obtain equitable mortgages in relation to the same property, in the absence of some postponing conduct by A, A will gain priority over B.
 - In this situation, the equities being equal, A gains priority because his or her interest was the first in point of time.
 - Between the holder of an earlier equitable interest in property and the holder of a later legal interest in the same property, the holder of the legal interest will have priority if his or her interest was acquired in good faith, for valuable consideration and without notice of the earlier equitable interest.
 - In such a situation, the equities being equal, the legal interest prevails.
- One who seeks equity must do equity
 - Plaintiffs in equity must fulfil their legal and equitable obligations before seeking remedy.
 - *Lodge v National Union Investment*:
 - a borrower could not be relieved in equity against securities that were illegal and void under the *Money-lenders Act 1900* (UK) without being put on terms by which both parties may be restored to the positions they occupied before the transaction commenced.
 - *Verduci v Golotta*:
 - 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.
- One who comes to equity must come with clean hands
 - *FAI Insurance v Pioneer Concrete Services*:
 - A plaintiff in equity must not be guilty of some improper conduct, or else relief will be denied.
- Delay defeats equity
 - *Smith v Clay*:
 - In seeking equitable relief, a plaintiff must act promptly and diligently.
- Equality is equity
 - It does not mean literal equality, but rather, proportionate equality.
 - The application of the maxim is seen in equity's favouring a finding of a tenancy in common over a joint tenancy because the latter unduly favours the person of longevity.
 - *Lake v Craddock*: if partners purchase land for their firm's business, unless expressly stated otherwise, equity will regard them as tenants in common rather than as joint tenants.

- Equity will not assist a volunteer

- *Colman v Sarrel*: A plaintiff seeking equitable relief has to have a valuable or at least meritorious consideration.
- A volunteer being a person who has not given valuable consideration
- *Reef & Rainforest Travel v Commissioner of Stamp Duties*: the maxim does not require that the consideration be paid or executed.
- *Redman v Permanent Trustee Co of New South Wales*:: It would not be unconscionable for equity to decline equitable assistance to a plaintiff who is a volunteer, whereas it would be so if he or she had provided valuable consideration.
 - It is the presence of valuable consideration that will attract the intervention of equity: *DPP of Victoria v Le*
 - *Conlan v Registrar of Titles*: Owen J suggested that this rationale was a little strange given that the common law would and will accept something that is entirely inadequate or lacking in actual value as being good consideration.
- *Corin v Patton*: the maxim is primarily associated with the rule that a voluntary covenant is not enforceable in equity.
 - Specific performance will not be ordered in relation to a promise unsupported by any consideration at all, but contained in a deed: *Roxborough v Rothmans of Pall Mall Australia*
 - Nor will specific performance be granted in relation to a contract to purchase land or an interest in land for the nominal consideration of \$1: *Nurdin & Peacock v DB Ramsden*.
 - In both cases the requirement of valuable consideration has not been satisfied. However, in both cases the promisor's promise is enforceable at common law by an award of damages: *Cannon v Hartley*.
- Valuable Consideration
 - *Bell Group v Westpac Banking Corporation*:
 - The notion of valuable consideration usually requires finding some economic worth as compared with something that is purely nominal, trivial or colourable. Valuable consideration is more than the nominal consideration that would be sufficient to support a common law contract.
 - Does not mean that it needs to be adequate in the sense of it being reasonably equivalent to the value of what was promised or given by the defendant - it will depend on the facts and circumstances of each case.
 - If the parties are at arm's length and the transaction can be fairly described as commercial in nature, valuable consideration will generally be present: *Bell Group v Westpac Banking Corporation*.
- *T Choithram International SA v Pagrini*: Although equity will not assist a volunteer, neither will it frustrate one or 'strive officiously to defeat a gift'.
- *Blackett v Darcy*:
 - The rule that equity does not assist a volunteer is not a complete statement

of the law and is only relevant if the donee requires the assistance of a court of equity in order to gain the property. Where the donee requires the assistance of a court of equity in order to gain the property. Where the donee has gained the property (at least where he or she has not done so illegally), then there is usually no equity in the donor to recover back the money.

- The most significant exception to the maxim relates to a beneficiary of a trust who can bring an action against the trustee to enforce the trust even though the beneficiary gave no consideration for the beneficial interest, provided that the trust is 'completely constituted by a present declaration of trust or by a transfer by the settlor of the legal title to the intended trustee: *Corin v Patton*.
- *Cain v Moon*: Another exception entitles a volunteer to enforce a *donatio mortis causa* - a doctrine by which property passes from a donor to a donee upon the death of the donor where:
 - (i) the gift is made in contemplation, though not necessarily in expectation, of death;
 - (ii) the property must be delivered to the donee; and
 - (iii) the gift must be made under such circumstances as show that the thing is to revert to the donor in case the donor should recover.
- *Strong v Bird*: if a donor has attempted to make an immediate inter vivos gift of property to a donee, or a purported immediate voluntary release of a debt owed by the donee to the donor, but the gift fails because of a failure to comply with the necessary legal formalities, then, if the donee subsequently becomes the executor of the donor's estate, the gift is considered to have been perfected by the vesting of the legal title in the donee.
 - For the rule to apply, there must be an intention, continuing up to the donor's death, to make an immediate gift: *Rutledge v Sheridan*
- Equity looks to the intent rather than the form
 - *Parkin v Thorold*:
 - Courts of equity make a distinction in all cases between that which is a matter of substance and that which is a matter of form; and if it find that by insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance.
 - *Stickney v Keeble*:
 - Equity will permit completion to take place within a reasonable time after the stipulated date.
 - *Carter v Wake*:
 - An equitable mortgagee is treated in equity as if a legal mortgage had been granted, with the consequence that the equitable mortgagee is able to pursue the same remedies as are available to a legal mortgagee, including foreclosure.
 - *Theodore v Mistford*:

- By looking at the intent rather than the form, equity is able to treat as done that which in good conscience ought to be done.
- Equity looks on that as done which ought to be done
 - *Frederick v Frederick* (1721):
 - Where one for valuable consideration agrees to do a thing, such executory contract is to be taken as done; and the man who made the agreement shall not be in a better case than if he had fairly and honestly performed what he agreed to.
 - *De Beers Consolidated Mines v British South Africa* (1912):
 - The doctrine cannot in its application to contracts be permitted to turn the conditional into the absolute, the optional into the obligatory, or to make for the parties contracts different from those they have made for themselves. What a party to a contract ought to do, within the true meaning of the doctrine, is what he has contracted to do, and nothing more and nothing less is to be taken in equity, to be done.
 - *Walsh v Lonsdale*:
 - A person who enters into possession of land under a specifically enforceable contract for a lease is regarded, by a court having jurisdiction to enforce the contract, as being in the same position, as between itself and the other party to the contract, as if the lease had actually been granted.
 - *Swiss Bank v Lloyds Bank*:
 - Although the basis of the equity jurisdiction was and still is founded on an order in personam, the courts of equity evolved the doctrine that, in the eyes of equity, that which ought to have been done is to be treated as having been done. Thus, under a specifically enforceable contract for the sale of land, the purchaser is treated in equity as the owner of the property whether or not an order for specific performance has been made.
- Equity acts in personam
 - *Deputy Commissioner of Taxation v Gashi*:
 - The court may punish a natural person for contempt by committal to prison or fine or both.

Chapter 3 - The Relationship of Law and Equity

- The system of separate courts of common law and equity was abolished with the introduction of the judicature system
- A fusion fallacy arises when the decision reached in a particular case is one which could not have been reached under the separate system of courts that existed before the judicature system reforms were enacted.
- *Felton v Mulligan*:
 - The two streams of jurisdictions, though they run in the same channel, run side by side and do not mingle their waters.

Mortgagee's power of sale

- The equitable principle has generally been formulated as requiring the mortgagee to act in good faith.
 - *Upton v Tasmanian Perpetual Trustees*:
 - The equitable good faith duty imposes a less demanding duty on the mortgagee and does not require him or her to sell at the best possible price, although it is widely accepted that the duty of good faith requires the mortgagee to take precautions to ensure that a 'proper' price is obtained and that the interests of the mortgagor are not completely sacrificed.

Damages in equity

- *Seager v Copydex*:
 - damages awarded for the breach of the equitable obligation pertaining to confidential information.

The doctrine of Walsh v Lonsdale

- Lease was void at common law.
- Tenant entered into possession and paid rent in accordance with the agreement for 18 months.
- The landlord then demanded a year's rent in advance (as per the original agreement) and the tenant failed to pay resulting in the landlord levying for distress at common law.
 - The remedy of distress permits a landlord to seize a tenant's chattels and hold them until rent is paid - if not paid, the chattels may be sold.
 - Tenant sought an injunction against the distress and damages for illegal distress.
- The issue before the court was whether the landlord's common law remedy of distress was permitted despite the absence of a lease at common law.
 - Under the equitable doctrine of equity deems done as ought to be done, the landlord was allowed to claim his right to specific performance without having first to obtain a decree and use this equitable defense against the tenant's claim.
- *Chan v Cresdon*:
 - Although the rule in *Walsh v Lonsdale* meant that an agreement to lease gave rise to an equitable lease, it did not create a legal interest.
 - The equitable lessee will be defeated by a bona fide purchaser of the legal estate who acquires the legal estate for valuable consideration and without notice of the equitable lease.
 - Also depends on the availability of specific performance of the agreement to lease.