PART A

INTRODUCTION

1

AN OVERVIEW OF EQUITY

What is equity?

The word 'equity' is one of the most ambiguous in the law. Its most obvious meaning is fairness and justice.[1] Many would argue that equity is the overriding goal of all law. How could the law ever justify *un*fair or *in*equitable outcomes? But a moment's thought will show that applying, without more, the criterion of 'fairness' to solve all legal problems is open to serious objections. Decisions will inevitably reflect the subjective beliefs and values of the decision-maker as to what is fair. In a pluralist democracy, disputes about what is fair or equitable are settled by elected legislators, not by unelected judges, except where legislation has explicitly authorised judges to determine cases by reference to considerations of fairness.[2] Judges do not assess what is equitable without reference to some standard or benchmark. [1.1]

Secondly, equity sometimes refers to the principles applied by judges where the law is deficient for some reason. Aristotle is the first recorded writer to define 'equity' in these terms. In *Nicomachean Ethics*, Aristotle contrasted law, which was said to be 'universal' in its application, with equity which was seen as 'a correction of law where it was defective owing to its universality'.[3] We might nowadays say that the law is only 'universal' in the sense that in a society based on the rule of law there is an expectation that like cases will be treated in a like way. The complexity of society in practice means that few legal rules, unless stated at a high level of generalisation, can be described as being of 'universal' application. Even if they can, it is doubtful whether equity should today be invoked in order to correct specific injustices caused by their over-rigid application. The preferable response in a democratic society to a legal rule that cannot do justice in an individual case is to invite the legislature to reform the law. But Aristotle anticipated the lawyer's idea of equity in two respects. First, equity corrects, or supplements, the law but does not replace it. The fact that equity modifies the application of the law in specific instances does not impair the legitimacy of the law in those cases where there is no need of equity. Secondly, some equitable doctrines can be explained in terms of the dilemma of 'universality' in the law: a soundly based legal rule of general application can, on occasions, be exploited for improper purposes. For example, where the law requires some contracts to be in writing equity can modify the writing requirement where its application would cause injustice.[4] [1.2]

Although some applications of Australian equity can be explained in Aristotelian terms, the Australian model of equity, taken as a whole, does not fit Aristotle's notion of equity. Instead, in common with equity in other common law jurisdictions, the model applied is that of *institutional* equity.

1 'I think it likely that over the years words such as unconscionable and inequitable have drawn closer to more objective concepts such as fair, reasonable and just': Somers J in *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 180, 193.

2 An example, drawn from trusts law, is the court's statutory power to excuse a trustee from liability where 'the trustee has acted honestly and reasonably, and ought fairly to be excused for the breach of trust …': *Trustee Act 1925* (NSW) s 85: see [20.20].

3 *The Nicomachean Ethics of Aristotle*, tr WD Ross (Oxford University Press, 1954) book 10, ch 5; *Sourcebook* 1.2.2a, p 4.

4 See [9.36]. See also Matthew Harding, 'Equity and the Rule of Law' (2016) 132(2) *Law Quarterly Review* 278.

Institutional equity

[1.3] The essence of institutional equity is the creation of a special court, distinct from the courts administering the general law, having the power to modify or correct the general law. In England, that court was the Court of Chancery until the enactment of the mid-nineteenth-century judicature legislation. In Australia, it is several courts – which include the High Court, the Federal Court, the Supreme Court of every State and Territory, and numerous inferior courts – which have inherited the jurisdiction of the Court of Chancery. Although that court no longer exists, its defining characteristics have been transmitted to other courts.

[1.4] This section provides a brief account of the history of equity. In reading this history, two points should be kept in mind.

First, the paradox of institutional equity is that it is premised on the existence of a court which no longer exists. The Court of Chancery, which administered equity doctrines developed by chancellors and other equity judges, was abolished by the judicature legislation of the mid-nineteenth century.[5] The legislation was enacted in all States except New South Wales, which retained a separate court of equity until 1972.[6] Courts applying equity today do not have to administer equity in exactly the same way as it was administered by the Court of Chancery immediately before its abolition. Equitable principles are flexible and respond to changes in social and economic conditions. For example, the law of resulting and constructive trusts has adapted to changes in patterns of family home ownership in the late twentieth century brought about by the ready availability of mortgage finance.[7]

Secondly, the Court of Chancery never had, save possibly in the earliest period of the Chancellor's jurisdiction, any *general* power to correct a common law rule when the rule caused injustice. Equitable intervention is significant in some areas of law, particularly property law, but slight in others, such as tort law. Precisely when equity modifies the law is not deducible by logical proposition. The scope of equity's jurisdiction can only be determined by reference to the history of the jurisdiction – although, as with all judge-made law, it is possible to infer that equity will modify the law on one matter from the fact that it already intervenes in another, closely-related, matter. For example, once it had been established that a contract was voidable for duress, no great extension of principle was involved in holding that a contract was also voidable for undue influence.

The emergence of institutional equity: medieval origins

[1.5] Institutional equity has its origins in the state of fourteenth-century English common law and, in particular, in the rigidity of the procedures for initiating writs to commence a common law action.[8]

5 *Supreme Court of Judicature Act 1873* (Imp) s 3.
6 *Supreme Court Act 1970* (NSW) pt 4; *Law Reform (Law and Equity) Act 1972* (NSW).
7 See chapters 22 and 23.
8 See generally JH Baker, *An Introduction to English Legal History* (Oxford University Press, 4th ed, 2002) ch 6; *Sourcebook* 1.3.1a, p 5.

Medieval common law was a highly centralised system of justice, with processes initiated by the issue of a writ by Chancery, which functioned principally as the royal secretariat. The issue of writs was the basis of the *formulary* system of law – claims could only be brought before a common law court if the facts fitted within the formula, or wording, of a writ issued by Chancery. Once a writ had been issued, the complaint would be heard by jury trial.[9]

[1.6] The strictness of the formulary system meant that not all complainants could obtain a writ giving them access to the common law courts. Some litigants who could not bring their complaint within the formula of the writ petitioned the king, who retained an overriding power to administer justice. The king investigated some of these complaints himself but increasingly adopted the practice of referring petitions to the Chancellor, who was the king's first minister and the head of the Chancery. The petitions which the Chancellor investigated were varied and not confined to what we would now term equity. If there was any pattern, it was that the administration of justice had broken down and that the petitioner needed the king's assistance in enforcing his or her rights. From the late fourteenth century, the Chancellor began hearing petitions in his own right.[10]

[1.7] Most early chancellors were churchmen who had legal training in civil and canon law and, in some cases, had practised in ecclesiastical courts. They did not apply civil or canon law but their rulings were inevitably influenced by their knowledge of these systems. Although some chancellors, such as Sir Thomas More (1529–33), had a common law background, the practice of appointing legally qualified chancellors with common law experience only became settled in the late seventeenth century.

[1.8] There was no question at that time of chancellors correcting or modifying the common law – there was little common law which could meaningfully have been corrected. The common law writs did not presuppose the existence of detailed legal rules, such as we now apply in the law of tort and contract. Any doctrinal issue raised by the plaintiff's proof of the matters alleged in the writ were, in practice, settled by the jury verdict, not by judicial ruling. As Sir Thomas More remarked,

> [the common law judges] may by the verdict of the jury cast off all quarrels from themselves upon them, which they account their chief defence.[11]

[1.9] The real differences between the common law and equity in its formative stage concerned not substantive law but the procedures applied by chancellors to obtain evidence. The action was begun not by a writ but by a simple summons to appear before the Chancellor. Failure to comply with the summons would render the defendant liable for contempt of court. Evidence was taken by interrogatories (questionnaires) or written depositions. The Chancellor did not work with a jury. In practice, he collected evidence until he had obtained enough to justify taking action.

[1.10] The fifteenth century, when these procedures were developed, was the period in which uses (or trusts) of land were enforced by chancellors. Disputes typically arose when the feoffee (trustee) of land, who was bound to hold the land for the benefit of the cestui que trust (beneficiary), claimed the land for himself. The common law courts could do little to

9 Trial by jury gradually superseded older methods of trial: Baker (n 8) 72–6.
10 See *Sourcebook* 1.3.1b, p 6, for an example of a petition.
11 EV Hitchcock (ed), *The Lyfe of Sir Thomas More* (EETS no 197, 1935) 44–5; *Sourcebook* 1.3.2a, p 6.

prevent the trustee from obtaining a personal advantage from the trust, because its methods for obtaining evidence were not suited to discovering the terms on which the trustee had agreed to hold the land. They could be ascertained, however, as a result of interrogatories administered by the Chancellor. Upon proof of the terms of the trust, the Chancellor made orders to protect the beneficiary's interest in the land. The basic features of the law of trusts therefore emerged from the orders made by chancellors to protect the interests of beneficiaries.

Chancellors enjoyed considerable discretion in making orders. Chancery was a court of conscience in which defendants could be compelled to do whatever conscience required. 'Conscience' did not, however, mean 'arbitrary justice', and chancellors generally followed the practices of their predecessors, where these were known. The Chancellor's decrees were fashioned to meet the circumstances of the case. They bound the parties to the case but no one else.[12]

Competition between common law and equity

[1.11] The period from the sixteenth century to the early seventeenth century in England was one of jurisdictional conflict and jealousy between the common law courts and Chancery. The Chancellor's court was caught up in the great constitutional struggles of that age. Chancery jurisdiction rested on the sovereign's prerogative power to administer justice, which was challenged by a parliament increasingly inclined to test the limits of the prerogative. The resolution of the dispute between the Chancellor and the common lawyers established the basis of the relationship between the common law and equity which still exists today.

[1.12] A particular grievance of common law judges was the Chancellor's power to grant an order known as a 'common injunction' to prevent the enforcement of a judgment obtained in a common law court.[13] If P obtained a common law judgment against D which the Chancellor considered had been procured by unconscionable conduct, an injunction would be granted to prevent P from enforcing the judgment. The injunction, although not formally an appeal, enabled D to avoid the consequences of the adverse judgment against him or her.

[1.13] The dispute culminated in the celebrated *Earl of Oxford's Case*[14] in which Chief Justice Coke challenged the jurisdiction of the Chancellor, Lord Ellesmere, to award common injunctions. Although Coke had the law on his side,[15] King James I ruled in favour of equity, accepting Ellesmere's argument 'that when a judgment is obtained by oppression, wrong and a bad conscience, the Chancellor will frustrate and set it aside, not for any error or defect in the judgment, but for the hard conscience of the party'.[16] The king's ruling was a landmark in the development of equity because it established for the first time the supremacy of Chancery over the common law in cases of conflict between the jurisdictions. The practical significance of the decision was, however, limited.

12 Baker (n 8) 104.
13 *Throckmorton v Finch* (1598) Co Third Instit 124.
14 (1615) 1 Ch Rep 1; 21 ER 485; *Sourcebook* 1.3.2b, p 7.
15 Common injunctions were contrary to the Statute 4 Hen IV, c 23, and had been held to be illegal in *Throckmorton v Finch* (1598) Co Third Instit 124.
16 (1615) 21 ER 485, 487.

Seventeenth-century chancellors were sparing in their award of common injunctions, which remained of doubtful legality in spite of the royal ruling.[17] The Court of Chancery might have been abolished in the course of the constitutional upheavals of that century, but the chancellors of the late seventeenth century were careful to respect the boundaries between Chancery and the common law courts.[18]

[1.14] By the end of the seventeenth century, Chancery's work, particularly in enforcing uses and preventing oppression in exercising contractual rights, was recognised as being indispensable to the landholding society of the time. The political turbulence of the century was succeeded by a period of reform and consolidation undertaken by lawyer chancellors such as Lord Nottingham (1673–82), Lord Hardwicke (1736–56) and Lord Thurlow (1778–83 and 1783–92). Lord Nottingham, for example, was responsible for the development of the mortgagor's equity of redemption, the rule against perpetuities, and for formulating the principles governing relief against unconscionable bargains.[19]

[1.15] By the end of the eighteenth century, most of the basic equitable doctrines applied today had been established, although they have inevitably undergone a continual process of renewal and restatement to meet the needs of industrial and post-industrial society. In one vital respect, the constitutional battles of the seventeenth century had left their imprint on the shape of the legal system. The relationship between the common law and equity was settled. Equity was said to be a 'gloss' on the common law, modifying the common law where the enforcement of legal rights was harsh or oppressive, but not claiming to be a parallel or rival system of law.[20]

Reform and the judicature legislation

[1.16] In the early nineteenth century, the Chancery court attracted criticism, principally on account of its delays in hearing and disposing of cases. The Chancellor for most of this period, Lord Eldon, did valuable work in restating existing doctrine.[21] But he was slow to decide cases, and the caseload of Chancery was too heavy to be carried by a single judge.[22] The delays of Chancery were condemned by Charles Dickens in *Bleak House*, with its extended metaphor of the 'fog of Chancery' enveloping the Chancellor and his court.[23]

17 *R v Standish* (1671) Treby MS Rep LPCL 438.

18 Chancellors began to apply the common law concept of precedent: see Selden Society, *Lord Nottingham's Chancery Cases*, DEC Yale (ed) (B Quaritch, 1955) vol 73, introduction.

19 Common law developments can rarely be ascribed to an individual judge (an exception being the concept of the duty of care ascribed to Lord Atkin in *Donoghue v Stevenson* [1932] AC 562) but it is usually not hard to identify the Chancellor responsible for the introduction of an equitable doctrine, as Jessel MR pointed out in *Re Hallett's Estate* (1880) 13 Ch D 696, 710.

20 F Maitland, *Equity: A Course of Lectures*, AH Chaytor and WJ Whittaker (eds), rev J Brunyate (Cambridge University Press, 2nd ed, 1936) 18.

21 Rose A Melikan, *John Scott, Lord Eldon, 1751–1838: The Duty of Loyalty* (Cambridge University Press, 1999).

22 'Having had doubts upon this will for twenty years, there can be no use in taking more time to consider it …': *Radnor v Shafto* (1805) 11 Ves 448; 32 ER 1160 (although Eldon had only been Chancellor for four years when he spoke these words). See also *Morgan v Lord Clarendon* (1808) in Baker (n 8) 113.

23 *Sourcebook* 1.3.3a, p 8.

[1.17] One defect of Chancery was that claimants might have to bring more than one set of proceedings in order to obtain the relief they wanted. A plaintiff who wanted to obtain an order of specific performance of a contract would have to sue in a common law court in order to establish the validity of the contract, unless its validity was conceded, and then obtain an order of specific performance in Chancery. It was not equity that was defective in such a case, but the system of civil justice that separated the administration of equity from adjudication by the common law courts. A steady flow of mid-nineteenth-century legislation patched up the system of separate equity.[24] Nonetheless, it was becoming obvious that more radical reform was needed.

[1.18] The *Judicature Acts 1873–6* enacted reforms which improved the administration of common law and equity but which, with a few exceptions,[25] did not change the substantive law of either. The *Supreme Court of Judicature Act 1873* (Imp), the principal Act, made the following major changes:

(1) The old superior common law courts were abolished and replaced by divisions of a new High Court of Justice, including common law divisions, such as the Queen's Bench, as well as the Chancery Division. The divisions reflected the conveniences of legal specialisation rather than the nature of the relief available. Every division was empowered to administer common law and equity.

(2) A unified code of procedure applied to both common law and equitable claims. Equity's discovery and interlocutory procedures were extended to the common law.

(3) Section 24 made provision for giving effect to equitable estates, interests and defences in legal proceedings in the manner that the Court of Chancery would have done. The section also provided for the recognition and enforcement of legal estates, interests and titles as they had been recognised before the enactment of the section. Section 24(5) abolished the 'common injunction', which had been the flashpoint for judicial disagreement in the *Earl of Oxford's Case*, while preserving the power to issue injunctions in cases in which the jurisdiction to do so was established.

(4) Section 25 resolved a number of conflicts between common law and equity either by providing that the equitable rule was to prevail or by enacting new law. Section 25(11) provided:

> Generally, in all matters not herein-before mentioned, in which there is any conflict or variance between the Rules of Equity and the Rules of the Common Law with reference to the same matter, the Rules of Equity shall prevail.

The subsection confirmed the supremacy of equity in the event of a conflict between common law and equity which was not otherwise resolved by the judicature legislation. At first sight, it might seem that the subsection added nothing to the *Earl of Oxford's Case*, which had established the primacy of equity more than

24 In particular, the *Common Law Procedure Act 1854* (Imp) ss 83–6, permitting equitable defences to be pleaded to common law claims. Baker (n 8) 111–13. Michael Lobban, 'Preparing for Fusion: Reforming the Nineteenth Century Court of Chancery' (2004) 22(2) *Law and History Review* 389, 565.

25 Section 25 of the *Supreme Court of Judicature Act 1873* (Imp) resolved some conflicts between common law and equity. The most significant substantive change was the introduction by s 25(6) of a statutory procedure for assigning choses in action. See [9.30].

250 years earlier. But s 24(5) of the 1873 Act had abolished the common injunction, which had been Chancery's means of ensuring that its principles prevailed in cases of conflict, and a statutory basis for preserving that supremacy was needed.

[1.19] The enactment of the judicature legislation is a landmark in equity, but the limits of the legislation need to be kept clearly in mind. The legislation was never intended to fuse or integrate legal and equitable rights. To justify the merger of legal and equitable rights by reference to the legislation has been described as 'fusion fallacy'.[26] An example of 'fusion fallacy' is to assume that a contract to create a lease, enforceable in equity because it has been partly performed by the tenant, confers the same rights and imposes the same duties as a common law lease created by the execution of a deed.[27] Regardless of whether or not it is a fallacy, it is certainly a misreading of history. The legislation would not have been enacted in the first place if its declared purpose had been to merge the substance of common law and equity.

[1.20] Arguments about the intention of the English legislature in 1873 are irrelevant to deciding whether particular common law and equitable doctrines should be merged in twenty-first-century Australia, as proposals to fuse or merge doctrines must be considered on their merits. The history of the application of a legal or equitable doctrine is obviously relevant to the analysis, and the fact that the dual system of common law and equity has worked satisfactorily for many years supports the well-known adage 'if it ain't broke, don't fix it'; however, the reason this dual system has worked has nothing to do with the judicature legislation. Arguments about whether the common law and equity ought to be merged, and if so how complete the merger ought to be, arouse surprisingly strong emotions.[28]

The reception of equity in Australia

[1.21] The immediate need of the earliest British settlers in Australia was to establish a stable legal order. The *First Charter of Justice* in 1787 created a Court of Civil Judicature which did not distinguish between common law and equity. The *New South Wales Act 1823* conferred on the newly created Supreme Court the power to exercise locally the jurisdiction that the Chancellor exercised in England.[29] The influence of particular personalities shaped the

26 MGL [2-125]–[2-225].

27 *Walsh v Lonsdale* (1882) 21 Ch D 9, 14, Jessel MR. Jessel had piloted the Judicature Bill 1873 through the House of Commons in the capacity of Solicitor-General, and later took a leading role in drafting procedural rules for the post-*Judicature Act* courts. Criticism of his judgments in *Walsh v Lonsdale* and in *Redgrave v Hurd* (1881) 20 Ch D 1, 12, where he suggested that damages might be available in equity for innocent misrepresentation, on the ground of 'fusion fallacy', must take into account his understanding of the judicature scheme from having been closely involved in its enactment and implementation.

28 Andrew Burrows, 'We Do This at Common Law but That in Equity' (2002) 22(1) *Oxford Journal of Legal Studies* 1; MGL [2-325]–[2-400]. For different perspectives on 'fusion fallacy', in the context of an unsuccessful claim to exemplary damages for breach of fiduciary duty, see *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, [18] (Spigelman CJ), [136]–[154] (Mason P), [353]–[393] and [444]–[445] (Heydon JA).

29 The history of the New South Wales equity legislation is traced in ML Smith, 'The Early Years of Equity in the Supreme Court of New South Wales' (1998) 72(10) *Australian Law Journal* 799; Keith Mason, 'Fusion: Fallacy, Future or Finished' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Thomson Reuters, 2005); *Sourcebook* 1.3.3d, p 10.

administration of equity within the Supreme Court framework as much as any consideration relating to the place of equity within a common law system. It was pressure exerted by the State's first equity judge, Willis J, which resulted in the provision for the appointment of a Primary Judge in Equity by the *Administration of Justice Act 1840*.[30] Thereafter, instead of steps being taken to integrate common law and equity procedures, the tendency throughout the nineteenth century was to emphasise the separation of equitable business from common law matters.[31] The identification of a judge as the Primary Judge in Equity (later the Chief Justice in Equity) encouraged the growth of an Equity Bar specialising in matters coming within the judge's jurisdiction, just as Chancery in England stimulated the creation of a Chancery Bar.

[1.22] The Supreme Court structure created by other States required judges to administer both common law and equity; however, this did not mean that the common law and equity were fused procedurally or in substance. The pre-*Judicature Act* institutional model of English equity was strictly applied. In practical terms, it meant that judges who devoted most of their time to deciding common law claims were sometimes required to hear equity suits determined by equity procedures. In the nineteenth century it was unusual for a Supreme Court to consist of more than two judges, and confining the work of a single judge to equity matters would have been considered a misallocation of judicial resources. The New South Wales experience was different both because judicial resources permitted equity specialisation, and the specialisation in turn reflected the volume of commercial and property litigation in Sydney which ensured a heavy workload for the equity judge.

The judicature legislation in Australia

[1.23] While most Australian States were content to apply the English system of equity, there were some imaginative early attempts to improve on the model. The most interesting of these was the South Australian *Supreme Court Procedure Act 1853*, enacted 20 years before the English judicature scheme was introduced.[32] It anticipated that legislation by conferring power on the Supreme Court in any proceedings to make orders of specific performance of agreements or to grant injunctions. Section 175 went even further in permitting actions at law to be brought to enforce exclusively equitable obligations, such as breach of trust.

[1.24] Another experiment in the substantive fusion of common law and equity was Queensland's *Equity Procedure Act 1873*, promoted by Sir Samuel Griffith.[33] This measure permitted common law courts to grant monetary relief in cases where an 'equitable claim or demand' had been made. Unusually, it made the monetary award dependent upon the plaintiff establishing an entitlement to a discretionary equitable remedy.

30 See Smith (n 29) 802.
31 The appointment of additional Supreme Court judges tended to emphasise the isolation of the Primary Judge in Equity who became increasingly disengaged from common law business. See Smith (n 29) 806.
32 Greg Taylor, 'South Australia's Judicature Reforms of 1853' (2001) 22(1) *Journal of Legal History* 55.
33 Peter M McDermott, 'Equitable Claims or Demands – Queensland District and Magistrates Courts and Western Australia Local Courts' (1991) 16(2) *University of Queensland Law Journal* 212.