

# INTRODUCTION TO EQUITY AND TRUSTS

- **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 judicature legislation which reformed the structure of the court system in the mid-nineteenth century.
- Dictionary definitions;
  - o The application of the dictates of conscience or the principles of natural justice to the settlement of controversies.
  - o A system of jurisprudence or a book of doctrines and rules developed in England and followed in other common law countries, serving to supplement and remedy the limitations and the inflexibility of the common law.
  - o An equitable right or claim.

## HISTORY

### ORIGINS

#### *JH Baker, An Introduction to English Legal History (Oxford University Press, 2002).*

- The Chancery (cancellaria) began as the royal secretariat, housed in the King's Chapel – in origin it was no more a court of law than the Exchequer, but was a department of state descended from the Anglo-Saxon scriptorium where royal writs and charters were drawn and sealed.
- The head of the department, the chancellor, had the custody of the great seal of England, which was used to authenticate the documents which his clerks prepared.
  - o Royal grants of property, privilege, dignity or office, charters, writs and commissions, all had to 'pass the seal' in Chancery.
- The chancellor has always been primarily an officer of state and a minister of the Crown.
  - o Most medieval chancellors were also bishops, or even archbishops. Some chancellors, notably Cardinal Wolsey (1515–29) and Lord Clarendon (1658–67), were prime ministers in all but name. Yet the majority of chancellors have been lawyers and until 1875 spent most of their time sitting in court.
- The chancellor's English jurisdiction, so called because the bills and pleadings were written in the vernacular tongue, grew not from the departmental work of the Chancery but from the jurisdiction of the king's council to deal with bills of complaint.
  - o We have seen that in the fourteenth century bills addressed to the king in council, complaining of interference with the common law, were passed on to the judges.
  - o Later in the century bills of this kind were addressed to the chancellor alone, whose function in such cases was not to dispense justice so much as to facilitate its achievement in other courts, to serve as 'a convenient clearing-house for all kinds of business transacted elsewhere' (Sayles, 76 Selden Society lxxi, lxxix).
  - o The jurisdiction was still that of the council, and the chancellor was – by a kind of fiction – deemed to be acting on behalf of 'the king and his council in Chancery.'
- By the time of Richard II (1377–1399), a further development had occurred.
  - o Bills increasingly sought a specific remedy from the chancellor himself, irrespective of whether proceedings were pending at common law, and it is evident that the chancellor had begun to issue process and grant decrees in Chancery instead of sending the petition elsewhere. ...
- Decrees were at first made in the name of the king in council, and then by the 'court', sometimes reciting the presence of judges and king's serjeants, councillors and advisers; but during the fifteenth century the chancellor came to issue decrees in his own name. In making such decrees, medieval councillors or chancellors did not regard themselves as administering a system of law different from the law of England.
- They were reinforcing the law by making sure that justice was done in cases where shortcomings in the regular procedure, or human failings, were hindering its attainment by due process. They came not to destroy the law, but to fulfil it (F W Maitland, 1909).

## WHAT IS EQUITY?

- **FAIRNESS AND JUSTICE** – however we can't base an entire body of principles simply upon fairness and justice. This opens up the criticism that equity is open to the idiosyncrasies of the decision maker and their conception of fairness or justice in any given case.
  - o This gave rise to the statement – 'equity merely represents the length of the chancellor's foot' i.e. it is subject to the discretion of the chancellor at any given moment of time.
- **FIXING DEFICIENCIES IN THE COMMON LAW** - an embodiment of institutional equity that is equity arises from an institution in which it was developed, which was its own special court, the court of chancery. That court was institutionally distinct from the principles of the common law which developed in the court of the king's bench.

## THE EMERGENCE OF THE COURT OF CHANCERY

- 1066 – The Norman Conquest and Local Courts;
- 1150 onwards – Henry II creates a centralised system of Royal/Common Law Courts. Proceedings in these ‘Common Law Courts’ were commenced with the issue of a writ.
- Writs were issued by the Chancellor who held the ‘Great Seal’ and acted in the name of the King.
- By the end of the 14<sup>th</sup> Century, bills requesting a unique remedy were being directed to the Chancellor personally.

## CHANCERY – A COURT OF CONSCIENCE

- Early Chancellors (until Sir Thomas More in 1529) were clerics.
- During this early period in the Court’s development, a guiding principle among clerics was that of ‘conscience’ – drawing from the writings of St Thomas Aquinas.
- It was the influence of these writings that led to Chancellors invoking notions of ‘conscience’ in deciding matters. The primary objective of an order of Chancery was to save the defendant's soul by preventing them from acting contrary to ‘conscience’.

### KEY DIFFERENCES BETWEEN THE COMMON LAW COURTS AND THE CHANCERY

- In its formative stages the key difference between the common law courts and the court of chancery *where how actions were commenced* as well as the *procedures applied by chancellors to obtain evidence*.
- Chancery proceedings were commenced by *summons* and not by writ, if a party failed to appear in court in response to a summons then they were held in contempt. In chancery evidence was obtained by *interrogatories or written depositions* – the chancellor did not reply upon jury’s like the common law did.
- The chancellors operated upon this notion of conscience, and it was only when the chancellor knew that he was confident about the facts concerning a case that he would determine whether or not conscience had been met within the relevant circumstances. In addition to this, parties beyond the plaintiff and the defendant were required to give evidence because for them to remain silent about a key matter of which they knew would mean that they themselves would be committing a moral sin and acting against conscience.
- The courts of chancery developed *remedial flexibility*, chancellors had *discretion* in making orders and the chancery as a court of conscience meant that *defendants could be compelled to do whatever it was that conscience required*.
- Conscience also impacted the enforcement of any decree made by any court of chancery – a person who failed to obey an order of chancery was in contempt of court and would be sent to prison until they would comply with the order.

PROCEDURAL	REMEDIAL
<ul style="list-style-type: none"> <li>▪ Common law matters proceeded by trials before juries.</li> <li>▪ Chancery matters could proceed via interrogatories, written depositions, and the presentation of evidence on oath by both the parties as well as other witnesses. This evidence could be given over a period of time.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Common law only offered only two remedies: damages and orders for possession of land.</li> <li>▪ The Court of Chancery was more flexible, as the Chancellor could mold relief to suit the particular circumstances of a plaintiff.</li> </ul>

## CONFLICT BETWEEN COMMON LAW AND EQUITY

- During this period there were two parallel legal institutions in operation – this meant that a plaintiff could commence an action in the common law court and the commence an action based upon the same dispute before the court of chancery.
  - o When this occurred, the court of chancery never scrutinised whether the decision at common law was wrong *rather its inquiry was whether by reason of circumstances not taken into account by the common law courts it was against conscience for the judgment*
- During the late 16<sup>th</sup> Century, the Chancellors began issuing ‘**common injunctions**’
  - o **Common injunctions** - These would order a litigant either not to enforce a common law judgment or not to commence a common law action or not to rely upon some argument in their common law case.
  - o During the late 16<sup>th</sup> century, common law judges resolved that this intermeddling should be prohibited, and the common law judges led by Chief Justice Coke would release litigants who had been in prison for disobeying the common injunctions granted by the court of chancery.
  - o The effect of a common injunction was to restrain a plaintiff from exercising a judgment obtained at common law where such judgement was deemed ‘unconscionable’.
- This led to increasing tensions between the Chief Justice (Coke) and the Chancellor (Lord Ellesmere).
- This tension culminated in the Earl of Oxford’s Case – highlights the resolution between these two bodies of principles today.

*The Earl of Oxford's Case (1615) 1 Ch Rep 1; 21 ER 485*

**Background Information**

- The dispute concerned a conveyance of land (a portion of Magdalene College, Cambridge) to Queen Elizabeth I.
- The Masters of the College transferred the land to Queen Elizabeth I, unaware of the provisions of a statute (the *Ecclesiastical Leases Act 1571* 13 Eliz c 10) which meant that this lease had not complied with the legal requirements.
- The Queen then granted the land to Benedict Spinola who then on sold it to the Earl of Oxford. The Earl built a number of houses upon the land, and one house was leased to John Warren.
- In time, the new Master of Magdalene College (Barnabas Gooch), having examined the provisions of the statute, realised that the initial lease was void. He then argued that he was entitled to lease the land to John Smith.
- Warren brought an action in the common law court for Smith to be ejected (i.e. remove him from the property).
- In the late sixteenth century chancellors began issuing orders, known as common injunctions, restraining plaintiffs from executing a judgment obtained at common law where the judgment had been obtained unconscionably.
- In ***Finch v Throckmorton (1597) 118 Selden Soc 441*** the common law judges resolved that this kind of 'intermeddling' in common law matters should be prohibited.
- However, Thomas Egerton, appointed Chancellor by King James I as Lord Ellesmere, continued the practice of issuing common injunctions. The common law judges, led by Coke CJ, released litigants who had been imprisoned for disobeying the injunctions.
- The issue was brought to a head in this case involving land owned by Magdalene College, Cambridge. The land was initially sold to Queen Elizabeth I and leased, the lease eventually being held by Warren.
- The College later took the view that the original sale was void under the *Ecclesiastical Leases Act 1571* and instead leased the land to Smith.
- Warren brought an action of ejectment at common law to evict Smith. Coke CJ held that the original transfer of land was void and that Smith could not be evicted.

**Legal Reasoning**

- HELD:**
- **King's Bench (at Common Law): Chief Justice Coke:**
    - o In the common law matter for ejectment Chief Justice Coke applied the terms of the statute and held that the college did not have the relevant interest in the land – this meant that the Queen herself did not receive any interest in the land and the title had not passed from the college.
    - o The earlier transfer of the land was void. The consequence was that Warren could not eject Smith.
  - **Chancery: Lord Ellesmere LC:**
    - o Following the King's Bench decision, the Earl of Oxford bought an action before the court of chancery. The central tenant of this argument was that that the Earl has spent considerable sums of money in developing the land (i.e. by building the houses) and had granted interest to his various tenants on the face of the title.
    - o The defendant in this action before the court of chancery was the Master of Cambridge College, he refused to respond to the petition relying on the decision from the Court of King's Bench – by refusing to appear he was found to be held in contempt of court chancery and was committed to the fleet prison.
    - o Issued a common injunction prohibiting the common law order from being enforced.
    - o The consequence of this was that the Earl of Oxford and his tenants (Warren) were not impacted by the statute.
  - **This resulted in two conflicting outcomes.**
  - Despite the ruling in the court of chancery, this was not the end of the matter, the master of Cambridge college refused to accept rent from Mr Warren and subsequently petitioned the King for confirmation that the court of chancery's position was binding – this resulted in a decree by king James I who ruled in favour of the court of chancery.
  - **James I ruled in favour of Lord Ellesmere's decision in the Court of Chancery (i.e. confirms the position of the court of chancery and confirms principles of equity over principles prevailing in common law courts):**
    - o "When their case deserveth to be relieved in course of equity by suit in our Court of Chancery, they should not be abandoned and exposed to perish under the rigor and

	<p style="text-align: center;">extremity of our laws...we ... do approve, ratifie and confirm, as well the practice of our Court of Chancery”</p> <ul style="list-style-type: none"> <li>- <b>The effect of his ruling was that where the rules of the common law and chancery (equity) conflict, <u>equity shall prevail</u>.</b></li> <li>- The king’s ruling in the Earl of Oxford’s Case 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.</li> <li>- By the end of the eighteenth century, the relationship between common law and equity was settled, and 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.</li> </ul>
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## REFORM AND RENEWAL

### THE FACTORS CAUSING THE SHIFT FROM CONSCIENCE TO EQUITY: 17<sup>th</sup> to 18<sup>th</sup> CENTURY

- During the 17<sup>th</sup> and 18<sup>th</sup> century, several factors contributed to the court of chancery moving away from decision making founded upon conscience to decision making founded upon clear equitable principles. These include -
  - o Earl of Oxford’s Case;
  - o Appointing Chancellors who were trained lawyers rather than clerics;
  - o Better record keeping and the development of precedent;
  - o The English Civil War, and the Parliament (and public’s) dissatisfaction with the scope of the King’s prerogative power.
  - o The shift from conscience (which focuses upon why Chancery does what it does) to equity (focusing upon what the court does).
  - o This was followed by a period of consolidation of existing equitable rules by Chancellors such as Lord Nottingham, Lord Hardwicke and Lord Thurlow.

### REFORM AND THE JUDICATURE ACTS

- Despite the developments in the 18<sup>th</sup> and 19<sup>th</sup> century, the court of chancery continued to attract attention in **the 19<sup>th</sup> Century** for **increasing delays in Chancery matters** and the ‘fog of Chancery’.
- Introduction of the **Judicature Acts of 1873 – 1876** – had the intention to produce *reforms to improve the administration of the common law and court of chancery*. The act led to the creation of the High Court of Justice as well as a Chancery – both courts could administer both common law and equitable principles. There was a *uniform code of procedure introduced and applied to all courts* → extend equity discovery and interlocutory procedures to the common law.
  - o Creation of the High Court of Justice: with both common law and Chancery divisions.
  - o **S 24(5)**: abolished the common injunction.
  - o **25(11)**: in the event that the rules of equity and the common law conflict, then the rules of equity shall prevail (this preserves the decision in the **Earl of Oxford**).
    - **While the legislation may have the effect of fusing the administration of these principles it was never intended to fuse the substantive legal and equitable principles which developed in each body of court.**
    - **When a court’s decision operates upon this error and attempts to apply the principles of one to another – we would say the court is committing a fusion fallacy.**
- The delayed introduction of judicature legislation in New South Wales has arguably had a significant effect on the development of equitable doctrine in Australia.
  - o Most other states adopted the Judicature Act model not long after it was enacted in England.

<b>Law Reform (Law and Equity) Act 1972 (NSW)</b>
<p><b>Section 5: Rules of Equity to Prevail</b></p> <p>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.</p>

### AUSTRALIA AND EQUITY

- The reforms contained in the Judicature Act were adopted throughout Australia in each state and territory.
- **Adoption of the Judicature Acts in NSW:**
- *Supreme Court Act 1970* (NSW) ss57-63; and