



Introduction to equity and trusts

Learning objectives

By the end of this chapter you should be able to:

- outline the major stages in the historical development of equity and trusts;
- appreciate that the theoretical distinction between equity and the common law is largely concerned with their different functions;
- explain the correct way to use the maxims and doctrines of equity;
- distinguish between equity as an inventive, flexible, remedial branch of law, and equitable institutions which are now settled and established, such as the mortgage and the trust;
- identify the place of equity in the modern world and anticipate its possible future development.

Introduction

cestui que trust

The one who trusts, i.e. the beneficiary of a trust (pronounced 'settee key trust').

cross reference

In future chapters we will see that if title to any property is vested in a person as trustee for another, equity imposes upon the trustee positive duties of good faith towards the other person (see Chapters 11 and 12).

Suppose your parents are about to take a once-in-a-lifetime boat trip down the Amazon river. Before they depart they hand a large sum of money to a trusted friend, saying 'hold onto this and if we don't return within three months invest it wisely and use the income to look after our children'. Suppose now that your parents do not return within the three months and you approach the trusted friend for financial assistance. As a matter of law he is within his rights to say 'I became the legal owner of your parents' money the moment it came into my possession – so go away!' Thankfully, though, his legal rights aren't the end of the story. He agreed to hold the money for your benefit, so his legal right to the fund is subject to your rights in it. We say that he holds his legal rights to (and powers over) the fund 'on trust' for you. He is the trustee and you are the beneficiary (sometimes called the *cestui que trust*). This is a simple example of 'a trust', which is the main focus of this book.

In the next chapter we will see that trusts are everywhere in modern life: they encompass charities, pensions, home ownership and commercial deals. Wherever somebody is the legal owner of property in which someone else has some beneficial ownership, there one finds a trust.

The trust is only one invention, albeit a very important one, of the branch of law known as equity. By the end of this chapter you should understand the function of equity in law and be able to say where it originated and how it developed.

Equity is a wide-ranging concept – it appears in one form or another in the Bible, ancient philosophy and great works of literature. In this book we are concerned with equity in the narrowest sense of the word, which is equity as a particular branch of English law. In that sense it is contrasted with, albeit compatible with, the general body of English law – known as the common law. 'Common law' can be a confusing term because it carries at least three distinct meanings. The first meaning distinguishes common law jurisdictions such as the UK, US and Australia, in which the law is developed on a case-by-case basis and consolidated and amended by statute, from civil law jurisdictions such as Germany, France and Italy, where the law is primarily codified or statutory. The second meaning of 'common law' applies *within* common law jurisdictions and contrasts common law in the sense of 'law found in cases' with law found in statutes; this meaning is not very helpful, but it is still sometimes used. The third meaning is the one which we will employ throughout the remainder of this book. It contrasts common law in the sense of 'general law' (whether based in statute or case law) with equity in the sense of 'law which modifies the general common law rules where the general rules cause practical hardship in the particular case'. Wherever any right or power

fee simple

The largest and best form of land ownership in English law.

cross reference

To see what the outcome of this case would be, look up 'proprietary estoppel' at 17.4.

cross reference

Maxims are considered in depth later in this chapter. Equitable doctrines and remedies are considered in depth in the final chapter of the book.

exists at common law, the role of equity is to restrain the exercise of the right and to keep the power in check.

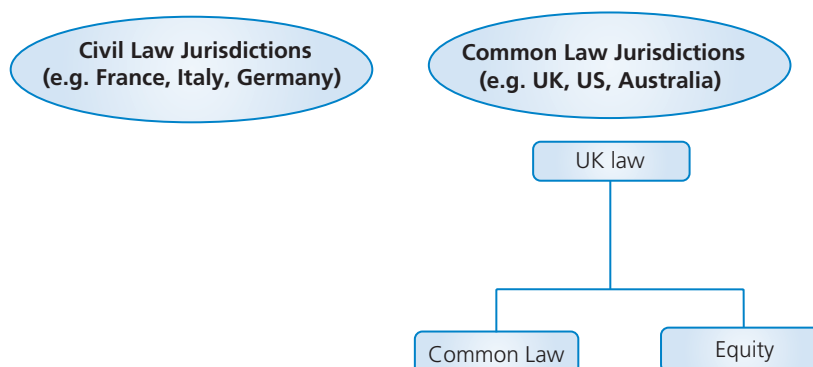
Consider another example of equity in action: imagine that the legal owner of the fee simple estate in a certain plot of land invites you to build a house on that land and promises that your reward will be the right to live in that house for the rest of your life. Suppose you build the house in the expectation that the promise will be fulfilled, but instead the owner of the land goes back on the promise. The building having being completed, the landowner shows you the formal deed of title to the land saying 'this proves that I am the fee simple owner of this land. You have got no deed of title to this land, so I say that you are a trespasser and must leave immediately'. As a matter of strict law, there is no doubt that you are a trespasser and must leave the land. The law will compensate you for your time and expenditure, to make sure that the landowner is not unjustly enriched at your expense, but it will not give you that hoped-for life-long entitlement to reside in the land. Some would describe the landowner's behaviour as clever and cunning; most, one suspects, would consider it an immoral breach of a promise. Neither opinion is relevant in a court of law, since a court of law is not a court of morality. However, what is relevant in a court of law is that the person who made the promise is using the strictness of the law to abuse you (the builder) since the whole point of equity in a court of law is to prevent the law itself from being turned into an instrument of abuse. The landowner is relying on the fact that you have not complied with the statute that requires a transfer of land to be by formal deed. If it were not for that rule of law, he would not be able to abuse you, and that is why equity gets involved. It is not because the landowner's behaviour is immoral, but because it brings the law into disrepute. As the maxim puts it: 'Equity will not permit a statute to be used as an instrument of fraud'.

equitable maxim

This is a traditional judicial principle developed in the old Court of Chancery which serves as a guide to the exercise of discretion in the application of equitable doctrines and the award of equitable remedies.

Figure 1.1

What does 'common law' mean?



1.1

The historical development of equity and trusts

An appreciation of the historical development of equity and trusts is crucial to a true understanding of the law as it currently is. What is more, the rational future development of the law depends upon an understanding of its origins. We will see through the course of this chapter that the future development of equity and trusts is very much a live issue.

1.1.1 The historical development of equity

The history of equity is characterised by its continual ebb and flow between compatibility and competition with the common law.

1.1.1.1 Twelfth to thirteenth century

In the twelfth century the royal court was largely itinerant (i.e. it rarely stayed in one place for very long). The itinerary of Henry I, for instance, took him as far afield as Carlisle, Norwich, Southampton and Normandy, all within the years 1119–23, whilst still allowing time to campaign for war in Wales. Effective government required that the King and his courtiers travelled the length and breadth of the realm collecting taxes, dispensing justice and generally asserting royal authority. One of the chief courtiers was the King's 'Chancellor' who was a learned cleric (usually a bishop), who would advise the King and his Council. One celebrated Chancellor was St Thomas à Becket, the Archbishop of Canterbury, who was infamously assassinated by supporters of King Henry II in 1170. The Chancellor was keeper of the King's Great Seal, and beneath him were the Chancery scribes who were responsible for the King's paperwork (or parchment work as it was then).

1.1.1.2 Fourteenth to fifteenth century

By the early fourteenth century the King's common law was fairly well established and where it caused injustice in individual cases, with consequent embarrassment to the King's conscience, the task of providing a just remedy fell to the Chancellor. By the end of that century the Chancellor was dispensing justice on his own authority from his base in Westminster, his concern being still to remedy the rigid common law position on grounds of conscience. The petitions to the Chancellor grew in number throughout the fifteenth century and the Court of Chancery, the Chancellor's court, grew.

1.1.1.3 Sixteenth century

Common law suits were at this time subject to technical and inflexible forms of action, with the result that a just cause might fail due to the lack of some formality. Throughout the sixteenth century increasing numbers of petitions were brought to remedy the harshness of the common law. Chancery's *ad hoc* dispensation of justice prompted the accusation that equity was undermining the certainty of the law. This led William Lambard, a sixteenth-century chancery lawyer, to ponder:

Whether it be meet that the Chancellor should appoint unto himselfe, and publish to others any certaine Rules & Limits of Equity, or no; about the which men both godly and learned doe varie in opinion: For on the one part it is thought as hard a thing to prescribe to Equitie any certaine bounds, as it is to make one generall Law to be a meet measure of Justice in all particular cases (quoted in S.F.C. Milsom, *Historical Foundations of the Common Law*, 2nd edn, London, 1981, p. 94).

Figure 1.2 *Historical overview of equity and trusts*

12th century – Chancellor advises the King in Privy Council. ↓

13th century – As keeper of the King's 'Great Seal', the Chancellor frames common law writs. The 'use' (precursor of the 'trust') of land is established. ↓

14th century – As keeper of the King's conscience, the Chancellor remedies the strictness of the common laws in particular cases. ↓

15th century – Growth of the Chancellor's court (Court of Chancery) at Westminster. ↓

16th century – At the start of the century, Chancellors were clerics; by the end they were lawyers and the Chancellor's equitable jurisdiction was established as a branch of law rather than a branch of ecclesiastic morality. Henry VIII attempts to abolish uses of land. ↓

17th century – Equity is established as supreme in cases of conflict between equity and the common law. Methods for indirectly enforcing uses of land become accepted and the modern trust is established. ↓

18th century – Equity develops in a manner supplemental to the common law; modern trust doctrine and mortgage doctrine is developed and established. ↓

19th century – Chancery and common law courts are subsumed within a new Supreme Court of Judicature. Procedures are unified, but both branches of law remain functionally distinct. ↓

20th century – Statutory consolidation and reform of the general law governing the creation and operation of trusts. ↓

21st century – Increasing and on-going international popularity of the trust as a commercial device, even in jurisdictions without the English tradition of equity.

(NB: some events were of an on-going nature and were not limited to the indicative dates)



thinking point

Is the relationship between law and equity at heart an attempt to reconcile certainty and justice?

The certainty – justice debate: the complaint against the uncertainty caused by equity's (or, more accurately, the Lord Chancellor's) interference in the common law was most memorably expressed by John Selden, in the seventeenth century, when he said:

Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity.

'T is all one as if they should make the standard for the measure we call a 'foot' a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'T is the same thing in the Chancellor's conscience.

*It is often said that the development of law is characterised by the on-going search for a balance between justice and certainty. Or to be more precise, a balance between justice in the individual case and that justice for the civilian population at large which flows from certainty in the law. The gradual move away from such ad hoc justice towards certainty led Bagnall J to suggest in *Cowcher v Cowcher* [1972] 1 WLR 425 at 431 that in modern times '[in] the field of equity the Chancellor's foot has been measured or is capable of measurement'. He was careful to add, however, that '[t]his does not mean that equity is past child-bearing; simply that its progeny must be legitimate – by precedent out of principle'. Some few years later *Browne-Wilkinson J* expressed a similar view: 'Doing justice to the litigant who actually appears in court by the invention of new principles of law ought not to involve injustice to the other persons who are not litigants . . . but whose rights are fundamentally affected by the new principles' (*Re Sharpe (a bankrupt)* [1980] 1 WLR 219 at 227).*

1.1.1.4 Seventeenth century

The competition between Chancery and the common law courts came to a head in the early seventeenth century with the *Earl of Oxford's Case* (1615) 1 Rep Ch 1. Chief Justice Coke had indicted a defendant in a common law action who had deigned to apply to Lord Chancellor Ellesmere for an injunction against a common law judgment on the grounds of fraud. Lord Ellesmere's response was to reason that such an injunction did not offend the common law courts at all, that it was effective merely *in personam* against the person who had been successful in the common law court: 'The office of the chancellor is to correct men's consciences for frauds, breaches of trust, wrongs and oppressions of what nature soever they be, and to soften and mollify the extremity of the law'.

in personam

A remedy, such as in injunction, is said to operate *in personam* because it is enforced against a defendant personally, so failure to comply with the injunction is a direct contempt of court (and not merely a breach of the law). A person can be fined or imprisoned for contempt of court. For more on injunctions, see Chapter 20.

In the end, the dispute between the Chief Justice and the Lord Chancellor was referred, in 1616, to King James I. The King resolved the dispute in favour of Lord Ellesmere, on the advice of his Attorney-General, Sir Francis Bacon. (Bacon went on, in fact, to succeed Lord Ellesmere as Chancellor.) It was thereby established that where equity and common law conflict, equity shall prevail.

1.1.1.5 Eighteenth century

In the eighteenth century equity matured through the careful Chancellorship of, amongst others, Heneage Finch, Lord Nottingham, who has rightly been called the father of modern equity (Holdsworth, *History of English Law*, vi, p. 547). During the eighteenth century equity developed in a manner harmonious with the common law, rather than in competition with it. Chancery appears to have been a beneficiary of the so-called 'Enlightenment' philosophy which emerged in that century.

1.1.1.6 Nineteenth century

Somewhat a victim of its own success, by the early nineteenth century the Court of Chancery had become hopelessly busy, despite the appointment in 1729 of the chief Chancery Master, the Master of the Rolls, to sit as a second judge. In 1813 a Vice-Chancellor was appointed. There were now three judges presiding in Chancery, where once there had been the Chancellor alone. Yet the first Vice-Chancellor, upon being asked whether the three judges could cope, is said to have replied 'No; not three angels'.

Outside the Box

Charles Dickens, *Bleak House*, 1852–3

Chapter 1 – In Chancery

Never can there come fog too thick, never can there come mud and mire too deep, to assort with the groping and floundering condition which this High Court of Chancery, most pestilent of hoary sinners, holds this day in the sight of heaven and earth . . . Well may the court be dim, with wasting candles here and there; well may the fog hang heavy in it, as if it would never get out; well may the

stained-glass windows lose their colour and admit no light of day into the place; well may the uninitiated from the streets, who peep in through the glass panes in the door, be deterred from entrance by its owlish aspect and by the drawl, languidly echoing to the roof from the padded dais where the Lord High Chancellor looks into the lantern that has no light in it and where the attendant wigs are all stuck in a fog-bank! This is the Court of Chancery, which has its decaying houses and its blighted lands in every shire, which has its worn-out lunatic in every madhouse and its dead in every churchyard, which has its ruined suitor with his slipshod heels and threadbare dress borrowing and begging through the round of every man's acquaintance, which gives to monied might the means abundantly of wearying out the right, which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honourable man among its practitioners who would not give – who does not often give – the warning, 'Suffer any wrong that can be done you rather than come here!'

The Court of Chancery Act 1850 and the Court of Chancery Procedure Act 1852 were early attempts to wrestle with the procedural problems in the Court of Chancery. But the great step towards expediting the procedure of Chancery came when Lord Chancellor Selborne introduced the Judicature Act 1873 into Parliament. Ironically, it was due to administrative delays that the statute did not in fact come into force until 1875, when it was re-enacted with amendments. We now refer collectively to the Judicature Acts 1873–5. By these enactments the Supreme Court of Judicature was established with concurrent jurisdiction to administer the rules of equity and law.

1.1.1.7 Twentieth century

It is of vital importance to realise that the Judicature Acts did not do away with the distinction between law and equity; equity and law still have their distinct functions. True, this book is primarily concerned with equitable doctrines, remedies and institutions having their origin in the old Court of Chancery, but nowadays we should expect to find the equity function flourishing in every court and every corner of the law. The leading legal historian Professor J.H. Baker has observed that, as the business of the Chancery Division of the High Court increasingly concerns commerce and property, where certainty is mostly highly prized, nowadays 'Chancery judges are the least likely to administer equity in the broad sense'. There is some truth in that, but on the other hand we have learned that equity is needed *most* where the law is most certain.

1.1.2 The historical development of the trust

The ancestor of the *trust* was the *use*. The *use* of land has existed since at least the early thirteenth century, and became an important device during the crusades. When Guille de Pends left for battle he might well have left title to his landed estate in the name of a trusted friend, to be held for the use and benefit of Guille's family during his absence. The use might have read: 'I convey all my lands to Richard de Livers for the use of Lady de Pends and her children'. Nevertheless, the use of land, though recognised by Chancery, differed from the trust of land in one important respect, as Professor Simpson (*op. cit.* at p. 170) has said:

The use had originated as a personal confidence or trust placed by one person in the other, and even when a use became a species of property it continued to bear marks of this origin. Thus it never came to bind the land itself; rather, it was conceived to bind the conscience of persons into whose hands the land came.

In 1535 Henry VIII pushed through the Statute of Uses with a view to abolishing uses of land, because landowners were employing uses effectively to separate the benefit of the land from legal title so

.....
bona fide

Good faith (pronounced 'bone-a fyde' or 'bonna fye-dee').

as to keep the benefits for themselves whilst avoiding the payment of fees which the Crown levied against legal title. The effect of the statute was to transfer legal title to the beneficiary of the use, thereby bringing the use to an end or 'executing' it. By means of this statute Henry VIII executed a great many uses, but as with his wives he didn't execute them all. The only uses that were executed were those concerning land where there was a single named beneficiary, usually the original absolute owner, and which therefore represented a sham device for avoiding the fees. Eventually, of course, inventive legal draftsmen found creative ways of avoiding the statute entirely. One such was a 'use upon a use' in the form: 'to A to the use of B to the use of C'. The Statute of Uses only executed the first use (by vesting legal title in B) but B would still then hold it to the use of the intended beneficiary, C. Thus the statute was by-passed and Chancery came to recognise the 'use upon a use' which in time became known as the trust. The trust was not, however, a mere replication of the old use under a new name. Crucially, the trust did not have to be established *in personam* against every person into whose hands it came, rather the trust bound the land itself. In the Court of Chancery the **bona fide** purchaser for valuable consideration of legal title to the land would take free of the trust, and only then if he had purchased without notice of the trust (*per* James LJ in *Pilcher v Rawlins* (1872) 7 Ch App 259, 268–9). This person was known, accordingly, as 'equity's darling', and is sometimes still referred to as such today (see, for example, *Griggs Group Ltd v Evans* [2005] FSR 31, [2005] EWCA Civ 11, Court of Appeal, *per* Jacob LJ at para. 7).

The situation had been reached whereby the Court of Chancery acknowledged the existence of a separate equitable title under a trust which the equitable (beneficial) owner could enforce against the legal owner against whom the equitable right had been established (the trustee), and against third parties who acquired the legal title with notice of the equitable interest binding upon it. Where Chancery recognised two or more parties as having competing equitable claims of equal merit, the Chancery judge would give priority to whichever claim came first in time.



thinking point

Jeffrey Hackney (in *Understanding Equity and Trusts*, Fontana, 1987) argues that the Court of Chancery afforded special status to the *bona fide* purchaser because it had no jurisdiction to question the legal title of such a person. In other words, he suggests that equity's darling is in truth the darling of the common law. Do you agree?

cross reference

See the maxim *qui prior est tempore potior est jure* at 1.3.10, below.

The court's approach to disputes between legal owners and equitable owners and disputes between equitable owners *inter se* was neatly summarised in *Liverpool Marine Credit Co v Wilson* (1872) 7 Ch App 507 at 511: 'The legal owner's right is paramount to every equitable charge not affecting his own conscience; the equitable owner, in the absence of special circumstances, takes subject to all equities prior in date to his own estate or charge'.

Through this scheme of priority to claims in land, Chancery created a law of property where previously there had existed only the common law concept of formal title. In the eighteenth and nineteenth centuries the trust was used extensively in relation to land to effect settlements according to which land could be kept within families for generation after generation. Changes in social attitudes, not to mention fiscal considerations and the onset of endemic inflation, have seen a dramatic decline in the use of trusts for this purpose. However, it is because of equity's willingness to acknowledge property behind legal title, that trusts, despite their origins as medieval land obligations, are nowadays asserted with regularity in modern commercial contexts and in particular in the context of insolvency. As Sir Peter Millett has said extra judicially: 'It can no longer be doubted that equity has moved out of the family home and the settled estate and into the market place' ('Equity – the road ahead' (1995) 9 TLI 35 at 36). To this we now turn.

1.2

Equity and trusts today

1.2.1 The commercial context

In 1995 in *Royal Brunei Airlines v Tan* [1995] 3 WLR 64 (see 19.5), Lord Nicholls of Birkenhead observed that '[t]he proper role of equity in commercial transactions is a topical question'. It is, of course, but it is also a rather old one. In 1927 Atkin LJ criticised the introduction of equitable principles into commercial sale of goods transactions as a migration 'into territory where they are trespassers' (*Re Wait* [1927] 1 Ch 606 at 635). Against this Sir Peter Millett has suggested (op. cit. 1.1.2 at 36) that '[t]he intervention of equity in commercial transactions, long resisted by common lawyers, can no longer be withstood'.

On both sides of the modern debate there is an implicit assumption that the intervention of equity in the field of commerce is something of a new development. In fact, equity has always exercised a right of way through that particular field. Professor Baker observed in *An Introduction to English Legal History* (3rd edn, 1990, pp. 119–21) that, throughout the fifteenth century, tort and commercial cases featured as prominently in Chancery as property disputes. He records that 'the typical petition complained of weakness or poverty or the abuse of position by an opponent'. It is interesting that some of the leading modern cases in which equitable principles have been developed still involve precisely the same kinds of plea. See, for instance, *O'Sullivan v MAM* [1985] QB 428 (12.1.3) where a pop star was granted equitable rescission of an unfavourable contract he had signed as a young and inexperienced artist when subject to the undue influence of his manager.



thinking point

A number of famous pop stars have successfully complained that their managers took commercial advantage of them when they were starting off. Are such cases appropriate to the equitable function?

cross reference

For more 'pop star' cases, see Chapter 20.

One thing is clear – equity will not mend a bad bargain. If you freely enter into a commercial contract that is disadvantageous to you, and find yourself in court, equity will not help you. You can only hope for *mercy* – which is a different thing! Antonio, the eponymous 'Merchant of Venice', discovered this when the Jewish moneylender, Shylock, took him to court for non-payment of a commercial bond:

Outside the Box

William Shakespeare, *The Merchant of Venice*, Act IV, scene I

PORTIA: Then must the Jew be merciful.

SHYLOCK: On what compulsion must I? Tell me that.

PORTIA: The quality of mercy is not strain'd, it droppeth as the gentle rain from heaven upon the place beneath: it is twice bless'd. It blesseth him that gives and him that takes: 'T is mightiest in the mightiest; it becomes the throned monarch better than his crown; his sceptre shows the force of temporal power, the attribute to awe and majesty, wherein doth sit the dread and fear of kings; But mercy is above this sceptred sway; it is enthroned

cross reference

We shall see in Chapter 19 that commercial agents such as banks, solicitors, directors etc. can indeed be turned into trustees, or at the very least treated as if they were trustees, but there is no doubt a reluctance even today to extend equitable regulation into that sphere.

in the hearts of kings, it is an attribute to God himself; and earthly power doth then show likeliest God's when mercy seasons justice. Therefore, Jew, though justice be thy plea, consider this, that in the course of justice none of us should see salvation: we do pray for mercy, and that same prayer doth teach us all to render the deeds of mercy. I have spoke thus much to mitigate the justice of thy plea; which if thou follow, this strict court of Venice must needs give sentence 'gainst the merchant there.

SHYLOCK: My deeds upon my head! I crave the law, the penalty and forfeit of my bond.

As for the introduction of *trusts* into commerce, Bramwell LJ had this to say:

Now I do not desire to find fault with the various intricacies and doctrines concerned with trusts, but I should be very sorry to see them introduced into commercial transactions, and an agent in a commercial case turned into a trustee with all the troubles that attend that relation (*New Zealand & Australian Land Co v Watson* (1881) 7 QBD 374 at 382).

1.2.2 The dualism/fusion debate

**thinking point**

Dualism and fusion are intellectually unattractive when taken to their extremes. In modern scholarship dualism is usually represented by a commitment to developing understanding of equity's unique function; whereas fusion is usually represented by a commitment to removing distinctions between equity and the common law.

dualism

In its most extreme form, the belief that, despite the Judicature Acts, equity remains utterly distinct from the common law.

fusion

In its most extreme form, the belief that, after the Judicature Acts, equity and the law are indistinguishable.

Professor Ashburner set out the dualist position in his *Principles of Equity* (2nd edn, 1933), where he famously described the common law and equity as two streams of jurisdiction which 'though they run in the same channel run side by side and do not mingle their waters'. Regardless of the substantial merits of his analysis, Professor Ashburner's metaphor is not a particularly helpful one. The picture of two streams running in the same channel without mingling is a hard one to imagine. Half a century later, Lord Diplock took the metaphor to its logical conclusion when he stated, *obiter*, that 'it may be possible for a short distance to discern the source from which each part of the combined stream came, but . . . the waters of the confluent streams of law and equity have surely mingled now' (*United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 at 924–5).

The dualists took up arms again when Meagher, Gummow and Lehane, authors of the leading Australian textbook, *Equity, Doctrines and Remedies*, described their lordships' decision in *United Scientific* as 'the low water mark of modern English jurisprudence' (2nd edn, 1984 at xi), to which Professor Peter Birks gave the following characteristically quotable response:

case close-up**P. Birks, *Civil Wrongs: A New World*, The Butterworth Lectures 1990–1, p. 55**

It is dangerous, not to say absurd, almost 120 years after the Judicature Acts, to persist in habits of thought calculated to submerge and conceal one or other half of our law . . . Meagher, Gummow and Lehane . . . did not attempt to say why the properties and dispositions of equity, which they rightly admire, should be confined to something less than the whole law. They did not attempt it because it cannot be done, any more than the courts might justify themselves in doing alpha justice on Mondays and Tuesdays and something less for the rest of the week.

In *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 180 at 193, Somer J provided a more conciliatory summary of the current relationship between law and equity, when he observed that '[n]either law nor equity is now stifled by its origin and the fact that both are administered by one Court has inevitably meant that each has borrowed from the other in furthering the harmonious development of the law as a whole'. This summary nowadays finds approval in most quarters.

Sir Anthony Mason has argued (in 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 LQR 238) that the Judicature Acts are an opportunity for equity to progress ahead of the common law. He argues that 'Equity has yielded to the common law some ground that conceivably it might have claimed for itself', including the territory appropriated by the 'boundless expansion of the tort of negligence, based on the existence of a duty of care to one's neighbour'.



thinking point

Is Sir Anthony's expansive version of equity a correct one, bearing in mind the way that equity operated historically in relation to the common law?

It is submitted that it is not correct. Equity and law are concerned to remedy similar ideas of negligence, but in quite different contexts. Unlike the law of tort, equity does not prescribe minimum standards of civilian behaviour, let alone suggested a paradigm 'neighbourhood principle'. In equity there is no gold standard of conscientious conduct equivalent to the objective opinion of the reasonable man in tort, the so-called 'man on the Clapham omnibus'. Equity does not concern itself with civil conduct generally, but only with conduct in relation to pre-existing legal rights, powers and duties. In short, there never is equity without law. As the maxim tells us, 'equity follows the law' (see 1.3.2).

One problem with an expansive ambition for the equitable jurisdiction is that equity can too easily become confused with the quite distinct concept of morality. This is a distinction which the next section seeks to clarify.

1.2.3 Equity, common law and morality

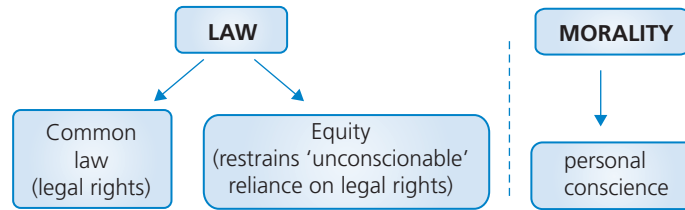
It should be clear from the preceding discussion that equity is most certainly a branch of law and not a branch of morality. However, largely due to its ecclesiastical origins and the consequent concern for conscience, it is a branch of law that has a moral flavour not so evident in the common law; though Sir Peter Millett opined in *Trustee of the Property of F.C. Jones and Sons (a firm) v Jones* [1997] Ch 159 that it would 'be a mistake to suppose that the common law courts disregarded considerations of conscience'. Just one example of equity's concern with matters of conscience is the requirement that, in relation to investment, trustees should 'take such care as an ordinary prudent person would take who was minded to invest for the benefit of another for whom he felt *morally* obliged to provide' (emphasis added) (*per* Lindley LJ in *Re Whiteley*, see 11.3.1).

Equitable 'morality' is limited to the restraint of unconscionability in legal contexts. Equity will not enforce a bare moral promise (*Taylor v Dickens* [1998] 1 FLR 806, see also 17.4). In fact, equity will sometimes encourage a trustee to break a non-legal promise ('gentlemen's agreement') if to do so would be in the best financial interest of beneficiaries (*Buttle v Saunders* [1950] 2 All ER 193). How can this be reconciled with the fact that equity, being unable to countenance the breaking of a promise made in a *legal* contract will enforce the contract according to the maxim that *equity sees as done that which ought to be done* (see 1.3.8)? The answer is that equity is not concerned with moral conduct generally, but only with the moral exercise of *legal* power or position. A great deal of immoral conduct

is prohibited neither in law nor equity. In fact, despite the ecclesiastical origins of equity, only three of the Ten Commandments (see Exodus, Chapter 20) are to be found today in English law, and even then in limited form. Equity cannot even claim the three survivors. 'Do not steal', 'do not kill' and 'do not accuse falsely' are to be found in the *common law*: as theft, homicide and perjury!


Figure 1.3

Equity is not morality



thinking point

Some years ago the late Diana, Princess of Wales, was secretly photographed while exercising in a gymnasium. She was photographed by the gym owner, whose guest she was, and the resulting images were sold by him to the tabloid press, allegedly earning him a small fortune. Legal proceedings against him were threatened, but never came to court. Do you think that equity would have required him to disgorge his ill-gotten gains?

In a court of morality there can be little doubt that the photographer would have been called to account for the proceeds of sale of the photographs. At common law, however, there was no cause of action against him. The Princess had been his guest, there had been no contract between them into which terms could be implied. What is more, there is no such thing in English law as a general tort of infringement of privacy (although, now that the Human Rights Act 1998  is in force, equivalent protection appears to ensue). In short, there was no legal relationship between the photographer and the Princess. Regardless of the lack of a relationship might it be said that the photographer had been unjustly enriched, and that the Princess should have had a cause of action on that basis alone? Unfairly enriched he may have been, but unjustly enriched in a legal sense, no. English law has only relatively recently acknowledged that A has a cause of action against B where B was unjustly enriched at A's financial expense (Lipkin Gorman v Karpnale Ltd [1991] 3 WLR 10). It is probably still some way off from acknowledging that enrichment may be unjust merely because it was acquired at the expense of someone else's privacy or reputation.


The question is whether equity, which has traditionally followed the common law, should go ahead of it, extending its boundaries. If we conclude that it should, there is a danger that we will have elevated equity to the status of free-standing moral guardian of society. The problem with this approach lies in choosing whose morality should hold sway. We might find ourselves thrown back to a time when justice varied according to the length of the judge's foot.



thinking point

Do you think it would be right for equity to assume to regulate wrongs such as infringement of privacy?

It is submitted that if the wrong committed through photographing Princess Diana had fallen into an accidental or technical lacuna in the common law, equity might legitimately have filled

the hole as part of its 'supplemental' or 'concurrent' jurisdiction to give effect to, and make sense of, the common law rules. The problem in this case is that the lack of a remedy was no mere oversight or imperfection within the scheme of legal regulation, the problem was that the wrong lay beyond the present boundaries of legal regulation. Equity is not the solution to the wrong in this type of case. Accordingly, the modern development of the equitable idea of 'breach of confidence' to fill this particular lacuna (see, for instance, the celebrated case of *Douglas v Hello! Ltd* [2001] QB 967, CA) is a situation in which equity (or at least the language of equity) has been inappropriately employed to perform a common law function. Indeed, the House of Lords has acknowledged that the equitable label 'breach of confidence' is inappropriate in this context. Lord Nicholls suggests that '[t]he essence of the tort is better encapsulated now as misuse of private information' (*Campbell v MGN Ltd* [2004] 2 AC 457, HL, at paras.13–14) , although that message appears to have been overlooked in an appeal in the *Douglas v Hello!* litigation (*Douglas v Hello! Ltd* [2005] EWCA Civ 595, CA).

Equity is morally ambiguous because it is selective in its recognition of unconscionable behaviour as between different legal contexts. Sometimes commercial sharp practice goes unchecked by equity, even if oppressive, and even if advantage has been taken of a legal entitlement. So, for example, in *Liverpool Marine Credit Co v Hunter* (1867–68) 3 Ch App 479 the defendants, the owners of a ship subject to a mortgage, deliberately sent the ship to be sold in Louisiana, knowing that Louisiana did not recognise mortgages of ships. The claimant argued that the defendant had committed a positive fraud. The judge held (at 487) that the defendant owed no duty of care to the claimant: 'I do not . . . see how Equity could properly interfere to restrain the actions which, however oppressive . . . arose out of remedies employed by the plaintiff for the recovery of his debt, of which the law entitled him to avail himself'.

cross reference

Lord Selborne went on to identify exceptional cases in which such agents would be liable (see Chapter 19).

The fact must be faced that equity's scrutiny of conscience varies dramatically according to the context in which legal powers are exercised and duties discharged. In *Barnes v Addy* (1874) 9 Ch App 244, a case of alleged accessory liability against an agent who had acted for a trustee who had breached his trust, Lord Selborne said that 'strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove' (emphasis added).

1.2.4 Concurrent rights in equity and common law

So long as law and equity remain to any extent distinct, they must function alongside each other. It is also true that rights recognised in law and equity must co-exist alongside each other. The case of *Walsh v Lonsdale* addresses some interesting issues of relevance to this section.

case close-up

***Walsh v Lonsdale* (1882) 21 ChD 9**

The facts were that a landlord and tenant had entered into a contract for a seven-year lease, the tenant had gone into possession, but the parties had forgotten to execute the formal deed needed for a valid legal lease. Despite the absence of the deed, the landlord claimed rent in advance in accordance with the contract and attempted to enforce his claim by exercising the legal right to distress for rent (which is the right to take and sell the tenants' goods *in lieu* of rent). The tenant claimed that

in the absence of a *legal* deed there could be no *legal* right to claim rent in advance, and that rent should be payable in arrear, so he sought an injunction against the distress.

Sir George Jessel MR, one of the leading equity judges of all time, stated (at pp. 14–15) that: ‘There are not two estates as there were formerly . . . There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted’. Ironically, the *tenant* had sought the aid of equity (in the form of an injunction), but the *landlord* actually received it (in the form of an equitable lease). Paradoxically, the landlord was permitted to exercise the traditionally *legal* right to levy distress for rent against the tenant of an *equitable* lease. Sir George based his judgment on the maxim that *equity sees as done that which ought to be done* (see 1.3.8). Of special interest to us is the fact that Sir George acknowledged that alongside the tenant’s fixed-term equitable lease, the tenant ALSO had a periodic legal tenancy which arose at law from the fact that the tenant was in possession and paying rent. Thus equitable and legal leases could co-exist. (The legal tenancy could be brought to an end by giving notice, so the equitable lease was more valuable – hence the litigation!)

case close-up

***Barclays Bank v Quistclose Investments Ltd* [1970] AC 567**

The facts were, briefly, that Quistclose made a loan to a company (RR Ltd) on the brink of insolvency for the express purpose of paying a dividend that the company had declared in favour of its shareholders. Had the loan been repaid in the normal course of events, the case would have been just like any other in which common law contractual obligations had been discharged. However, the borrowing company became insolvent before the dividend had been paid. At that point one might assume, as did Barclays Bank, that Quistclose’s contractual claim would have to join the queue of personal claims against the estate of the insolvent company. In fact, a majority of their lordships favoured quite the opposite result.

Lord Wilberforce, delivering the leading speech, held that the arrangement gave rise to a primary trust in favour of the shareholders in whose favour the dividend had been declared, and a secondary trust in favour of Quistclose arising in the event of the company’s insolvency. What type of trust this secondary trust might be is considered at 2.3.4.2. What is significant for present purposes is that a trust of *any* sort was held to exist *alongside* the common law contractual debt. Lord Wilberforce held (at p. 582) that ‘[t]here is surely no difficulty in recognising the co-existence in one transaction of legal and equitable rights and remedies’. No doubt it has never been a difficulty to recognise the existence of concurrent legal and equitable rights, but whether as a matter of policy it *should* be recognised is quite a different matter.

The case of *Barclays Bank v Quistclose Investments Ltd* is another where common law and equitable rights were held to co-exist.

The consequence of Lord Wilberforce’s analysis was, of course, to take Quistclose out of the queue of general creditors and to promote its claim to the status of proprietary right. *Against* this it could be argued that the borrowing company had unfairly preferred Quistclose to its other creditors. In *favour* it could be argued that to save a company from insolvency is for the good of all its creditors, and is to the benefit of society generally, and that special protection should be advanced to those creditors who lend money to companies on the brink of insolvency.



thinking point

Can you think of any policy reasons for and against the decision in *Quistclose*?

1.2.5 Co-operative remedies in equity and common law

Equitable remedies are considered in depth in the final chapter of this book. Here it is worth pointing out that law and equity take a co-operative approach to remedies. At law, contracts do not have to be performed – each party has the option to breach their contract and pay common law damages to the other party. Equity follows the law, but the court will exceptionally decree (order) ‘**specific performance**’, which requires the contract to be performed according to its terms or according to the terms of the court order.

cross reference

For detailed consideration of the remedy of specific performance, see Chapter 20.

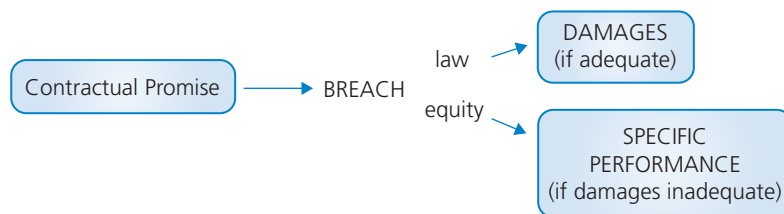
specific performance

An equitable remedy taking the form of an order of the court requiring performance of a contract; it is awarded where the court will not permit the defendant to breach his contract and pay common law damages by way of remedy.

The following diagram summarises the position:

Figure 1.4

Specific performance



Where common law damages would provide an *adequate* remedy, specific performance will not be awarded. The court will only decree specific performance where ‘it can by that means do more and complete justice’ than the common law (*Wilson v N & B J Rly Co* (1874) 9 Ch App 279 at 284). For this reason a number of specific performance cases relate to land, for all land is unique and damages are therefore presumed to be inadequate compensation for breach of a contract to convey land.

case close-up

***Beswick v Beswick* [1968] AC 58**

The facts were that Mr B gave his coal merchant business to his nephew, in consideration of which the nephew agreed to look after Mr B’s widow after Mr B’s death, to the order of £5 per week. In due course Mr B died and his widow sought to enforce the nephew’s promise. The House of Lords granted the equitable remedy of specific performance of the contract in favour of the widow, because the defendant had received the whole benefit of the contract and as a matter of conscience the court would ensure that he carried out his promise so as to

achieve 'mutuality' between the contracting parties. However, the widow could not enforce the contract in her own person, but only in her capacity as Mr B's personal representative. The doctrine of privity of contract would not permit her to sue in her own right. The fact that the widow was suing in her husband's place meant that common law damages would have been merely nominal (the husband, being dead, had suffered no real loss); damages being inadequate, specific performance was ordered.

Incidentally, Lord Reid acknowledged that had the case involved a trust for the benefit of Mrs B, as opposed to a contract for her benefit, she would have been entitled to sue in her own person. However, counsel for Mrs B did not argue that there was a trust, and so their lordships restricted their deliberations to the contract issue.

cross reference

The Contracts (Rights of Third Parties) Act 1999 (see 5.5) now permits persons in Mrs Beswick's position (i.e. an identified third party beneficiary of a contract) to enforce the contract in some cases.

Equity's co-operation with the common law in this context receives extra assistance from statute. According to the Chancery Amendment Act 1858 (known as Lord Cairns' Act), courts can award common law-type damages *in lieu* of an injunction or decree of specific performance (see, now, s. 50 of the Supreme Court Act 1981).

1.2.6 Equity and crime

The court of equity is not a court of punishment (see *Vyse v Foster* (1872–3) 8 LR Ch App 309 at 333). However, equity's traditional concern for matters of conscience has led to some interesting points of overlap with the criminal law. It has been suggested that where somebody profits from killing another, the ill-gotten gains are held by the killer as constructive trustee for those entitled under the deceased's will or **intestacy**.

intestacy

The legal scheme for distributing the estates of people who die without leaving a valid will.

Certainly, it is well established that a killer will not be permitted to take the victim's property by will or intestacy (*Re Sigsworth* [1935] Ch 89) and if the killer's innocent children were next-in-line to inherit under the victim's intestacy, they will receive nothing if the killer is still alive, with the result that the estate may pass to some more remote relative of the victim in ways the victim would never have intended. This seems unfair, so the Law Commission has recommended that where a potential heir is disqualified under this so-called 'forfeiture rule' the estate should be distributed on the assumption that the killer had died ('The Forfeiture Rule and the Law of Succession Report' (Law Com No 295), 27 July 2005). (Incidentally, this presumption will apply not only to the potential heir who kills, but also to the potential heir who refuses the inheritance and to a potential heir who dies unmarried under the age of 18 but leaves behind children.)

It has also been held that criminal gains in the form of a bribe (on 'bribes' see 16.3.1.1) are subject to a constructive trust in an appropriate case. Beyond this it seems certain that no branch of the civil law will actually enforce rights which have accrued to the person asserting them as a *result* of the crime of that person (*Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147). If equity takes note of criminal behaviour, then it is equally true that the criminal courts take notice of equity, if only in as much as dishonest breach of trust or **fiduciary** duty is an aggravating factor in cases of theft. (See *R v Clark* [1998] Crim LR 227.)

fiduciary

(As an adjective) descriptive of a duty of exclusive loyalty owed in law by one person to another and descriptive also of certain offices (the paradigm being trusteeship) under which a fiduciary duty is always one of the duties owed. (As a noun) descriptive of certain people: although a trustee is the paradigm fiduciary, the term 'fiduciary' is often used as shorthand to indicate 'a fiduciary other than a trustee'.

1.2.7 Equity and restitution

An interesting example of a case in which **restitution** was awarded to reverse an unjust enrichment is *Cressman v Coys of Kensington* [2004] All ER (D) 69, Court of Appeal, in which the purchaser of a car mistakenly transferred with a valuable personalised number plate was liable to account for the value of the number plate because he knew of the mistake at the time of the purchase.

restitution

There is no simple definition of restitution, and if there is, it is disputed on account of its simplicity. For present purposes we will adopt Professor Andrew Burrows' simple (and disputed) proposition that 'Restitution is the law concerned with reversing a defendant's unjust enrichment at the plaintiff's expense' (*The Law of Restitution*, 1993, Butterworths, p. 1).

Supporters of the development of restitution as a coherent body of English law in its own right play down the distinction between the legal and equitable nature of restitutionary remedies and the routes to asserting them. The emphasis is upon remedial justice for the claimant, be it achieved by requiring the defendant to disgorge his unjustified receipts under, for example, a common law tort action for money had and received, or as a constructive or resulting trustee in equity. This aspect of restitution was met with some scepticism in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] 2 WLR 802 where Lord Browne-Wilkinson commented that 'the search for a perceived need to strengthen the remedies of a plaintiff claiming in restitution involves, to my mind, a distortion of trust principles'.

Nevertheless, the House of Lords in *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 3 WLR 10 did appear to acknowledge a general remedy of restitution based on the concept of unjust enrichment.

case close-up

***Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 3 WLR 10, House of Lords**

A partner in a firm of solicitors (the claimants) had used monies from the firm's client account in order to gamble at the 'Playboy' casino (run by the first defendant, Karpnale Ltd). The House of Lords decided that the casino had to pay back the monies it had received to the extent that it had been unjustly enriched by them. However, it did not have to pay back monies to the extent that it had changed its position in good faith as a result of receiving them (the so-called 'change of position' defence). It was permitted to deduct a sum equivalent to the winnings it had paid out to the fraudulent solicitor before making restitution to his firm.

Lord Goff of Chieveley: 'In these circumstances it is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these? The answer must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution. If the plaintiff pays money to the defendant under a mistake of fact, and the defendant then, acting in good faith, pays the money or part of it to charity, it is unjust to require the defendant to make restitution to the extent that he has so changed his position. Likewise, on facts such as those in the present case, if a thief steals my money and pays it to a third party who gives it away to charity, that third party should have a good defence to an action for money had and received. In other words, *bona fide* change of position should of itself be a good defence in such cases as these. The principle is widely recognised throughout the common law world . . . The time for its recognition in this country is, in my opinion, long overdue'.

cross reference

For detailed consideration of the tracing procedure, see Chapter 18.

According to one of the leading academic advocates of a substantive law of restitution, Professor Peter Birks, '[t]heir Lordships [in *Lipkin*] looked forward to the day in which there might be a synthesis of common law and equity relating to restitution of misapplied funds' (*Civil Wrongs: A New World*, The Butterworth Lectures 1990–1, pp. 55, 56). Certainly this was the view of Lord Goff (the co-author, with Professor Gareth Jones, of *Goff and Jones on Restitution*). His lordship, having accepted that the solicitors' claim was founded upon the unjust enrichment of the club, and that the club was entitled to defend that claim to the extent that it had changed its position in good faith, said:

The recognition of change of position as a defence should be doubly beneficial. It will enable a more generous approach to be taken to the recognition of the right to restitution, in the knowledge that the defence is, in appropriate cases, available; and, while recognising the different functions of property at law and in equity, there may also in due course develop a more consistent approach to tracing claims, in which common defences are recognised as available to such claims, whether advanced at law or in equity.

**thinking point**

Suppose Professor Birks' vision of a law of restitution in which law and equity are indistinguishable were to come true, surely the effect would be to isolate that new law of restitution from the rest of English property law and remedial law, for the rest of English law is still based upon a distinction between law and equity.

1.3**The maxims of equity**

The remedial jurisdiction of equity was predicated not upon the recognition of formal entitlement, but upon the exercise of the court's discretion; and in the exercise of discretion maxims are more useful than rules.

1.3.1 Equity will not suffer a wrong without a remedy

The Latin version of this maxim suggests equity to be the healer of all ills: *nullus recedat e curia cancellariae sine remedio* (nobody leaves the Court of Chancery without remedy). The reality, of course, is that equity does not concern itself with every type of wrong (see 1.2.1). However, where an activity is one with which the law is concerned, and in relation to which the law provides no sufficient remedy, equity will endeavour to supplement the shortcomings of the common law.

1.3.2 Equity follows the law

The judge in *Leech v Schweder* (1873) 9 LR Ch App 463 gave the following useful exposition of this maxim (at 475): 'I always supposed that where a right existed at law and a person only came 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'.

1.3.3 Equity looks to substance not form

In *Walsh v Lonsdale* (1882) 21 ChD 9 we have already considered one of the most dramatic illustrations of this principle (see 1.2.4). Another nice illustration is provided by *Locking v Parker* (1873) 8 LR Ch App 30 where the question arose whether a real security in the form of a trust for sale of land was or was not a mortgage. The judge held that ‘... it is not for a Court of Equity to be making distinctions between forms instead of attending to the real substance and essence of the transaction. Whatever form the matter took, I am of the opinion that this was solely a mortgage transaction’.

It should not be assumed, however, that the common law is blind to substance. In *Street v Mountford* [1985] 1 AC 809 Lord Templeman famously refused to recognise an occupier’s right in land to be a personal ‘licence’, even though it had been labelled a ‘licence’ and intended by the parties to be such. Instead he held that it was a lease, because an examination of the substantial relationship between the parties revealed that the tenant had in fact got exclusive possession of the landlord’s premises. The name the parties used could not alter the substantial nature of the transaction. As Shakespeare put it in *Romeo and Juliet* (Act II, scene ii): ‘What’s in a name? That which we call a rose by any other name would smell as sweet’. Lord Templeman preferred another gardening metaphor: ‘The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade’.

Nevertheless, if we take the example of a ten-year lease of land contained in a document labelled ‘licence’, the fact remains that the common law will only recognise the document as creating a valid legal lease if the document itself is in the *form* of a deed. It is in relation to statutory formality requirements such as these that equity is able to take a less constrained approach to fulfilling the substantial intentions of the parties. See next.

1.3.4 Equity will not permit a statute to be used as an instrument of fraud

This maxim usually applies to restrain a defendant from relying in bad faith upon the absence of some statutory formality in order to defeat the claimant’s legitimate claim. The leading authority is *Rochevoucauld v Boustead* [1897] 1 Ch 196, which was applied in *Bannister v Bannister* [1948] 2 All ER 133 and *Lyus v Prowsa Developments* [1982] 1 WLR 1044. See, generally, Chapter 3 at 3.2.1–3.2.3.

A more radical, and relatively unknown possibility, is that equity might, by virtue of its *in personam* jurisdiction have power, not simply to prevent existing statutes from being used as instruments of fraud, but to restrain an improper application to Parliament for the enactment of a new private Act of Parliament. The possibility was admitted in *Re London, Chatham and Dover Railway Arrangement Act* (1869–70) 5 LR Ch App 671, although the court thought it difficult to conceive of a case in which it would be right for the court to exercise the power.

1.3.5 Equity acts in personam

One of the most useful modern applications of equity’s *in personam* jurisdiction has been in relation to international freezing injunctions (formerly known as *Mareva* injunctions: *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd’s Rep 509, [1980] 1 All ER 2). This form of injunction is designed to prevent a defendant from dissipating assets in order to defeat a judgment of the court. The injunction is effective *in personam* against any person made a defendant to proceedings in an English court, and is not defeated by the mere fact

that the assets subject to the injunction are based outside the jurisdiction of the English court (although *freezing* injunctions are usually used to prevent assets from being taken outside the English jurisdiction). For more on injunctions, see Chapter 20.

1.3.6 Those who come to equity must come with clean hands

In *Lee v Haley* (1869) 5 LR Ch App 155 the claimants failed when they sought an injunction to protect their trade as coal merchants. The court held that they had ‘unclean hands’, not because of the coal, but because they had been dishonestly selling their customers short. As the judge said (at 158): ‘. . . if the Plaintiffs had been systematically and knowingly carrying on a fraudulent trade, and delivering short weight [of coal], it is beyond all question that this court would not interfere to protect them in carrying on such trade’.

The maxim applies in the case of injunctions and on applications for specific performance because the award of such remedies lies in the discretion of the court. The maxim will not be applied to prevent a claimant from bringing an action under an established equitable right (*Rowan v Dann* 64 P & CR 202).

It is crucial to realise that equity only insists on the good behaviour of those who *come to equity* seeking a remedy. It does not insist that the successful equitable claimant must continue to use his equitable interest with probity after the award. This is perhaps nowhere better illustrated than in the case of *Williams v Staite*.

case close-up

***Williams v Staite* [1979] Ch 291**

The facts of that case were that the holders of an equitable right to occupy a cottage for life persistently interfered with the enjoyment by their neighbour of an adjoining cottage. The neighbour had purchased the legal titles to *both* cottages from the person against whom the bad neighbours had established their equitable interest. On account of the harassment that he had suffered, the legal owner sought to evict his bad neighbours. The judge at first instance held that the equitable rights of the bad neighbours should be revoked by reason of their conduct, and he awarded possession to the claimant. The defendants successfully appealed.

Goff LJ held that, after the appropriate award has been made in satisfaction of the equity (based on estoppel, see 17.6), subsequent ‘excessive user or bad behaviour towards [the legal owner] cannot bring the equity to an end or forfeit it’. Denning LJ thought that the equitable award might be revoked in ‘some circumstances’ (he did not specify what they might be) but held that the remedies available to the legal owner in this case would be to bring an action at common law for nuisance, trespass and so forth.

1.3.7 Those who come to equity must do equity

The 1877 edition of Story’s *Commentaries on Equity Jurisprudence* states, in the context of rescission and specific performance, that:

[T]he interference of a court of equity is a matter of mere discretion . . . And in all cases of this sort . . . the court will, in granting relief, impose such terms upon the party as it deems the real justice of the case to require . . . The maxim here is emphatically applied – he who seeks equity must do equity.

The English Court of Appeal in *O'Sullivan v Management Agency Ltd* [1985] QB 428 (see 12.1.3), in exercising its jurisdiction to set aside (rescind) a contract on equitable grounds, required the successful claimant to allow the other party to retain some benefits made under the contract. Their lordships stated that, by means of the maxim *he who comes to equity must do equity*, 'the court can achieve practical justice between the parties' (*per* Dunn LJ) and 'the court will do what is practically just in the individual case' (*per* Fox LJ). For further illustrations of the maxim see *Sledmore v Dalby* (1996) 72 P & CR 196, *Cheese v Thomas* [1994] 1 WLR 129 at 136 and *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 69 ALR 678.

1.3.8 Equity sees as done that which ought to be done

As we saw when we considered the relationship between equity and morality, equity sees as done that which ought *legally* to be done: see *Walsh v Lonsdale* (1882) 21 ChD 9, CA, at 1.2.4. Although normally applied to private transactions, this maxim has occasionally been applied to treat a court order to transfer property as taking immediate effect in equity, so as to impose a constructive trust on the person subject to the order (*Mountney v Treharne* [2003] Ch 135, CA; *Re Flint (a bankrupt)* [1993] Ch 319).

cross reference

For examples of this maxim in operation, see the case of *Re Hallett's Estate* (1880) 13 ChD 696, CA (18.2.3.3) and, in Chapter 20, the equitable remedies of 'performance' and 'satisfaction'.

1.3.9 Equity imputes an intention to fulfil an obligation

Equity imputes an intention to fulfil a *legal*, but not a *moral*, obligation.

1.3.10 Where the equities are equal the first in time prevails (*Qui prior est tempore potior est jure*)

This maxim is sometimes paraphrased *the first in time is the first in right*. Its use can be illustrated by taking the straightforward case of equitable mortgagees competing against each other for priority. Suppose that A grants an equitable mortgage of property to B and later grants a mortgage of the same property to C. In the usual course of events, B's mortgage will have priority over C's, in accordance with the maxim. In theory the maxim only applies if the competing equities are equal, but Kay J in *Taylor v Russell* [1890] 1 Ch 8 at 17 stated that nothing less than 'gross negligence' must be proved by a later equitable mortgagee against a prior mortgagee to give priority to a later one. Earlier authorities which appear to suggest that B might cede priority to C, if C's equity is merely *technically* superior to B's, must be doubtful. See, for example, *Pease v Jackson* (1867–83) Ch App 576.

1.3.11 Where the equities are equal the law prevails

This maxim, like the previous one, operates more like a rule than a principle and operates in the context of determining priority between competing equitable claims. If we take our previous hypothetical case, where A granted an equitable mortgage to B and then another to C, the present maxim allows C to gain priority over B by the simple expedient of purchasing the legal title from A (see *Bailey v Barnes* [1894] 1 Ch 25 and *Taylor v Russell* [1893] AC 244).

One exception to this maxim is the rule in *Dearle v Hall* (1828) 3 Russ 1. According to this rule, priority between competing assignees of a *debt* is awarded to the first one to give notice to the debtor. It matters not that one of the competitors has a legal interest and the other merely an equitable one.

1.3.12 Where equity and law conflict, equity shall prevail

Established as a result of the *Earl of Oxford's Case* (1615) 1 Rep Ch 1 at 1.1.1.4, this maxim is now enshrined in s. 49 of the Supreme Court Act 1981, which provides that:

Every Court exercising jurisdiction in England and Wales in any civil cause or matter shall continue to administer law and equity on the basis that, wherever there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail.



thinking point

Note how, more than a century after the Judicature Acts, Parliament thought it quite appropriate for this section to draw a distinction between the rules of law and the rules of equity.

cross reference

For illustrations of the maxim 'Equality is equity', see the Court of Appeal decisions in *IRC v Broadway Cottages Trust* [1955] Ch 20 (4.4.1.1) and *Midland Bank plc v Cooke* [1995] 4 All ER 562 (17.1.1.2.).

cross reference

For detailed consideration of laches, limitation and the effect of delay on equitable claims, see 15.2.

cross reference

These last three maxims are considered in detail in Chapter 5.

1.3.13 Equality is equity

1.3.14 Delay defeats equities

The processes of law are notorious for delay. Shakespeare's Hamlet lists 'the law's delay' among the chief woes of life in his famous 'to be, or not to be' soliloquy. More than two centuries later administrative delay effectively crippled Chancery procedure. This may in part explain the requirement, enshrined in the maxim 'delay defeats equities', that a person seeking an equitable remedy should not be lax in bringing their claim. In practice, however, the doctrine of **laches** is more often resorted to (to defeat stale claims) than is this maxim (see J. Brunyate, *The Limitation of Actions in Equity*, London, 1932).

laches

Delay or 'laxness' in bringing a claim. A claim against a defendant will be barred by reason of the claimant's laches if there was such a delay in bringing the claim as is likely to prejudice the defendant's fair trial or otherwise offend the public interest in finality of litigation.

1.3.15 Equity will not assist a volunteer

1.3.16 There is no equity to perfect an imperfect gift

1.3.17 Equity abhors a vacuum in ownership



Chapter summary

In this chapter we have seen that equity developed to prevent the unconscionable abuse of common law rights and powers, but that equity is a branch of law and not a branch of morality. True, it is assisted by principles (called maxims) and doctrines which can lead to creative results in hard cases, but it is developed where possible in accordance with precedent, just like any other branch of law in a common law system. The challenge for the student is to understand the relationship between the equity branch and the common law branch of law. Most students would like the path to understanding to be paved in simple key points, in which case the good news is that the content of some of the chapters in this book may safely be summarised under a few key headings, and this writer will attempt this at the end of chapters where appropriate. However, it would be dangerous to adopt such an approach at the end of this first chapter, in which we have encountered some of the fundamental ideas that will accompany us throughout the remainder of our study of the law of trusts. One cannot grasp the big idea of equity by holding onto a few key points any more than one can comprehend the wind by holding one's breath. Equity, like so many big ideas, must be understood as a whole, and to convey understanding of the whole it is useful to employ metaphor; but *which* metaphor?

We have heard it suggested that equity and the common law are streams of water that flow in the same channel in which they are now merged as one. However, the image of two streams in a single channel is not a helpful one. It would be better to see the single river of the law as being composed of two parts: the river bed and the water that runs over it. The common law is the river bed; in places it is as unyielding as stone, but in those places over time it is softened by the more fluid processes of equity. Crucially, one can have a river bed without water but one cannot have a river without a river bed: equity follows the common law; it is not the other way round. Equally important is the fact that there are muddy waters which belong as much to the water of equity as to the river bed of the common law. Remedies for breach of duty of care and remedies for restitution of unjust enrichment are amongst those areas in which (in some situations) it makes little practical sense to distinguish equity from law. However, one area in which it is absolutely necessary to distinguish equity from law is the area which will form the major subject of study throughout the remainder of this book: *the trust*. In the trust, legal title (common law ownership, i.e. ownership by the trustee) is held apart from equitable title (beneficial ownership, i.e. ownership by the beneficiary). Of course, the distinction between equity and law within the trust is not a particularly fluid distinction, it is a distinction which has been established over centuries, so that it is now solid and predictable to the extent that the absolute owner of an asset knows exactly what he or she must do in order to create a trust of that asset. In the trust, the river of equity has frozen so that equitable ownership and legal title are clearly distinct from one another.



Key points

THE HISTORICAL DEVELOPMENT OF EQUITY AND TRUSTS

- Where the King's common law caused injustice in individual cases, with consequent embarrassment to the King's conscience, the task of providing a just remedy fell to the Chancellor. The Chancellor came to dispense justice on his own authority from Westminster, and so the Court of Chancery, the Chancellor's court, developed;

- competition between Chancery and the common law courts came to a head in the early seventeenth century with the *Earl of Oxford's Case*, reported at (1615) 1 Rep Ch 1. The dispute between the Chief Justice and the Lord Chancellor was referred, in 1616, to King James I. The King resolved the dispute in favour of Lord Ellesmere, thereby establishing that where equity and common law conflict, equity shall prevail;
- in the eighteenth century equity developed in a manner supplemental to the common law and modern trust doctrine and mortgage doctrine was established. The success of Chancery rendered it too busy to cope, and so, by the Judicature Acts 1873–5, Chancery and the common law courts were subsumed within a new Supreme Court of Judicature. Procedures were unified, but equity and common law remain functionally distinct.

EQUITY AND THE COMMON LAW

- 'Neither law nor equity is now stifled by its origin and the fact that both are administered by one court has inevitably meant that each has borrowed from the other in furthering the harmonious development of the law as a whole' (*Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 180 at 193, *per Somer J*);
- equity is a branch of law and not a branch of morality. Equitable 'morality' is limited to the restraint of unconscionability in legal contexts. Equity will not enforce a bare moral promise. In fact, equity will sometimes encourage a trustee to break a non-legal promise ('gentlemen's agreement'), if to do so would be in the best financial interest of the trust beneficiaries (*Buttle v Saunders* [1950] 2 All ER 193).



Summative assessment exercise



THE MAXIMS OF EQUITY

We scrutinised the maxims of equity at the end of the chapter, but can you remember them all? As a final exercise, the following list of maxims contains DELIBERATE MISTAKES. Put a cross next to any of the maxims in the following list which is not accurately expressed – and underline the mistake in each case:

- equity will not suffer a moral wrong without a remedy;
- equity leads the law;
- equity looks to substance and never to form;
- equity will not enforce the Statute of Frauds;
- equity acts *in personam*;
- those who come to equity must come with clean hands;
- those who come to equity must do good;
- equity sees as done that which ought morally to be done;

- equity imputes an intention to fulfil an obligation;
- where the equities are equal it is a draw;
- where equity and law conflict, equity follows the law;
- equality is equity;
- delay defeats equities;
- equity will mend a bad bargain;
- equity will not assist a volunteer;
- equity will perfect an imperfect gift.

Full specimen answers can be found at http://www.oxfordtextbooks.co.uk/orc/watt_directions.



Further reading

- Baker, J.H. 'The Court of Chancery and Equity' (Chapter 6) in *An Introduction to English Legal History* 3rd edn (2002) London: Butterworths
a wonderful overview from the leading modern text on legal history.
- Halliwell, M. *Equity and Good Conscience* 2nd edn (2004) London: Old Bailey Press,
an engagingly written and hopeful vision for greater moral conscience in law
- Holdsworth, W.S. 'Relation of the Equity Administered by the Common Law Judges to the Equity Administered by the Chancellor' (1916) 26 Yale LJ 1
a classic piece by one of the academic fathers of modern legal history. It examines the surprising fact that the common law judges have always exercised their own brand of equity
- Martin, J. 'Fusion, Fallacy and Confusion: a Comparative Study' (1994) Conv 13
a clear and helpful contribution to the debate regarding the fusion of law and equity
- Watt, G. *Equity Stirring: The Story of Justice Beyond Law* (2009 Oxford: Hart Publishing)
an interdisciplinary study of the concept of equity drawing on a range of legal and non-legal sources, including Aristotle, Dickens and Shakespeare