Part I

Introduction to equity and trusts

Part I of this book explores the nature of equity and the trust concept. It is important to have a sound understanding of the nature of equity and the trust concept before moving on to a more detailed study of the law relating to trusts. Chapter 1 explores the nature of equity and its relationship with the common law. The chapter explores the historical development of equitable jurisdiction and explains the modern grounds for the application of equitable relief. The reader is encouraged to appreciate the role of unconscionability as the fundamental ground for invoking equitable relief. Chapter 2 moves on to explore the nature of the trust concept. The chapter explores the nature of the trust, the reasons why people create trusts and the key players in the trust relationship. The purpose of this chapter is to put into context the modern social and economic significance of the trust so as to allow the reader to appreciate the concerns which form the subject matter of the remaining parts of the book. Chapter 3 looks at how the trust concept differs from other legal concepts, including powers of appointment, contracts and the rights of individuals receiving under a will or on intestacy.
Introduction to equity

Learning objectives
After completing this chapter you should be able to:
➔ understand the origins of equity
➔ understand the idea and nature of equity
➔ understand the relationship between law and equity
➔ understand the nature of rights in law and rights in equity
➔ understand the maxims of equity
➔ understand the nature of equitable relief
➔ understand the contemporary role of equity.
What is equity and why does the English legal system recognise a body of rules known as equity are two frequently asked questions in an undergraduate study in law. In attempting to answer these questions it is, perhaps, apt to begin with a look at two statements made some 400 years apart which provide explanation of the touchstone for application of equity and equitable doctrines to given factual situations.

The first statement is that of Lord Ellesmere who once commented in the famous *Earl of Oxford's Case* (1615) 1 Rep Ch. 1 at page 6 that ‘men's actions are so diverse and infinite that it is impossible to make any general law which will aptly meet with every particular and not fail in some circumstances. The office of the Chancellor is to correct men's consciences for fraud, breaches of trust, wrongs and oppressions of what nature so ever they be, and so soften and mollify the extremity of the law.’

The idea that equity is essentially conscience driven was recently reaffirmed by the House of Lords in *Westdeutsche v Islington London Borough Council* [1996] AC 699 (HL) (at p. 705) where Lord Browne-Wilkinson commented in the context of trusts that ‘equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied) or which the law imposes on him by reason of his unconscionable conduct.’

The word ‘equity’ is susceptible to a number of different meanings. In one sense the word means what is ‘fair and just’ and is, therefore, undistinguishable from the general concern of any system of laws, which is that all laws should be fair and just. However, another somewhat narrower sense of the word is that equity is that specific body of law which supplements the common law and is invoked in circumstances where the conduct of a defendant is deemed unconscionable. The unconscionability of the defendant may arise in a number of different contexts and for a number of different reasons. Additionally, the defendant’s unconscionable conduct will have resulted in the defendant acquiring some advantage, whether personal or proprietary, which cannot be rightfully retained by the defendant. In most cases the defendant’s unconscionability will have arisen from the strict and rigid application of a rule of common law. Where such unconscionable conduct has arisen, the role of equity is to temper the rigour of the common law by the award of an appropriate equitable remedy. Throughout this book there will be many examples where equity has intervened to prevent unconscionable conduct on the part of the defendant.

This chapter explores the nature and function of equity in the English legal system. In particular, the chapter explores the grounds for the intervention of equitable relief and the relationship between equity and the common law. It examines the role of unconscionability in equity and examines some of the important maxims of equity.
Introduction

One of the unique features of the English legal system is the duality of rights that can exist at common law and in equity. English law, like many other systems of law, allows the courts to administer two separate principles of law, which are not necessarily in conflict with each other but which seek to achieve justice on any given set of facts. The central feature of the common law is that it is based on the principle of precedent and looks to matters of form rather than substance. For example, any potential claimant wishing to pursue a remedy in the common law courts must satisfy that his complaint is a complaint which is recognised as being capable of being remedied in the common law courts, in most cases through the award of damages for loss caused to the claimant. Additionally, the common law requires that the claimant comply with all the necessary formal requirements that apply to the facts which give rise to his cause of action. This is better explained with reference to the following question.

APPLYING THE LAW

Thomas orally agreed with Victor that he would sell his house to Victor for a sum of £400,000. Victor was very pleased with the selling price and told Thomas that he would need a few months to raise the purchase price. Thomas did not hear from Victor for several months and Thomas sold his house to Betty for £500,000. Victor is not happy with the sale to Betty and wants to bring an action against Thomas for going back on his word. Can he do this?

The above, admittedly rather simplistic set of facts, is a good starting point to illustrate whether a claimant can pursue a remedy in the common law courts. Whilst the reader may or may not be exposed to the common law rules governing contracts for the sale of land, it is a basic principle of modern land law that a contract for the sale of land is put in writing and that the written contract incorporates all the terms agreed between the parties. This formal requirement is found in s. 2(1) of the Law of Property (Miscellaneous) Provisions Act 1989. Whilst it is true that Victor may feel aggrieved by the fact that Thomas did not sell his house to him, Victor would have no remedy at common law on the grounds that a contract for the sale of an interest in land is ineffective at common law if it is not in writing and incorporating all the terms and conditions of the sale.

Equity, on the other hand, is a system of law historically developed in the Court of Chancery correcting unconscionable conduct on the part of a defendant. Unlike the common law, equity is not defeated by failure to comply with form. It is often said that equity looks to matters of substance rather than form. So where there has been a failure to comply with form, equitable relief is not necessarily prevented from being given if, as a matter of substance, the court decides that equitable relief should be given. As to what matters of substance will persuade a court to grant equitable relief, the court will look to the underlying question of conscience. In particular, equity’s concern is over the unconscionable conduct of a defendant. If the defendant, despite an absence of formality, has conducted himself in a manner in which he has acted unconscionably, the court will

---

1 For more detail, see K. Gray and S. Gray, Elements of Land Law 5th edn (2009) at p. 1034.
grant equitable relief even where to do so would be in face of an absence of legal formality. It will be observed in this chapter that in the early days of the administration of equitable relief, the Court of Chancery was not necessarily restricted by precedent. The Lord Chancellors of the early Court of Chancery exercised equitable principles on a case-by-case analysis, the only common thread being the proof of unconscionable conduct on the part of the defendant.

A proper understanding of modern equity requires an appreciation of the common law and its shortcomings, particularly in the twelfth and thirteenth centuries. Before that, however, it is worth revisiting the question posed above regarding the sale of Thomas’s house to Victor. Whilst it is established that the contract would be void at common law for failure to comply with the formal requirements of s. 2(1) of the Law of Property (Miscellaneous) Provisions Act 1989, would Victor have any relief in equity on what has been said so far about equity and the role of unconscionability? At this stage of the book the reader will not have been exposed to the very specific rules of equity governing oral contracts for the sale of land, but it is nevertheless useful to think whether the Thomas and Victor type of scenario is one which is within equity’s jurisdiction to give some remedy.2

The common law

The origins of the common law go as far back as 1066 when the Norman Conquest introduced a new system of law for England. Towards the end of the thirteenth century two main types of courts were responsible for administering law in the country. First, there were the local courts, which were courts set up within the feudal structure and administered by the feudal lords.3 Secondly, there were the royal courts, also known as the Courts of Common Pleas consisting of the King’s Bench, Court of Common Pleas and the Exchequer. A potential litigant who felt that he had not received justice in the local courts had a right to petition the King and ask for his case to be heard in one of the royal courts. The right of an individual to petition the King arose out of the fact that the right to justice was a royal prerogative. Maitland once explained that each of the royal courts at one time had separate sphere of interest, but soon the claimant had a choice as to which court heard his case simply because each court began to administer the same law and in the same manner.4 The Exchequer, however, was more than just a court of law; it had responsibility for fiscal matters as well as legal. Alongside the Exchequer was the Chancery Department headed by the Chancellor (who was normally a bishop).

2 The detailed equitable rules relating to the enforcement of oral contracts for the sale of land are considered in Chapter 13.

3 The feudal structure of England involved a system where the Crown acquired ownership of all land in the country, sometimes also referred to as the radical title of the Crown. Under this feudal structure, the Crown’s radical title served as a means by which smaller rights or ownership could vest in other persons: notably, the most powerful Lords and Knights at the top of the feudal ladder and less powerful individuals as the bottom. These smaller rights did not grant absolute ownership but limited forms of ownership. The limitation of ownership was defined by time: that is, ownership of land for defined periods of time, otherwise also known as the concepts of estates and tenures in the land. For a detailed examination of feudal tenure see F. Barlow, The Feudal Kingdom of England 1042–1216 (4th edn, 1988) and A.W.B. Simpson, A History of the Land Law (2nd edn, 1986).

The Chancery at this stage was not a court of equity that developed much later in the sixteenth and seventeenth centuries administering equitable principles and doctrines on the basis of unconscionable conduct. Rather, it was a secretarial office answerable to the King's permanent Council. The Chancellor, by way of delegation from the King, dealt with many of the petitions made to the King for justice to be given in individual cases.

The inadequacy of the writ system

The law administered by the medieval courts was partly traditional and partly statute. Traditional law was based on precedent and was termed the common law in that it was common to all areas of England and all its subjects. A claimant wishing to commence an action in the Court of Common Pleas or the Kings Bench required a royal writ. A royal writ consisted of a sealed authorisation to commence proceedings in the royal courts. The office of issuing writs was given to the Chancellor who had at his disposal a number of established writs, but also had a limited power to issue new ones. It is important to note that at this point in history the Chancellor did not act in a judicial manner; his role was simply to hear the claimant's application and issue the appropriate writ. The grant of a writ did not mean that the claimant was successful, since the courts could quash the writ as being contrary to the law of the land. The power to invent new writs presented a real threat to the feudal lords and barons since new writs meant new remedies, which in turn created new rights and duties. In recognition of this problem faced by the feudal lords and barons, the Provisions of Oxford 1258 disallowed the issuing of new writs without the permission of the King's Council. In one sense this was the power of the feudal lords and barons sitting in the King's Council preventing new law, which was primarily directed at them. The net effect of the Provisions of Oxford was that a number of new cases requiring new remedies remained unresolved in the common law. The common law became rigid and incapable of dealing with the changes taking place in society requiring the recognition of new rights and remedies.

The inadequacy of an appropriate remedy

Apart from the fact that the common law was not able to redress new legal problems, there was also the fact the common law lacked an appropriate remedy in many cases. The predominant remedy at common law was, and still is today, the award of monetary damages. Thus, in the case of typical civil wrongs – for example, a breach of contract or the commission of tort such as negligence – the injured party was and still is entitled to compensation in the form of monetary damages reflecting the loss suffered by that injured party. Whilst the award of damages is appropriate in some cases it is not appropriate in all, particularly where the subject matter of the dispute involves some property: for example, land. A good example of the inappropriateness of damages is illustrated by the example of a persistent trespasser of land. In the case of a persistent trespasser a landowner can sue for damages: however, a more appropriate remedy would be an injunction preventing the commission of the trespass. The problem with the common law is that it does not recognise a remedy in the form of an injunction. It will be seen later that one of the reasons for the development of equity was primarily in response to the inadequacy of the common law remedy. Another good example is the sale of a valuable

---

painting to a purchaser. It is trite law that in the event of a breach of such contract, the purchaser has a right to sue for damages for failure to deliver the painting. However, given the fact that special significance is attached to the painting in that it is something that is not readily available on the open market, a more appropriate remedy would be a decree of specific performance compelling the seller to perform the contract. Again, a primary shortcoming of the common law is that it does not recognise the remedy of specific performance. Seen in this way, one of the fundamental contributions of equity to the English legal system was the diverse range of remedies available to a claimant to enforce his rights.

**The origins and development of equity**

Most legal systems, whether common law based or civil, have had to entertain the notion of equity. The term equity is susceptible to a number of different meanings. In one sense the word equity means what is fair and just, and in this sense equity is a theme that runs through most legal systems in that all laws should strive for fairness and justice. Another sense of the word is that equity consists of a distinct body of rules that seek to introduce ethical values into the legal norms. In this respect one commentator once explained that equity consists of ‘a set of legal principles entitled by the extrinsic superiority to supersede the older law’. It is this latter definition which properly explains the idea of equity in the English legal system. It will be observed in this chapter that equity in the English legal system is not a system of law based on what is necessarily fair on any given set of facts. As one judge once commented, English law does not possess a jurisdiction to administer ‘palm tree justice’. Modern equitable jurisdiction is exercised in well-defined circumstances which involve unconscionable conduct on the part of a defendant.

**The nature of equity in the early days**

In its early development, equity was developed by the Court of Chancery in the medieval ages to iron out the deficiencies of the common law and correct unconscionable conduct. The need for a separate court to administer equitable relief arose from the deficiencies of the common law in the Middle Ages, which have already been outlined above. In particular, the common law failed to address new legal problems simply because of the rigidity of the writ system: that is, the unavailability of a writ to initiate proceedings because of no recognised cause of action. Even where a recognised action existed, there was the problem of an appropriate remedy to resolve the dispute between defendant and the claimant. However, it was not simply the fact that a remedy was inappropriate; in many cases even though a remedy existed, it was simply not forthcoming for the claimant. The principal reason for this was that in many cases the rich and powerful individuals could influence both the courts and the jury, resulting in the fact that justice was simply not forthcoming for the very weak and vulnerable. Equity, as administered by the early Lord Chancellors, was not defeated by these constraints. The Lord Chancellor attempted

---

7 Sir Henry Sumner Maine, *Ancient Law* (1905) at p. 44.
8 *Springette v Defoe* [1992] 2 FLR 388 at 393 per Dhillon LJ.
to correct abuses of fraud and unconscionable conduct by looking at each case on its merits rather than on the question of whether an appropriate course of action existed in the first place.

The Lord Chancellor

In the early development of equity the Lord Chancellor administered equitable relief. It will be recalled that when a potential litigant wished to commence proceedings against a defendant, he was required to obtain a royal writ from the Chancellor's office. Where the Lord Chancellor was unable to issue a writ because of the lack of a precedent, he could demand that the defendant appear before him and answer the charges made against him. The process by which this could happen required the complainant to issue the Lord Chancellor with a bill outlining the nature of his grievance. Having considered the bill, the Chancellor ordered the potential defendant to appear before him and answer the grievances raised by the complainant. In order to compel the defendant to appear before the Chancellor, the Chancellor issued a writ, called a *subpoena*, ordering the defendant to appear upon pain of forfeiting a sum of money, otherwise known as *subpoena centum librarum*. This writ was very different from the types of writs available to commence proceedings in the common law courts, since it simply required the person against whom the complaint was made to answer to the Lord Chancellor the complaints made against him.

What started out as a mere secretarial office of government answerable to the King's Council now took on the shape of a court administering law in its own right. What law did the Chancellor administer? The Chancellor did not introduce any novelty in the law-making process and neither did he introduce laws so different in their juridical nature to the ordinary laws of the land. However, what the Chancellor did recognise was the inability of the common law to deal with the social and economic changes taking place in society. Given the fact that the Chancellor was an ecclesiastic, a man of the Church and learned in civil and canon law, he was ideally placed to deal with the legal problems put to him. The basis upon which he exercised his power was on the simple premise of what was right in any given case. If there is one word that describes how the Chancellor exercised his power to relieve aggrieved parties, that word is conscience.

The early court of equity was essentially a court of conscience. Every case was decided on its merits rather than on the question whether there existed a precedent to deal with the complaint brought by the claimant. Given the fact that the Lord Chancellor would change from time to time, each Chancellor would exercise greater or lesser power depending on his own notions of justice. In this respect most accounts of equity refer to the length of the Chancellor's foot, which was another way of saying that some Chancellors went further in the exercise of equitable relief than others. Later in the development of equity, lawyers rather than ecclesiastics were appointed to the office of Chancellor. Lord Nottingham (1673–82), Lord Hardwicke (1736–56) and Lord Eldon (1801–27) were pioneers of modern equity as we know it today. In doing so, they developed a set of principles and doctrines which were to become as fixed and rigid as the common law. In more recent times, a question that has been frequently asked is whether equity has passed child bearing and is now as established and rigid as the common law. This is a question to which this chapter will return later.

---

Lord Eldon, described as one of the greatest equity lawyers, was primarily responsible for establishing equity as a defined body of rules and principles. He once remarked that ‘nothing would inflict on me greater pain in quitting this place than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor’s foot’. One of the many areas where Lord Eldon contributed to the development of equity was in the context of fiduciary relationships and the imposition of strict duties on persons standing in fiduciary relationships. These are analysed in more depth in Chapter 16.

Disputes in the early Court of Chancery

The types of complaints petitioned to the Chancellor at the initial stage of the development of equity were predominantly property based and centred on the most prized resource at the time, which was land. A number of examples can be given here: one of the most common complaints brought before the Lord Chancellor was the abuses of trusts. The predecessor of the modern trust, the use, was primarily employed in feudal England to overcome the taxation implications of feudal landholding. Land would be put upon use by appointing trustees (called feoffees) for the benefit of beneficiaries (called cestui que use). Under feudal law, the heir of a deceased was required to pay feudal dues before taking possession of the land which once belonged to his father. Coupled with this problem was the fact that an individual had no freedom of testation, that is, the freedom to dispose of his land to his heirs by way of a will. These problems could, however, be avoided by the employment of a use. Typically, land would be conveyed to a number of feoffees who would be directed to hold the land for designated beneficiaries such as the oldest son of the person creating the use. The legal title would pass to the trustee; however, the Court of Chancery would recognise the rights of the beneficiary on the grounds that the conscience of the trustees would bind them to the trust. On the death of the landholder, that is the person who created the trust, the oldest son could compel the trustees to transfer the land to the oldest son on the grounds that he had equitable rights in the land. Equity would compel the trustees to transfer the land to the beneficiary. Seen in this way, a landholder could by the use of trustees convey land to his oldest son who would avoid paying feudal dues because all transfers of the land would be taking place during the lifetime of the person creating the trust and then during the lifetime of the trustees.

Another notable example of the intervention of equity was in the context of a mortgage transaction. Historically, particularly in the eighteenth and nineteenth centuries, the typical mortgage transaction was very different from the type of mortgage transaction which operates today. Today, a mortgage confers upon the mortgagee (the lender) a charge on the property of the mortgagor. The charge has the effect of conferring upon the mortgagee a number of rights, not least the right to take possession of the mortgagor’s land and sell it should the mortgagor default in paying the monies due under the mortgage. Historically, a typical mortgage took the form of an outright transfer of the mortgagor’s land to the mortgagee. The mortgagee became the absolute owner of the land in return for the mortgage money which had been duly paid over to the mortgagor. The problem with this type of arrangement was that the common law regarded the

11 Gee v Pritchard (1818) 2 Swan. 402 at 414.
12 The nature of the trust and its origins is discussed in more detail in Chapter 2.
13 The concept of the use and the abuses thereof are considered in more detail in Chapter 2.
agreement to create a mortgage as an ordinary commercial one. Thus, the common law
failed to redress key issues affecting the mortgagor such as his right to redeem the land
once he made full payment under the terms of the mortgage. For example, if the contract-
tual date of redemption had passed, there was nothing stopping the mortgagee from
keeping the land for himself. Equity, however, intervened in a number of ways to prevent
the mortgagor getting more out of the transaction other than the security for his money.
Equity regarded the right of the mortgagor to get his property back on repayment of
the loan money as fundamental to the mortgage agreement. The right to the return of
the property, termed in equity as the mortgagor’s ‘equity of redemption’, prevailed over
and above the contractual provisions purporting to restrict it. The need for equity to
intervene in mortgage transactions of the eighteenth and nineteenth centuries was
influenced by the inequality of bargaining power between lender and borrower. The
typical mortgage transaction at this time was in the form of money raised for some com-
mercial venture or, as a last resort, for the poor person. Lord Chancellor Nottingham
was particularly instrumental in protecting and recognising the rights of the mortgagor
against abuses of power by the mortgagee.14

Equity and the role of conscience

In the early development of equity the notion of conscience underpinned the grounds for
the intervention of equitable relief. This has, perhaps, been best explained by Lord
Ellesmere in the famous Earl of Oxford’s Case where the Chancellor held that
men’s actions are so diverse and infinite that it is impossible to make any general law which
will aptly meet with every particular and not fail in some circumstances. The office of the
Chancellor is to correct men’s consciences for fraud, breaches of trust, wrongs and oppressions
of whatever nature so ever they be, and so soften and mollify the extremity of the law.15

The Chancellor, in administering equitable relief, did so not by interfering with the
common law but rather by asking the defendant to personally appear before him. A
judgment was said to be given in personam, which was also another way of saying that
equity acts in personam. The Chancellor would order the defendant to do something;
failure to comply with the Chancellor’s order would make the defendant liable to
imprisonment for contempt of court. The flexibility of the early Court of Chancery was
illustrated by the fact that it was not constrained by precedent, and moreover the
Chancellor could make a number of orders which were not merely monetary awards.
In modern equity, the types of equitable remedies include specific performance of an
obligation, injunctions, recission and rectification.

In more recent times the question has often been asked whether equity is still to be
regarded as a court of conscience in the manner in which it once operated. For example,
do the courts administering modern equity have the same degree of flexibility and
discretion that once availed itself to the Lord Chancellors of the early Court of Chancery?
In other words, are the grounds for equitable intervention dependent on a case-by-case
basis looking at the merits of every case rather than by the application of some rigid
process of principle and precedent? This question has received a mixed response. Lord
Chancellor Eldon observed in 1818 that ‘nothing would inflict on me greater pain . . .

14 Howard v Harris (1681) 1 Vern. 33.
15 (1615) 1 Rep. Ch. 1 at 6.
than the recollection that I had done anything to justify the reproach that the Equity of this Court varies like the Chancellor's foot'. Some 140 years later Harman LJ remarked that equity principles had been 'rather too often bandied about in the common law courts as though the Chancellor still had only the length of his foot to measure when coming to a conclusion'. In light of these remarks there have been suggestions that equity is truly beyond childbearing and that the process of creating new rights and remedies, like the way in which equity once did, should now be the responsibility of Parliament and not the courts. For example, in *Western Fish Products Ltd v Penwith District Council* Megaw LJ took the same view as Harman LJ in *Campbell Discount Co Ltd v Bridge* that 'the system of equity has become a very precise one. The creation of new rights and remedies is a matter for Parliament, not the judges.'

Despite the above remarks, it has been equally suggested and argued that equity continues to work in the same manner that it once did, in other words, the recognition of new rights and remedies is not beyond those judges who administer equity. For example, Jessel MR explained in 1880 that

> the rules of Courts of equity are not supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time – altered, improved and refined from time to time. The doctrines are progressive, refined and improved.21

Despite the remarks of Jessel MR the general position in the modern equity is that equity has more become a system of principle and precedent rather than a system of ad hoc justice once administered by the Lord Chancellor. The reason for this is primarily due to the uncertainty that is created by ad hoc justice in individual cases. This is, perhaps, no better illustrated than in the context of the cohabitation and the ‘deserted wife’ cases of the 1970s and the attempt by Lord Denning to introduce into English law a ‘new model constructive trust’.22

During the 1970s Lord Denning attempted to introduce broad notions of justice in resolving family property disputes. Although these matters are discussed in more detail in Chapter 13, the attempted application of broad notions of justice was primarily in response to the limited common law proprietary rights of spouses and cohabitees in the land co-occupied with their respective spouses and partners. Firstly, in a decision some 20 years earlier in *Bendall v McWhirter* Denning LJ suggested that a wife who had no legal title to her husband's property and who did not make any contribution to the purchase nevertheless had a deserted wife's equity in the property capable of binding a purchaser of the land. The House of Lords in *National Provincial Bank Ltd v Ainsworth* rejected this analysis of a deserted wife's equity. In the view of the House of Lords this deserted wife's equity did not have all the characteristics of a property right, namely, identifiability, stability and permanence. The House of Lords' decision illustrated the uncertainty that would have been introduced to the system of conveyancing.25

---

16 Gee v Pritchard (1818) 2 Swans. 402 at 414.
17 *Campbell Discount Co Ltd v Bridge* [1961] 1 QB 445 at 459.
18 [1981] 2 All ER 204.
20 [1981] 2 All ER 204 at 210.
21 *Re Hallett’s Estate* (1880) 13 Ch. D 696 at 710.
22 This constructive trust is discussed in more depth in Chapter 13.
23 [1952] 2 QB 466.
24 [1965] AC 1175.
25 A spouse does, however, have a statutory right of occupation now to be found in s. 30 of the Family Law Act 1996.
In 1975, when dealing with a cohabitation dispute between a husband and his wife, Lord Denning commented that 'a few years ago even equity would not have helped her. But things have altered now. Equity is not past the age of child bearing. One of her latest progeny is a constructive trust of a new model...'. What Lord Denning attempted to do was to use the new model of constructive trust as a means of doing broad justice by awarding a spouse equal ownership in the home that was in the sole name of the husband. As to the grounds upon which this could be done, Lord Denning looked to the somewhat broader and artificial notion that where a husband and wife were living jointly they both intended to share the beneficial ownership of their family home. In so far as the grounds of imposing a constructive trust, his Lordship famously commented in one case that such a trust was founded on large principles of equity and could be imposed ‘whenever justice and good conscience’ required it. Despite Lord Denning’s attempts in the 1970s to introduce wide principles of equity, the higher courts have not accepted them. The principal reason for this, as mentioned earlier, is the ‘palm tree justice’ that would be served as a result of wide discretion by the courts and the resulting uncertainty that would arise. For example, Bagnall J commented in Cowcher v Cowcher that ‘[I] am convinced that in determining rights, particularly property rights, the only justice that can be attained by mortals, who are fallible and are not omniscient, is justice according to law; the justice that flows from the application of sure and settled principles to proved or admitted facts. So in the field of equity the length of the Chancellor’s foot has been measured or is capable of being measured.’

More recently, however, there has been some suggestion that there may be scope for the development of a new model of constructive trust which could serve as a restitutionary remedy to reverse unjust enrichment. However, English lawyers continue to demonstrate a more cautious approach to the recognition of wholly new principles of equity based on wide principles of justice and good conscience. So where does this leave modern equity? Lord Browne-Wilkinson’s judgment in Westdeutsche v Islington LBC which can perhaps be described as one of the more important equity and trusts cases of the last century, seeks to offer an explanation of modern equity. The facts of this case involved a complex interest-rate swap transaction that turned out to be ultra vires the council’s power. In an attempt to address the issue of whether a resulting trust could be imposed on payment made under a transaction which should not have taken place, his Lordship attempted to define some basic premises of the law of equity and the law of trusts. With regard to the juridical basis of equitable intervention, his Lordship explained that ‘equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trusts).’ In so far as the possibility of an equity introducing a broad notion of justice based on a new model constructive trust, his Lordship commented that ‘although the resulting trust is an unsuitable basis for developing proprietary restitutionary remedies, the remedial constructive trust,

---

26 Eves v Eves [1975] 1 WLR 1338 at 1341.
28 See, for example, Springette v Defoe [1992] 2 FLR 388 at 393.
30 [1972] 1 WLR 425 at 430.
31 See, for example, Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 699.
33 The facts of this case are considered in more detail in Chapter 11.
Unconscionability, fairness and the role of context

So far, it has been observed how the early Court of Chancery, which started out as a court administering equitable relief on a case-by-case basis, transformed into a court administering established principles of equity. As to the grounds for the application of the decided principles of equity, it has already been mentioned that the fundamental feature was the unconscionability of the defendant’s conduct. This section explores the concept of unconscionability and how it differs from the notion of fairness. Although the term ‘unconscionability’ has been used widely in the sphere of equity to describe the grounds for the intervention of equitable relief, it is a term which is not always defined with exact precision. When will a lawyer seeking equitable relief know whether the conduct complained of by his client has the grounds for the application of equitable principles leading to a successful remedy? In this respect, there is a lot to be said for Lord Nicholls’s comment, in the context of a case concerning the liability of third parties intermeddling with trust property, that

unconscionable is a word of immediate appeal to an equity lawyer. Equity is rooted historically in the concept of the Lord Chancellor, as the keeper of the Royal Conscience, concerning himself with conduct which was contrary to good conscience. It must be recognised, however, that unconscionable is not a word in everyday use by non-lawyers. If it is to be used in this context, and if it is to be the touchstone for liability as an accessory, it is essential to be clear on what, in this context, unconscionable means.

At the present moment in time there is no universal definition of unconscionability which encapsulates all the various contexts in which equity has operated in. This statement may at first instance seem rather strange and controversial on the grounds that it questions the very fabric and foundations of equitable relief. The statement almost implies that equity lacks decided principles which allow the courts to measure whether a defendant’s conduct has indeed been unconscionable. However, nothing could be further from the truth and the answer, as will be seen in the discussion in this chapter and indeed throughout this book, lies in understanding the importance of ‘context’ before defining what is unconscionable and what is not unconscionable.

The absence of a universal definition of unconscionability has not proved to be a limitation in equity’s ability to intervene in a diverse range of commercial and family contexts. In fact, it has been precisely because of the lack of a rigid test of unconscionability that equity has been able to resolve a number of disputes in a number of different contexts. The diversity of contexts in which equity has operated throughout the previous

35 [1996] AC 699 at 716. More recently, in Sinclair Investment Holdings SA v Versailles Trade Finance Ltd [2006] 1 BCLC 60 Arden LJ did not rule out the question whether a new model constructive trust would be introduced in English law; however, that was to be decided by a further court.


Unconscionability, fairness and the role of context

centuries has allowed the courts to define the notion of unconscionability with specific meanings in each context. In fact this has been one of the fundamental features of modern equity. One leading commentator on equity writes:

The word unconscionable has lost its connection to morality and the courts try to use it as precisely as possible, in ways which vary from context to context, but it reminds us of equity’s ecclesiastic origins and reminds us that equity is a broader idea than the quite narrow legal version of the concept might suggest. Language such as unconscionability sits somewhat uncomfortably in modern law, but that is a good thing for keeping the law realistically and appropriately humble about its capacity to cover every possible case by means of general rules. The language of unconscionability is highly effective at keeping the general rules open to just exceptions in particular cases and particular kinds of cases. 38

One of the fundamental reasons for the absence of a unifying definition of unconscionable conduct relates to the fact that the definition operates in so many different social and commercial contexts and, as explained by Delany and Ryan in their analysis, in each context ‘the principle has been or is currently being used in a distinct manner. As such, the invocation of the principle has different implications and consequences for equitable intervention in each context.’ 39 The importance of understanding the principle of unconscionability in light of the context in which it is being applied was more recently explained by Lord Neuberger Thorner v Major. 40 The facts of this case, which are considered in more detail below, concerned the question of whether a claimant, who had worked unpaid on his uncle's farm for many years, was entitled to the farm in circumstances where he had been made certain promises by his uncle that he would inherit the farm. The case involved the application of the equitable doctrine of proprietary estoppel, which prevents a person from denying a claimant a proprietary right which the claimant has been led to believe will be granted to him and one which the claimant has relied upon and suffered a detriment. The doctrine, which is explored in more detail in Chapter 13, requires the defendant to have made a clear and unambiguous assurance to the claimant that he will acquire some property right in the defendant’s land. However, what amounts to a clear and unambiguous assurance depends primarily on the context in which it is made. Lord Neuberger explained that in the context of the facts of Thorner v Major and Others, the course of dealings between the uncle and nephew, although not amounting to express references that the nephew would inherit the uncle’s farm, were nevertheless capable of establishing the level of unconscionability which would otherwise arise if the nephew was denied a right to inherit his uncle’s farm. In the course of his judgment Lord Neuberger explained that ‘in the facts of this case, it seems to me to have been an eminently sensible conclusion. Indeed, that point is a neat illustration of the fundamental importance of context to the questions of how a particular statement or action would have been understood, and whether it was “clear and unambiguous”.’ 41

Whilst unconscionability is not necessarily capable of a precise definition, it is a concept which can be readily appreciated when looked at in the context in which it is being employed. At the heart of unconscionability is the element of some advantage, whether personal or proprietary, taken by the defendant, which he or she has consciously agreed belongs to the claimant. Examples of the types of context in which such unconscionable advantage has been taken by the defendant are diverse and they include the very subject

40 [2009] 1 WLR 776 at 805.
41 [2009] 1 WLR 776 at 805.
Chapter 1 Introduction to equity

matter of this book: that is, the trust. At the heart of the enforcement of a trust is the trustee's conscience that he or she has agreed to hold trust property for the beneficiary. Where a trustee refuses to accept the rights of the beneficiary in the trust property, equity will intervene in order to prevent him from obtaining an advantage over the beneficiary's property. Another good context is that of proprietary estoppel, which prevents the owner of some property from denying the claimant some property interest in the property belonging to the owner. The doctrine of proprietary estoppel operates where the legal owner of, let's say, land encourages the claimant to believe that he will be entitled to some, if not all, of the legal owner's land and the claimant relies on that assurance and suffers some detriment as a result of the reliance. Where the legal owner of land seeks to deny the existence of the proprietary right he has led the claimant to believe will be his, his conduct will be deemed as unconscionable. Equity will invoke the doctrine of proprietary estoppel in order to prevent the legal owner from taking an advantage which clearly has been given to the claimant.

Unconscionability is, however, to be distinguished from the notion of fairness. Despite what students of equity may think, unconscionability and fairness are not the same thing. Furthermore, fairness is not the basis for the intervention of equitable relief. Many factual situations may be perceived by the layman as being unfair; however, they do not necessarily provide the basis for the intervention of equitable relief. Consider the following questions.

### APPLYING THE LAW

In her will Sarah left one half of her property to charity and the other half to her two youngest children equally. Sarah has, in fact, five children. The three elder children who have not been left any of Sarah's property are not happy that they have not received anything under their mother's will.

*Do you think Sarah's conduct was unconscionable and that the children should seek equitable relief?*

### APPLYING THE LAW

Sarah, who is of very old age and suffering from a terminal illness, has two children both of which emigrated to Australia some time ago. Her nephew, Thomas, has cared for Sarah for the last seven years. Thomas qualified as an architect and was offered a high-profile job in the city. He declined the job in order to look after Sarah. Sarah assured him that she would leave her cottage to him after her death, knowing that he had cared for her and was the only important person in her life. Last year, Thomas decided to marry his girlfriend; however, Sarah persuaded him not to as it would mean that he would have to move to London and he would not be able to care for Sarah. Thomas decided not to marry and continued to live with Sarah. In her will Sarah left her cottage to her two children. When Thomas found out he was not very happy about this.

*Do you think that Sarah's conduct is unconscionable? Should equity intervene here?*

---

42 Proprietary estoppel is considered in Chapter 13 in the context of constructive trusts.
In order to think more about equity and unconscionability it is convenient at this stage to investigate two cases where equitable principles have been the subject matter of discussion. The cases provide a useful insight into notions of unconscionability and the importance of understanding the context in which equity is asked to operate.

Applying equity: two cases in the House of Lords – where lies the unconscionability?

In order to understand the importance of unconscionability and the context in which it is applied it is perhaps a good starting point to consider two decisions of the House of Lords. Although, at this stage of the book, the reader will not have been exposed to the equitable doctrines and principles in operation in the two cases, it is nevertheless a useful exercise to explore the facts of both cases and consider whether equitable relief should be given. Read the facts of these cases first and think whether the claimants in both cases should have a remedy of some sort from the court; then read what was actually decided by the House of Lords and see where the unconscionability lies, if any, in both cases. Remember, at this stage it is not crucial whether you fully understand the equitable principles applied in the cases; rather the emphasis is on identifying factual contexts which give rise to unconscionability.

Case One: Thorner v Major [2009] 1 WLR 776

The facts

In 1997 Peter Thorner made a will by which, after a number of pecuniary legacies, he left the residue of his estate, including his farm (Steart Farm, Cheddar) to his nephew, David Thorner. The will was subsequently destroyed and Peter died intestate in November 2005. In accordance with the intestacy rules Peter’s estate, including Steart Farm, was available for his blood relatives, namely, his sisters. David commenced proceedings against Peter’s sisters and the personal representative to claim the farm on the grounds that he had the benefit of a proprietary estoppel against Peter and his estate. The claim was based on the grounds that Peter has made an assurance to David that the farm would be left to him after his death and that David had relied on that assurance by working for a period of some 28 years on the farm and thereby suffering a detriment.

The relevant facts in David’s claim to be entitled to a proprietary estoppel begin around about 1976 when Peter’s first wife died at an early age. David would help Peter in some aspects of the running of the farm; however, after Peter’s second marriage failed, David worked on the farm almost on a daily basis for no remuneration at all. The work included attending to the animals, mending the fences and gates, taking cattle to and from the market, working on farm buildings and bringing in hay. Additionally, it was observed that much of the paperwork relating to the management of the farm was in a mess when David first started helping out on the farm. David took it upon himself to sort out the paperwork and continued to look after it from then on. The court was told that by 1985 David was working 18 hours a day and 7 days a week for no payment. Several witnesses remarked that David was an exceptionally hard worker and had no social life as such. Other witnesses, including a surveyor, noted that in any discussions relating to the farm, Peter would always consult with David and his father (Peter’s cousin). It was further noted that, despite working punishing hours, David lived on pocket money which his own parents gave him.
It was argued on behalf of David that Peter had indeed made an assurance to him that he would inherit the farm. Although it was not possible to pinpoint the exact time at which the assurance was made, it was argued that the expectation arose around the early 1990s when Peter handed over a number of documents and discussed with David that he would take over the farm and run it. One such document was a Prudential Bonus Notice relating to two life policies worth £20,000. Peter explained to David that they would be sufficient to cover his death duties. The timing of these discussions was important because they were at a time when David was possibly thinking of pursuing his own career. The court was pointed to the fact that the timing of these discussions were duly to encourage David to stay with his parents, who lived nearby, and continue helping Peter. In 1997, Peter made a will in which he left the farm to David along with a number of pecuniary legacies to others who had helped Peter on the farm. Peter’s intention was clear in that he wanted David to have the farm. In 1998, Peter fell out with some of the persons who were receiving the pecuniary legacies under his will and thus destroyed the will with the intention of making another one. In 2004 Peter suffered a stroke and David continued to look after him, but more importantly, engaging in major work on the farm. Peter died in November 2005, a couple of weeks after David’s own father had died.

Having read the facts of this case do you think that David should be given his uncle’s farm? If so, what factors lead you to come to that conclusion?

Case Two: Yeoman’s Row Management Ltd v Cobbe [2008] 1 WLR 1752

The facts

The facts of *Yeoman’s Row Management Ltd v Cobbe* involved a claimant who was unhappy about the defendant’s conduct in refusing to honour an oral agreement to purchase land from the defendant. The essence of the agreement, which was conducted with one of the directors of Yeoman’s, was to the effect that Mr Cobbe would seek planning permission out of his own pocket to develop land belonging to Yeoman’s and that if permission was obtained, Yeoman’s would sell the land to Mr Cobbe for a sum of £12 million. The agreement also made provision for Mr Cobbe to receive vacant possession of the land in order to erect six town houses. Additionally, the agreement made allowance for Yeoman’s to receive further profits from the sale of the town houses should Mr Cobbe succeed in making a profit in excess of £24 million. This agreement, which was concluded ‘in principle’, did not cover all the matters relating to the sale of the land to Mr Cobbe – for example, matters relating to time scales regarding completion of the building of the flats and so on. The parties had deliberately not entered into a legally binding agreement because there was so much left to agree, and it was only when such matters had been agreed that the parties would enter into a legally binding written agreement. Planning permission was duly granted by the local authority; however, Yeoman’s withdrew from the original oral agreement and claimed that Mr Cobbe had incurred expenditure on the land at his own risk. Mr Cobbe, however, commenced proceedings against Yeoman’s on the grounds it was unconscionable for Yeoman’s to withdraw from the oral agreement. In particular, he claimed that they were estopped from denying the interest in the land they had promised to give him; furthermore, he had incurred the expenditure as a result of the assurances given by Yeoman’s to him. Additionally, Mr Cobbe sought to argue that a constructive trust arose in his favour on the grounds of the unconscionability of Yeoman’s conduct in withdrawing from the oral agreement. Therefore, on the grounds of both proprietary
Unconscionability, fairness and the role of context

Do you think that Yeoman’s were acting unconscionably when they refused to honour the oral agreement? Do you think that Yeoman’s had unequivocally made a promise to sell the land to Mr Cobbe?

The decision of the House of Lords in Thorner v Major

The House of Lords held that David was indeed entitled to his uncle’s farm on the grounds of proprietary estoppel. In the context of their dealings and conduct, the requisite degree of unconscionability had arisen whereby it would be inequitable to deny David a right to the farm. Although there was no evidence of express assurances that David would inherit the farm, it was clear from the context that what David had done over the years was done in reliance that the farm would become his one day.

The decision of the House of Lords in Yeoman’s Row Management Ltd v Cobbe

The House of Lords held that Mr Cobbe was not entitled to claim a proprietary right in the land which Yeoman’s had orally agreed to sell to him. The oral agreement which had been entered into was nothing more than an agreement ‘in principle’. There was still room for further negotiations and the agreement did not refer to all the terms which the parties would have wanted to include. In this respect Mr Cobbe could not be heard to be asserting that the oral agreement was enforceable but for the absence of writing. Lord Scott explained that the oral agreement did not profess to create an expectation that Mr Cobbe would be granted an interest in land. At most, the expectation Mr Cobbe had was that there would be further negotiations which would lead to a formal agreement.

Distinguishing the decision in Thorner v Major and Yeoman’s Row Management Ltd v Cobbe

The facts of both cases illustrate situations where there have been promises of some sort that the claimant will acquire some interest in the defendant’s land; however, only the claimant in Thorner v Major was successful. How do you distinguish the two cases?

The following extract of Lord Neuberger’s judgment in Thorner v Major [2009] 1 WLR 776 at 803 may help answer the question:

93 In the context of a case such as Cobbe’s case [2008] 1 WLR 1752, it is readily understandable why Lord Scott considered the question of certainty was so significant. The parties had intentionally not entered into any legally binding arrangement while Mr Cobbe sought to obtain planning permission: they had left matters on a speculative basis, each knowing full well that neither was legally bound – see para 27. There was not even an agreement to agree (which would have been unenforceable), but, as Lord Scott pointed out, merely an expectation that there would be negotiations. And, as he said, at para 18, an ‘expectation dependent upon the conclusion of a successful negotiation is not an expectation of an interest having [sufficient] certainty’.

94 There are two fundamental differences between that case and this case. First, the nature of the uncertainty in the two cases is entirely different. It is well encapsulated by Lord Walker’s distinction between ‘intangible legal rights’ and ‘the tangible property
which he or she expects to get', in Cobbe’s case [2008] 1 WLR 1752, para 68. In that case, there was no doubt about the physical identity of the property. However, there was total uncertainty as to the nature or terms of any benefit (property interest, contractual right, or money), and, if a property interest, as to the nature of that interest (freehold, leasehold, or charge), to be accorded to Mr Cobbe.

In this case, the extent of the farm might change, but, on the deputy judge’s analysis, there is, as I see it, no doubt as to what was the subject of the assurance, namely the farm as it existed from time to time. Accordingly, the nature of the interest to be received by David was clear: it was the farm as it existed on Peter’s death. As in the case of a very different equitable concept, namely a floating charge, the property, the subject of the equity could be conceptually identified from the moment the equity came into existence, but its precise extent fell to be determined when the equity crystallised, namely on Peter’s death.

Secondly, the analysis of the law in Cobbe’s case [2008] 1 WLR 1752 was against the background of very different facts. The relationship between the parties in that case was entirely arm’s length and commercial, and the person raising the estoppel was a highly experienced businessman. The circumstances were such that the parties could well have been expected to enter into a contract, however, although they discussed contractual terms, they had consciously chosen not to do so. They had intentionally left their legal relationship to be negotiated, and each of them knew that neither of them was legally bound. What Mr Cobbe then relied on was ‘an unformulated estoppel . . . asserted in order to protect [his] interest under an oral agreement for the purchase of land that lacked both the requisite statutory formalities . . . and was, in a contractual sense, incomplete’.

In this case, by contrast, the relationship between Peter and David was familial and personal, and neither of them, least of all David, had much commercial experience. Further, at no time had either of them even started to contemplate entering into a formal contract as to the ownership of the farm after Peter’s death. Nor could such a contract have been reasonably expected even to be discussed between them. On the deputy judge’s findings, it was a relatively straightforward case: Peter made what were, in the circumstances, clear and unambiguous assurances that he would leave his farm to David, and David reasonably relied on, and reasonably acted to his detriment on the basis of, those assurances, over a long period.

In these circumstances, I see nothing in the reasoning of Lord Scott in Cobbe’s case [2008] 1 WLR 1752 which assists the defendants in this case. It would represent a regrettable and substantial emasculation of the beneficial principle of proprietary estoppel if it were artificially fettered so as to require the precise extent of the property the subject of the alleged estoppel to be strictly defined in every case. Concentrating on the perceived morality of the parties’ behaviour can lead to an unacceptable degree of uncertainty of outcome, and hence I welcome the decision in Cobbe’s case [2008] 1 WLR 1752. However, it is equally true that focussing on technicalities can lead to a degree of strictness inconsistent with the fundamental aims of equity.

The Judicature Acts 1873 and 1875 and the relationship between law and equity

The idea of two sets of courts, that is the common law courts and the Court of Chancery, gave rise to procedural problems for potential litigants in the nineteenth century. The
The Judicature Acts 1873 and 1875 and the relationship between law and equity commo

The Judicature Acts 1873 and 1875 and the relationship between law and equity common law courts did not have equity jurisdiction; the Court of Chancery did not have the right to interfere or change a decision given by the common law courts. If a litigant had no redress at common law he would have to present a bill to the Lord Chancellor for his complaint to be heard in the Court of Chancery. This was even so where the common law courts acknowledged that there might be redress in equity; however, because of their limited jurisdiction, they could not award an equitable remedy such as an injunction. The same was true of the Court of Chancery, which could not award damages although it could grant an equitable remedy. This meant the lodging of a new complaint in a separate court. However, it was not just the problem of procedure itself; by the nineteenth century the work of the Court of Chancery had increased considerably and this inevitably resulted in numerous delays.

To overcome the problems of two separate courts and the delays involved in litigation, the Judicature Acts 1873 and 1875 were enacted in order to restructure the court system in England. The Acts had the effect of abolishing the old courts and establishing one unified court, the Supreme Court, which was divided into a number of divisions. Initially these divisions were the Court of Chancery, King’s Bench Division, Common Pleas, Exchequer, Probate and the Court of Admiralty. The Supreme Court could administer law and equity at the same time. As to whether the effect of the Judicature Acts was to fuse common law and equity is, however, a question which has been asked on many occasions and is addressed in the next section.

The modern position is re-enacted in the Supreme Court Act 1981, which divides the Supreme Court into the Court of Appeal and the High Court, the High Court consisting of the Queen’s Bench Division, Chancery and Family Division. These divisions are to administer law and equity together, and where there is a conflict between the rules of equity and the rules of the common law the rules of equity are to prevail. The supremacy of the rules of equity is enshrined in s. 25(11) of the Supreme Court of Judicature Act 1873 which provides: ‘Generally, in all matters not hereinbefore particularly mentioned in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.’ The relationship between law and equity is perhaps nowhere better explained than in the context of a lease. A lease which has a duration exceeding three years can only be created if it is in a deed. Failure to comply with the requirements of a deed has the effect that no legal lease is created since no legal estate is created in the tenant. There simply is no lease capable of recognition in the common law courts. At most, where the landlord purports to act inconsistently with the terms of the lease, the purported tenant only has a right to damages for breach of contract. This is on the premise that the landlord entered into a contract with the tenant to grant a lease, albeit the contract confers no proprietary interest in the land because of the failure to comply with the requirement of a deed. At common law the tenant would not have exclusive right to possession of the land.

However, given the fact that a lease is a contract, where all the other requirements of the lease have been met, there seems to be no reason why equity should not intervene to

43 There were limited reforms in the form of the Common Law Procedure Act 1854 which gave the common law courts power to grant equitable remedies. The Chancery Amendment Act 1858 gave the Court of Chancery the power to award damages.
44 See s. 49(1) Supreme Court Act 1981. The Constitutional Reform Act 2005 has introduced a new Supreme Court of the United Kingdom to replace the House of Lords as the highest court of appeal. The Court of Appeal, the High Court and the Crown Court will be collectively called the Senior Courts of England and Wales.
45 See s. 52 Law of Property Act 1925. A deed is a formal written document which declares it to be a deed and is signed by the parties: see s. 2(1) Law of Property (Miscellaneous Provisions) Act 1989.
compel performance of the lease. After all, as a matter of substance, as opposed to form, the landlord has done what he said he would do and the only reason why the lease is not being recognised at common law is for failure to comply with the requisite formality of a deed. Equity has long recognised that a lease, which has failed for formality at common law, could take effect in equity as a contract to grant a lease. Although it was not a legal lease, the contract to grant a lease was for all practical purposes a lease taking effect in equity. Equity could compel the purported landlord to perform his obligation to grant the lease by means of a decree of specific performance of the contract. Until such time of a decree of specific performance equity recognised the lease in equity on the equitable maxim that equity regards that as done which ought to be done. Thus, the substantive lease, which was purported to be created in law, would be recognised in equity as a lease for all practical purposes.

Recognition of the lease in equity did not mean that the tenant was vested with a legal estate in the land. At common law, the lease would still be merely contractual in nature, unless it could be construed as a different lease – for example, one not requiring formalities in the nature of a deed. It is a well-settled principle of property law that where a tenant pursuant to a long lease moves into possession of land without compliance with the requisite formality of a deed, his tenancy will be construed at common law as a periodic tenancy. This is particularly so where the tenant is paying periodic rent, that is, month-to-month or quarter-to-quarter. A periodic tenancy requires no formality even though its duration may be longer than three years. Thus, a periodic tenancy may arise at common law even though the intentions of the parties were to create a long lease of the land. It is at this point in the example that one can see the potential conflict between law and equity. The question that arises here is: what is the position where a long lease fails at common law for lack of formality but is nevertheless recognised in equity, and at common law the long lease is construed as a periodic tenancy? In other words, which one takes supremacy in the event of a dispute?

The matter is both illustrated and answered in the seminal case of *Walsh v Lonsdale* where the court upheld the supremacy of equity. On the facts, a landlord had agreed in writing to grant a seven-year lease of a mill to the tenant but had failed to grant the lease by deed necessary to give it effect at common law. One of terms of the lease was that the tenant pay rent in advance. The tenant paid no rent in advance: instead he moved in and paid rent on a quarterly basis. The payment of quarterly rent was sufficient to find a periodic tenancy at common law. When the landlord demanded one year rent in advance, the tenant refused to pay. The landlord sought to exercise his right of distress which entitled him to distrain the tenant’s good in order to meet the rent demanded. The tenant complained that the distress was illegal since the periodic tenancy, which arose at common law, did not contain any provision for the payment of advance rent. The landlord counter-argued that the distress was not illegal because it was the seven-year lease, which had a provision for the payment of advance rent, which determined the rights and obligations of the landlord and tenant. There was no doubt, on what has already been said above, that the seven-year lease took effect in equity as a contract to grant a lease, whilst at common law there was mere periodic tenancy. In court the tenant’s action failed since the contract to grant a lease – in other words, the equitable lease – prevailed over and above

---

46 See Browne v Warner (1808) 14 Ves. 409.
47 This equitable maxim along with others is discussed below.
48 Exceeding three years.
49 See Alder v Blackman [1952] 2 All ER 41.
50 (1882) 21 Ch. D 9.
the legal periodic tenancy. The distress by the landlord, pursuant to the terms of the seven-year lease, was therefore not illegal at all but entirely consistent with the terms of that lease.

Fusion Fallacy

The effect of the Judicature Acts was to allow one court to administer law and equity simultaneously. However, a question which has often been asked in many discussions on equity is whether the effect of the Acts was to fuse the principles of the common law and equity into one single coherent body of law applicable to any dispute whatsoever? In other words, could a potential claimant ask the court for a common law remedy or an equitable remedy irrespective of the nature of his claim? Professor Ashburner once commented on the relationship between law and equity by describing law and equity as ‘the two streams of jurisdiction though they run in the same channel run side by side and do not mingle their waters’. Professor Ashburner’s view very much reflected the generally understood position as to the effect of the Judicature Acts of 1873 and 1875 which was explained by the great Sir George Jessel MR in Salt v Cooper. His Lordship commented that the main object of the Act ‘has been sometimes inaccurately called the fusion of law and equity; but it is not any fusion, or anything of the kind; it was the vesting in one tribunal the administration of law and equity in every cause, action or dispute which should come before that tribunal.

However, in more recent times there have been suggestions that the rivers of law and equity are truly mingled and that there is a single coherent body of law consisting of the common law and equity. For example, in United Scientific Holdings Ltd v Burnley Borough Council Lord Diplock, referring to Professor Ashburner’s metaphor, commented:

[M]y Lords, by 1977 this metaphor has in my view become both mischievous and deceptive. The innate conservatism of English lawyers may have made them slow to recognise that by the Judicature Act 1873 the two systems of substantive and adjectival law formerly administered by Courts of Law and Courts of Chancery were fused. As at the confluence of the Rhone and Saone, it may be possible for a short distance to discern the source from which each part of the combined stream came, but there comes a point at which this ceases to be possible. If Professor Ashburner’s fluvial metaphor is to be retained at all, the waters of the confluent streams of law and equity have surely mingled now.

Likewise, in other Commonwealth jurisdictions such as New Zealand the courts have been more relaxed in finding that equity and common law are truly fused into a single body of law. In one New Zealand Court of Appeal case concerning whether common law damages were available for breach of an equitable obligation, the court held that ‘for all purposes now material, equity and common law are mingled or merged. The practicality of the matter is that in the circumstances of the dealings between the parties the law

---

52 Ashburner, Principles of Equity (2nd edn, 1933) at p. 18.
53 (1880) 16 Ch. D 544.
54 (1880) 16 Ch. D 544 at 549.
55 [1978] AC 904. Much earlier, Lord Denning advocated that law and equity had truly merged; see Errington v Errington and Woods (1952) 1 KB 290 at 298.
56 [1978] AC 904 at 924.
imposes a duty of confidence. For its breach a full range of remedies should be available as appropriate, no matter whether they originate in common law, equity or statute.\footnote{[1990] 3 NZLR 299 at 310.}

Despite the approaches taken in some Commonwealth jurisdictions and what has been said by Lord Diplock in \textit{United Scientific Holdings Ltd v Burnley Borough Council}\footnote{[1978] AC 904.}, it is incorrect to suggest that the common law and equity are fused in a single coherent body of law. This is perhaps best illustrated by the subject matter of this book which is about the trust concept. In Chapter 2 the trust concept is examined in much more detail; however, suffice it is to say here that the trust concept generates two separate sets of rights. The legal title is vested in the trustee, and the equitable title to the trust property is vested in the beneficiary. The beneficiary’s equitable title is only recognised in equity and enforced therein. If there is some breach of trust involving the transfer of the beneficiary’s property to a third party, then that beneficiary has no right to follow that property into the hands of the third party at common law, but only in equity. If a third party negligently damages trust property, then the beneficiary has no right at common law to sue the third party for negligence.\footnote{Surrey County Council v Bredero Homes [1993] 1 WLR 1361. These matters are explored in more detail in Chapter 21.}

Further examples can be given to illustrate that the common law and equity remain two distinct bodies of law, but administered by one single court. It is trite law that the equitable remedy of specific performance is available to a contract which has been entered into for valuable consideration. Thus, where A enters into a contract with B to sell his painting for £3000, B can ask the court to decree specific performance instead of awarding damages. However, the equitable remedy of specific performance will not be available to a contract which is created by deed and recognised in the common law only. The common law recognises and enforces a contract entered into by deed on the grounds that the deed is the consideration.\footnote{See \textit{Cannon v Hartley} [1949] Ch. 213.} Equity, however, takes the view that there is no valuable consideration and therefore refuses to recognise the contract. Thus, if A had entered into a promise by deed to transfer his painting to B, in the event of breach, B could ask the common law for an award of damages but could not ask for specific performance of the contract as the contract would not be recognised in equity.

So what then does one make of Professor Ashburner’s metaphor about the two streams which run side by side and do not mingle their waters? The answer to this is neatly explained by Gary Watt, who writes: ‘[T]he image of two streams in single channel is not a helpful one. It would be better to see the single river of law being composed of two parts: the riverbed 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.’\footnote{Gary Watt, \textit{Textbook on Trusts} 2nd edn (2006) OUP Oxford at p. 25.}

\section*{Equitable maxims}

It has already been seen that historically equity developed not on any formal process of precedent, but rather on the discretion of the Lord Chancellor. However, as time went on, the decisions of the Court of Chancery began to form a set of principles and doctrines, which one can say have become as rigid as the common law. What emerged in the course
of the development of equity were a set of maxims which explained the way in which equity would intervene in given situations.

- **Equity will not suffer a wrong without a remedy**
  
  This equitable maxim provides that, where possible, a wrong should be redressed by the courts. It does not suggest that every possible wrong complained of should be addressed, but that where there is a defect in the common law then equity should provide an answer. A good example here is the trust. In the early development of equity, the Court of Chancery readily upheld the rights of the beneficiary of the trust despite the trustee having a legal title to the trust property enforceable at common law. The trustee would be compelled to recognise the rights of the beneficiary and transfer the property to the beneficiary. Another example of the operation of this maxim is in the context of a contract. A contract may be perfectly recognised at common law in that is has satisfied all the common law requirements as to form. However, if such a contract has been entered into on grounds of fraud, mistake or undue influence, equity will allow the party affected by the fraud, mistake or undue influence to escape contractual liability. Unlike the common law, equity can put the contract to an end by the remedy of recission, which is to undo the contract and put the parties in the position had the contract not been entered into.

- **Equity follows the law**
  
  Equity developed as a response to the defects of the common law; however, it did not aim to override the common law. Of course, where there was a conflict between law and equity, equity would prevail. This maxim is particularly relevant in the context of land law where equitable estates and interests in land reflect legal estates and interests in the land. Thus, where a legal estate in the land fails for want of formality such as a deed, the same estate will be recognised in equity.

- **Equity acts in personam**
  
  One of the more important maxims of equity is that ‘equity acts in personam’. This maxim has its origins in the manner in which the Lord Chancellor would seek to redress a legal wrong complained of by a claimant. The Chancellor would not interfere with the common law rule or judgment awarded by the common law courts; instead he would ask the defendant to appear before him personally. A decision would be given and an order would be made personally against the defendant to carry out what was instructed. For example, where a contract was capable of being specifically performed, an order would be made to perform that contract. Similarly, where a trustee refused to recognise the rights of a beneficiary under a trust, an order would be made compelling the trustees to so recognise the rights of the beneficiary and convey the title to the trust property in appropriate circumstances. Failure to comply with the order amounted to a contempt of court, which could lead to imprisonment; thus there was every incentive to comply such an order. What is clearly apparent from the idea of acting in personam is that the Chancellor and, therefore, equity did not interfere as such with the property in the hands of the defendant. For example, in the context of a trust, equity did not have the power to say that the beneficiary was the legal owner of the property, but could compel the trustee to recognise the existence of the trust, and if appropriate convey the title to the trust property to the beneficiary in the appropriate common law way.
A modern example of this maxim was illustrated in *Webb v Webb*[^62] where the Court of Justice of the European Community recognised that equity acting *in personam* was sufficient to give jurisdiction over a person abroad and it made no difference that the order related to property situated abroad. On the facts, a son was ordered to hold a flat on resulting trust for his father on the grounds that his father had paid for the purchase price of the flat but did not take legal title to it.[^63] Given the fact that the order related to the person and not the property, there was no conflict with the laws of the foreign country regarding ownership of the disputed property.

**He who comes to equity must come with clean hands**

This maxim is one that students of law become more accustomed to than any other. Unlike the common law, which is based on precedent and looks to questions of form, equitable relief is given on a discretionary basis. Indeed, all equitable remedies are given on a discretionary basis and are not available per se. Thus, even if all matters of form were complied with, the Lord Chancellor could deny the claimant a remedy if there was some impropriety in his conduct leading up to the dispute complained of. A good example is that between a landlord and tenant under a lease. Although a lease confers in the tenant an estate in the land, it is also a contractual agreement. Any attempt by the landlord to remove the tenant contrary to the terms of the lease agreement amounts to a breach of contract; the tenant can ask equity to decree specific performance of the lease. However, it is quite clear that equity will not decree specific performance where the tenant is at fault, for example, by not observing the covenants in the lease agreement.

An example of the operation of the maxim can be seen in *Lee v Haley*[^64] where the claimants sought an injunction to protect their coal business. This was, however, denied by the Court of Appeal on the simple grounds that they had fraudulently sold their customers short.

It is important, however, that the wrongful conduct of the complainant must have a direct nexus with the dispute in question for the maxim to apply. For example, in *Argyll (Duchess) v Argyll*[^65], the fact that the wife’s adultery was the sole reason for divorce proceedings did not prevent her from obtaining an injunction stopping her former husband from publishing confidential information. Similarly, in *Tinsley v Milligan*,[^66] where the House of Lords considered the maxim in detail and the extent to which it was admissible to prevent the court from awarding the claimant a remedy, the House of Lords explained that the wrongful conduct must be causally related to the particular dispute in question.

On the facts of this case, a lesbian partner had joined her co-partner in the purchase of land but did not put herself on the title to the disputed property. This was done in order to make dishonest claims for social security benefits. When her co-partner denied her an interest in the disputed property, she complained that she had an equitable interest under a resulting trust by virtue of her contribution to the property. Her co-partner (the legal owner of the house) argued that her dishonest conduct in claiming social security...

[^63]: Resulting trusts arising on grounds of contribution to the purchase price of property are discussed in more detail in Chapter 11.
[^64]: (1869) 5 Ch. App. 155.
benefit was sufficient to deny her equitable relief because she was not coming to equity with clean hands. The House of Lords, however, held that the maxim only applied where the wrongful conduct of the claimant was the purpose of setting up her entitlement in the first place. On the facts, although there had been wrongful conduct by the claimant, her right to an interest in the property purchased was not influenced by the wrongful conduct put before the court. In Lord Browne-Wilkinson’s opinion the claimant did not need to rely on her dishonest conduct to establish an entitlement to the property: that entitlement arose by virtue of the resulting trust in her favour. In other words, if the dishonest conduct of the claimant was the only basis upon which her entitlement could be established then that would be not entertained by the court. A good example of this is illustrated in Gascoigne v Gascoigne where a husband took a lease in the wife’s name. This was sufficient to raise a presumption of advancement and infer a donative intent on his part. The husband sought to rebut that presumption of advancement by arguing that the only reason he transferred the lease in his wife’s name was to defraud his creditors. The Court of Appeal, however, held that he was not entitled to use evidence of an illegal nature to rebut the presumption of advancement.

**Equity looks to substance as opposed to form**

Equity will not be defeated by lack of compliance with form. It has already been observed in Walsh v Lonsdale that a long lease which failed for want of formality was nevertheless recognised and upheld in equity on grounds that in substance the landlord had purported to grant a long lease. Sometimes this maxim is also explained by saying that equity looks to intent rather than form. The matter is neatly explained by Romilly MR in Parkin v Thorold when he commented that ‘courts of equity make a distinction between that which is a matter of substance and that which is a matter of form; and if it finds that by insisting on the form, the substance will be defeated, it holds it inequitable to allow a person to insist on form, and thereby defeat the substance’.

**Equity regards that as done which ought to be done**

Equity sees that as done which ought to be done at law. Once again the decision in Walsh v Lonsdale provides a perfect example of the operation of this maxim. The decision to uphold the long lease in that case was based on the ground that equity regarded that as done which ought to be done, and in doing so, the court regarded the long lease as having been granted even though at common law it failed for formality. The maxim also explains the grounds upon which the equitable remedy of specific performance is decreed in the case of a contract for the sale of land or some other special property. Where a contract is capable of being performed, the vendor is converted into a constructive trustee and the equitable interest in the subject matter of the contract passes to the purchaser. The basis for treating the purchaser as owner in equity is simply because

---

67 See also Tribe v Tribe [1996] Ch. 107.
68 [1918] 1 KB 223.
69 The equitable presumption of advancement infers a donative intent when a transfer is made from father to child or husband to wife. These are considered in more detail in Chapter 13.
70 (1882) 21 Ch. D 9.
71 (1852) 16 Beav. 59.
72 (1852) 16 Beav. 59 at 66.
73 (1882) 21 Ch. D 9.
equity regards that as done which ought to be done. The decree of specific will require the vendor to transfer the legal title to the purchaser.

### He who seeks equity must do equity

Where a person seeks equitable relief he must act fairly towards the other party against whom the equitable relief is being sought. For example, where an individual seeks to set aside a contract by asking the court to rescind the contract, he must be prepared to pay over any money received under the contract. Equally where a contract is set aside, for example, on grounds of undue influence, one party will be allowed to retain remuneration for work done despite having to return the profits made under the contract which is now rescinded. Thus, in *O’Sullivan v Management Agency and Music Ltd*74 a contract between a singer and a music agency was set aside on grounds of undue influence. The Court of Appeal ordered the music company to return any profits made to the singer but also held that the company was entitled to retain some of the profits by way of remuneration for their labour and skill. A similar result was achieved in *Boardman v Phipps*75 where a solicitor who was acting in connection with a trust advised the trustees, who were already holding shares in a private company, that they should acquire more shares in the same company with a view to exerting greater control in that company. The trustees refused to purchase further shares on the basis that the trust instrument did not authorise them to do so. After consultation with some of the trustees, the solicitor acquired a controlling interest in the company and made a substantial profit for himself as well as restructuring the company and profiting the beneficiaries. The House of Lords held by a bare majority that the solicitor was required to account for those profits made in his capacity as a fiduciary. Despite the absence of dishonesty on his part, those profits had been made in his capacity as a fiduciary and thus belonged to the beneficiaries. The decision illustrates the strict rule of equity that a fiduciary is not entitled to retain any property made in his capacity as a fiduciary. Boardman, however, was authorised to retain some of the profit by way of remuneration on the basis of *quantum meruit*. Both the Court of Appeal and the House of Lords were aware that Boardman was a man of great ability and had expended labour in reorganising the company and increasing the share therein.

### Equity imputes an intention to fulfil an obligation

Equity will impute an intention to fulfil an obligation. If a person intends to carry out an obligation and then does something which has the effect of fulfilling that obligation, equity will deem that obligation as being satisfied. This maxim is better explained by what has become known as the rule in *Strong v Bird*.76 This rule holds that where a person (donor) intends to make a lifetime gift to another (donee) but fails to do so then, provided his intention to make the gift continues up until his death and he appoints the donee as his executor or administrator, the gift is said to be complete. The vesting of the donor’s property in the donee as executor or administrator is deemed to impute an intention that he wanted the donee to keep what he was promised during the lifetime of the donor.

75 [1967] AC 46. The decision in *Boardman v Phipps* is considered in more detail in Chapter 17.
76 (1874) LR 18 Eq. 315. The rule is considered in much detail in Chapter 5.
Delay defeats equity

Otherwise known as the equitable defence of laches, a person who seeks equitable relief must do so within a reasonable time.\textsuperscript{77} If he does not assert his right to bring an action within a reasonable time then his conduct is seen as being acquiescence of the wrong complained of. The equitable defence of laches, which still applies in some cases today, must be seen in light of the Limitation Act 1980.

Where equities are equal, the first in time prevails

Where there are two competing equitable interests in the same property then the first in time will prevail. For example, if A grants an equitable mortgage to B and then subsequently grants an equitable mortgage to C, B’s mortgage will take priority.\textsuperscript{78}

Where the equities are equal, the law prevails

Unlike the last maxim, which seeks to address priority between two competing equitable rights, this maxim addresses the priority between an equitable right and a legal right in respect of the same property. The legal right takes priority over the equitable right. It does not matter whether the equitable right had pre-existed the legal right.

Where there is a conflict between law and equity, equity prevails

It has already been seen above that where there is a rule of the common law and a rule of equity, equity is said to prevail over and above the common law.

Nature of proprietary rights in law and in equity

From what has been observed so far in this chapter, it is clear that rights, particularly proprietary rights, are recognised both at common law and in equity. There is, however, a fundamental difference between those rights recognised at common law and those recognised in equity. Proprietary rights at common law are said to be rights \textit{in rem} whereas proprietary rights recognised in equity are said to be rights \textit{in personam}.

Legal proprietary rights: rights \textit{in rem}

The general principle is that proprietary rights, such as legal ownership, are good against the whole world. Proprietary rights recognised at law are said to be rights \textit{in rem}.\textsuperscript{79} There are two meanings to the use of the word that they bind the whole world. In the first place,

\textsuperscript{77} See \textit{Smith v Clay} (1767) Amb. 645 and also \textit{Lindsay Petroleum Co v Hurd} (1874) LR 5 PC 221.

\textsuperscript{78} An equitable mortgage will arise, for example, where the mortgagor only has an equitable interest to mortgage. Thus, a beneficiary under a trust can only grant an equitable mortgage over the equitable interest in the trust property.

\textsuperscript{79} Meaning that they bind the whole world.
legal rights prevail over any subsequently created legal or equitable interests.80 A legal right, for example, affecting land will bind anyone who subsequently acquires the land, irrespective of the lack of knowledge of its existence.81 Thus if A, the owner of land, leases it to B for a term of 25 years and then subsequently sells the land to C, then C, although the freehold owner of the land, cannot take possession of the land because he will be bound by the legal lease created in B. C is, however, entitled to the receipt of rent from B.

The second aspect of the phrase that legal rights of property bind the world relates to the fact that the right in question is held against a thing rather than a person or persons. In this respect the right is good against anyone who interferes with the thing in which the right is held. Thus, the ownership of A's house is good against anyone in the world and it does not matter who has trespassed on his land. A will have an action against anyone who wrongfully interferes with his land; his right to bring an action is not limited to certain persons. In this respect Austin once commented that 'rights \textit{in rem} may be defined in the following manner – rights residing in persons and availing against persons generally'.82

**Equitable property rights: rights \textit{in personam} or rights \textit{in rem}?

Unlike common law property rights, equitable property rights are often described as rights \textit{in personam}. This attribute arises from the historical basis that equity acts \textit{in personam}. Conceptual problems do, however, arise when equitable property rights are described as rights \textit{in personam}. The reason for this is that rights \textit{in personam} have traditionally been analysed as purely personal rights. For example, parties under a contract have personal rights: for example, a personal right to see that the contract is performed. This creates the rather strange paradox that although we refer to equitable property rights as property rights, we describe them as rights \textit{in personam}, suggesting that they are purely personal rights. However, the fact is that equitable property rights are not rights \textit{in personam} in the sense that they are purely personal rights: they are indeed property rights.83 For example, the right of a beneficiary under a trust is proprietary, albeit an equitable proprietary right. The fact that they are also described as rights \textit{in personam} is attributable to the method of enforcement of the right in equity: that is, an order \textit{in personam} in equity.

It is submitted that equitable property rights, albeit classified as rights \textit{in personam}, are proprietary rights in the true sense of the word. The answer is arrived at if one puts aside the juridical analysis of rights and then simply asks the question of enforceability of the right. Where a right has the ability to bind a potentially large class of persons then

---

80 The only limited exception to this rule is in the case of personal property when there may be exception to what is known as the nemo dat quod non habet rule. This rule holds that a person cannot give a better title to property which he does not have. Thus, a person cannot give a good title to something if he does not have it in the first place. The exceptions to the nemo dat quod habet rule are outside the scope of this book; however, see generally, M. Bridge, \textit{Personal Property Law} 3rd edn (2002) at pp. 95–115.

81 In the case of land, certain legal rights may be subject to registration where the title to land is registered. Registration of legal rights in this context is an integral and normal part of the registration process; such registration does not detract from the common law principle that legal rights bind the whole world.

82 Austin, \textit{Jurisprudence} (4th edn) at p. 381.

83 Some commentators have, however, suggested that all equitable rights are personal as opposed to proprietary. See, for example, Langdell, \textit{Brief Survey of Equity Jurisdiction} (2nd edn) who once wrote that an equitable right ‘may be defined as an equitable personal obligation. It is an obligation because it is not ownership’, (p. 6). See also W. Hart, ‘The Place of Trust in Jurisprudence’ (1912) 28 LQR at 290, where the author examines the idea of a right \textit{in personam} in the context of the trust and the rights of the beneficiary thereunder.
Nature of proprietary rights in law and in equity

Equitable rights and the doctrine of notice

Equitable rights, for example, the rights of a beneficiary under a trust, are governed by the doctrine of notice. This doctrine holds that equitable rights are binding on all persons except a bona fide purchaser of a legal interest without notice of the pre-existing interest. Equity, acting in personam, clearly binds the conscience of the party against whom an equitable interest is granted. Thus, for example, a trustee is clearly bound by the trust and must recognise and respect the equitable interest of the beneficiary. However, equity goes further and binds all those persons who subsequently acquire the legal title to the property in which the equitable right is granted with notice of the equitable right. Thus, where a trustee transfers the legal title to the trust property to a third party, the equitable rights of the beneficiary will bind the third party if he has notice of the equitable interest of the beneficiary.

The doctrine of notice requires the purchaser to be a bona fide purchaser. This is no more than saying that the purchaser must be one who is innocent and acting in good faith. The absence of notice on the part of the bona fide purchaser will readily satisfy this requirement. The purchase must have given value, that is, consideration. Consideration includes the common law meaning as well as that in equity, thus money or money’s worth and marriage consideration will suffice. A purchaser for value need not, however, show that consideration was adequate. Where a purchaser has not provided any consideration he will not be able to rely on the doctrine of notice and will be bound by the equitable right irrespective of notice. This is primarily because equity will not assist a volunteer and a volunteer is someone who has not provided consideration. The purchaser must be of a purchaser of a legal estate. In the context of real property this means that the purchaser must be a purchaser of either a freehold estate or a leasehold estate. In the context of personal property the purchaser must simply be the purchaser of the legal title to such property: for example, the legal title to shares in a company or a painting. It is clear, however, that the doctrine of notice does not extend to the purchase of an equitable estate or interest in property. Here the equitable maxim ‘where the equities are equal the first in time prevails’ applies in order to give priority to such rights.

---

85 See London and South Western Rail Co v Gomm (1882) 20 Ch. D 562 and Pilcher v Rawlins (1872) 7 Ch. App. 259.
86 Marriage consideration is considered in more detail in Chapter 6.
88 Purchaser includes a legal mortgagee who, by operation of the Law of Property Act 1925, s. 87(1), is deemed as being vested with a legal estate in the land.
89 Re Morgan (1881) 18 Ch. D 93; McCarthy and Stone Ltd v Harding [1973] 1 WLR 1547.
Chapter 1 Introduction to equity

The central requirement of the doctrine of notice relates to the question of what constitutes notice. Three types of knowledge have been identified for the purposes of the doctrine.

1 Actual notice. This is the most obvious and simplest form of knowledge attributable to a purchaser. It refers to the situation where a purchaser is consciously aware of the equitable right in the property at the time of the purchase. Thus, if a trustee sells trust property in breach of trust to a third party who knows of the existence of the trust then that third party is clearly bound by the equitable right of the beneficiary.

2 Constructive notice. Actual notice is to be distinguished from constructive notice, which refers to knowledge which would have come to the attention of a purchaser had he carried out a reasonable inspection of the title to which he was purchasing. A good example of constructive notice was illustrated in a trust of land case Kingsnorth Finance Co Ltd v Tizard.90 On the facts, a husband held the legal title to a matrimonial home on trust for himself and his wife. After they had separated the wife discontinued to live with her husband but did visit the house on a daily basis to look after the children. The husband arranged a mortgage with the mortgagee, which was duly given after an inspection on a Sunday afternoon arranged by the husband at a time when the wife was not there. The husband told the surveyor that he had separated from his wife some time ago and that she did not have any interest in the house. When the husband later absconded with the mortgage monies, the court held that the equitable rights of the wife under the trust bound the mortgagee. The inspection by the mortgagee was simply insufficient and they were affixed with constructive notice.91

3 Imputed notice. The final type of notice is imputed notice, which arises when an agent of the purchaser has notice, actual or constructive, which is imputed to the purchaser: for example, notice which a solicitor of the purchaser may have but fails to communicate it to the purchaser. Nevertheless, the purchaser will have imputed notice by virtue of his agent.

The effect of a successful claim that a purchaser purchased the legal title without notice of the equitable right is to give him an ‘absolute, unqualified, unanswerable defence’92 against the holder of an equitable interest in the property purchased. The doctrine of notice not only gives the purchaser an unqualified defence against the holder of the equitable right but also operates in a destructive way so that the equitable interest in the property is completely destroyed. It cannot be revived against a subsequent purchaser of the legal title who may have notice of the fact that the equitable right once existed.93

In the context of land, the doctrine of notice has been largely superseded by a system of registration of interests. Furthermore, the doctrine of overreaching was introduced

---

90 [1986] 1 WLR 783.
91 The extent to which constructive notice operates in contexts other than land is debatable. It is generally understood that the level of investigation of title in personal property transactions is different from that of land transactions. Personal property has never been subject to the rigorous inspection of title that occurs in land transactions simply because there are no elaborate title deeds or a system of registration by which a purchaser can inspect title. Over a hundred years ago Lindley LJ remarked that ‘the equitable doctrines of constructive notice are common enough in dealing with land and estates with which the Court is familiar; but there has always been repeated protest against the introduction into commercial transactions of anything like an extension of those doctrines and the protest is founded on perfect good sense’. See, Manchester Trust v Furness [1895] 2 QB 539 at 545.
92 Pilcher v Rawlins (1872) 7 Ch. App. 259 at 269.
93 Wilkes v Spooner [1911] 2 KB 473.
whereby the rights of beneficiaries under a trust were automatically transferred to the proceeds of sale, provided that the purchase money was paid over to a minimum of two trustees.94

Equity and social reform

In this chapter a lot has been said about the development of equity as a gloss upon the common law. It has been seen that equity played an important role in ironing out the deficiencies of the common law and thereby developing its own unique equitable principles and doctrines. However, it must also be remembered that equity played an important role in social and economic reform and recognised rights and doctrines which were not recognised at common law. Three particular examples can be given in this chapter to illustrate equity’s contribution to social and economic reform.

The property rights of married women

Until the enactment of the Married Women’s Property Act 1882, a married woman had no right to own property; everything she had belonged to her husband. Despite the 1882 legislation, which changed that rule, the husband usually continued in practice to be the sole owner of property.95 It is not altogether clear why the common law denied property rights to married women. Holcombe explains that historians attribute the common law rule on grounds such as religion.96 The medieval church regarded marriage as sacramental and the idea that two persons became one flesh justified the husband’s dominion over his wife and any property she may have. Other justifications simply concentrate on the social and economic reality of the position of women in the Middle Ages. The extent of the common law rule prior to 1882 is neatly explained by Holcombe who writes: ‘[T]he property that a woman possessed or was entitled to at the time of the marriage and any property she acquired or became entitled to after her marriage became her husband’s to control. Moreover, if a woman who accepted a proposal of marriage sought, before the marriage took place, to dispose of any property without the knowledge and consent of her intended husband, the disposition could be set aside as a legal fraud.’97 The denial of property to married women was not something peculiar to English law; other systems of law and state followed similar patterns.98

Despite the denial of property rights for women at common law, equity recognised and enforced marriage settlements, protecting that property which was the subject of the settlement. Under a marriage settlement, the wife would agree to settle any property she brought into the marriage or any property acquired after her marriage upon trust. The trustees of the marriage settlement would then hold such property for her and her

---

94 See s. 2(1) Law of Property Act 1925. For an application of the doctrine of overreaching, see City of London Building Society v Flegg [1988] AC 54. The process of registration of equitable interests in registered land is now governed by the Land Registration Act 2002.


97 Ibid. at p. 18. The approach of the common law to the property rights of married woman was not followed by equity jurisdiction. Equity contributed to law reform by using equitable principles, notably the trust and marriage settlements, to protect the rights of married woman in property they might acquire after marriage.

The role of equity in protecting the property rights of women is best explained by Holcombe, who writes:

In practice the Court of Chancery allowed the creation of a special category of property, the so-called separate property or separate estate of married women. At law a married woman could not own property, but in equity property could be settled upon her for her use under the management of a trustee who was responsible to the court for carrying out the terms of the trust. At first it was necessary to prove to the court’s satisfaction that there was a good reason for the creation of the trust, as, for example, that the husband was a wastrel or that the woman was separated from her husband. But soon equity came to accept without inquiry any trust created for a married woman. The separate property created by the trust would be protected by the Court of Chancery against a woman’s husband and all other persons according to the wishes of the donor.

Freedom of testation

The system of feudal tenure discussed earlier in the chapter operated in a way in which no person, apart from the Crown, was absolute owner of land. Instead the ownership of land was fragmented vertically so that the King granted land to powerful lords who could in return grant further segments of land to tenants. The trust developed out of the use as a way in which feudal tenants could freely leave land to their heirs, without their heirs having to pay feudal dues to the overlord. By transferring the land to trustees on use of the tenant and, after death, his family, there would be no acquisition on the land of the tenant’s death. Instead, the trustees would be (and would always remain) the owners of the land, but would be bound by equitable intervention to the use (this is discussed more fully in Chapter 2, under ‘Historical foundations of the trust’).

The second advantage of the trust lay in the fact that it permitted greater freedom to the tenant in devising his property to persons other than just the heir. The common law was strict in requiring land be vested in the heir of the tenant. Where the tenant died without an heir, the overlord became entitled to the land by way of escheat. Transfer to trustees, however, allowed land to be enjoyed by those designated in the terms of the use rather than on the strict principles of the common law. In recognition of the potential scope of the use in undermining the system of feudal dues and the consequential emptying of the Crown’s pocket, the Statute of Uses 1535 was introduced which had the effect of undermining certain uses. The basic aim of the legislation was to deny the beneficiary equitable rights in the land. Rather, where the use was employed, the intended beneficiary acquired a legal title to the land and was thus subject to feudal dues in the event of the death of the tenant. In 1540 the Statute of Wills was also passed in recognition that the landowning aristocracy rejected the strict common law rule requiring land to be acquired by the heir. The statute permitted greater freedom in the disposition of property after the death of the tenant; however, such dispositions would be subject to the same feudal taxes that existed before the statute.
Restrictive covenants

Although in the nineteenth century it was important to keep land unfettered from burdens so as to maintain its optimal value for industry, there was also a growing recognition towards the end of the century that the pace of industrial and urban growth would seriously undermine land use in the country.104 In the landmark decision in Tulk v Moxhay,105 Lord Cottenham LC held that a successor of a negative covenant who had notice of the covenant was thereby bound in conscience to honour it. On the facts of the case, the covenantor had agreed with the covenantee that he would maintain a garden at Leicester Square uncovered with any buildings. Although the sale of the covenantor’s land to his successor contained no provision in the conveyance relating to the garden, it bound the successor of the covenantor on the grounds of notice. The effect of the ruling in Tulk v Moxhay was to recognise a new equitable interest in land capable of binding third parties despite having its origins in contract and starting out as a personal right.

Conclusion

This chapter has explored the nature and historical development of equity. It has been observed that equity developed in response to the inadequacies of the common law in the thirteenth and fourteenth centuries. The two particular deficiencies identified in this chapter were the inadequacy of the common law remedy and the rigidity of the system of precedent. Equity developed in a manner, not so to override the common law or indeed to conflict with it: rather equity’s aim was to supplement the common law system and provide a gloss on the common law. The early Court of Chancery was administered by the Lord Chancellor who sought to exercise his discretion in any given dispute by looking to the unconscionable conduct of the defendant. In this respect, equity has sometimes been described as a system of law which seeks to undo unconscionable conduct. Although the early Court of Chancery interpreted the notion of unconscionability with reference to principles of morality and applied it on a very broad discretionary basis, the modern interpretation of unconscionability is much more refined. Unconscionability in modern equity is interpreted and understood by looking at the relevant context in question. By examining the various contexts in which equity has operated and continues to operate, one can see that the courts have over time established set principles and rules which determine whether the conduct of the defendant has been unconscionable in that context.

Although the early Court of Chancery looked at cases on an individual basis, and exercised relief on the merits of every case, there has been in more recent times the debate whether equity still possesses the same degree of flexibility in developing new rights and remedies. It has been suggested that equity has gone past childbearing and now possesses the same degree of rigidity as the common law. That is to say that the rules of equity are now as determined and established as the rules of the common law. Whilst this is true to a large extent in English law, the courts have from time to time shown a willingness to use equitable jurisdiction to develop new rights and remedies. However,

---

105 (1884) 2 Ph. 774; 41 ER 1143.
Chapter 1 Introduction to equity

It must be said that English law, unlike its Commonwealth partners, has remained cautious in the expansion of new equitable rights and remedies. This has primarily been in response to the perceived uncertainty in law that would arise by the creation of new rights and remedies.

This chapter has examined some of the basic maxims of equity which explain how equitable relief is administered by the courts. These maxims provide the basis upon which the discretionary nature of equitable relief is administered. As well as the maxims of equity, this chapter provides the reader with an understanding of the difference between property rights which are recognised at law and those recognised in equity. The fundamental difference lies in the fact that property rights at law are described as rights in rem whilst rights in equity are recognised as rights in personam. The distinction between the two relates primarily to the enforceability of the right against third parties. Property rights at common law bind the whole world whereas property rights in equity are governed by the equitable doctrine of notice and bind everyone except a bona fide purchaser of the legal title without notice of the equitable interest.

Finally, whilst this chapter has looked at the manner in which the common law developed as a gloss on the common law, the supremacy of equity in dealing with emerging social and economic reform cannot be underestimated. This chapter has looked at some of those areas, such as the rights of married women, the rights of a borrower under a mortgage and the restrictive covenant in planning, which demonstrate the importance of equity in meeting some of the social and economic challenges presented from time to time. Indeed, one of the notable achievements of equity has been its ability to provide legal redress in a number of quite diverse contexts ranging from social to commercial context.

Moot points

1. Explain the reasons for the development of the early Court of Chancery.

2. What do you understand by the term ‘unconscionability’ and how would you differentiate it with the notion of fairness?

3. How would you describe the relationship between the common law and equity?

4. What do you understand by the ‘fusion fallacy’ between common law and equity? With specific examples explain how common law and equitable remedies need to be distinguished on any given set of facts.

5. What are the fundamental differences between property rights at law and property rights recognised in equity?

6. One of the greatest achievements of equity in English law has been its ability to operate in a number of quite diverse contexts ranging from social to commercial. Explain the reasons why equity has been able to do this.
Further reading

Baker, J.H. *An Introduction to English Legal History* (3rd edn 2002). A useful resource for further investigation into the development of the common law and equity.

Delany, H. and D. Ryan ‘Unconscionability: A Unifying Theme’ (2008) Conv. 401. This article provides an excellent discussion surrounding the term ‘unconscionability’ and explores the extent to which it is possible to identify a unifying theme which explains the term.


Holmes, O. ‘Early English Equity’ (1885) 1 LQR 162. Provides a useful historical account of equity.

Maitland, F.W. *Equity: A Course of Lectures* (J. Brunyate (ed.) 1936). This provides an excellent read of the nature of equity and its associated principles and doctrines as delivered by Professor Maitland to his students.


Visit www.mylawchamber.co.uk/panesar to access study support resources including interactive multiple choice questions, practice exam questions with guidance, podcasts, weblinks, legal newsfeed all linked to the Pearson eText version of Exploring Equity and Trusts which you can search, highlight and personalise with your own notes and bookmarks.

Use Case Navigator to read in full some of the key cases referenced in this chapter with commentary and questions:

Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 699 (HL)

Boardman v Phipps [1967] 2 AC 46