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FACULTY OF JURIDICAL SCIENCES

E- CONTENT

COURSE: BBALLB-Vth Sem

SUBJECT: EQUITY AND TRUST

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Lecture-10

LECTURE-10

WHAT IS EQUITY?

Equity to the layman means fairness and justice, but in the legal context its meaning is much more strictly defined. There are rules of equity: it must obey the rules of precedent as does the common law, and its development may appear equally rigid and doctrinal.

Yet, because of its historical development and the reasons underlying this, there does remain an element of discretion and the potential for judges to retain some flexibility in the determination of disputes.

There are well-established principles which govern the

exercise of the discretion but these, like all equitable principles, are fl exible and adaptable to achieve the ends of equity, which is, as Lord Selborne LC once remarked, to 'do more perfect and complete justice' than would be the result of leaving the parties to their remedies at common law: **Wilson v Northampton and Banbury Junction Railway Co.** (1874) LR 9 Ch App 279, 284 (and see Lord Hoffmann, Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] AC 1). Principles of unconscionability underpin much of equity in its modern context.

In **Westdeutsche Landesbank Girozentrale v Islington LBC** [1996] AC 669, Lord Browne Wilkinson described the operation of equity in relation to the trust as working on the conscience of the legal owner. Equity developed as a result of the inflexibility of the common law; it 'wiped away the tears of the common law' in the words of one American jurist. When the common law developed the strictures of the writ system through the twelfth and the thirteenth centuries and failed to develop further remedies, individuals aggrieved

by the failure of the common law to remedy their apparent injustice petitioned the King and Council. The King was the fountain of justice and if his judges failed to provide a remedy then the solution was to petition the King directly. The King, preoccupied with affairs of state, handed these petitions to his chief minister, the Chancellor. The Chancellor was head of the Chancery, amongst other state departments. The Chancery was the offi ce which issued writs and, therefore, when the courts failed to provide a remedy, it was appropriate to seek the assistance of the head of the court system. Originally the Chancellor was usually an ecclesiastic. The last non-lawyer was Lord Shaftesbury who retired in 1672. Receiving citizens' petitions, the Chancellor adjudicated them, not according to the common law, but according to principles of fairness and justice; thus developed equity.

Early on, each individual Chancellor developed personal systems of justice giving rise to the criticism that equity had been as long as the Chancellor's foot. The Lord Chancellor did indeed sit alone in his court of equity, or Chancery, as it

became known. It was not until 1813 that a Vice-Chancellor was appointed to deal with the volume of work. Equity began to emerge as a clear set of principles, rather than a personal jurisdiction of the Chancellor, during the Chancellorship of Lord Nottingham in 1673. By the end of Lord Eldon's Chancellorship in 1827 equity was established as a precise jurisdiction.

But the development of a parallel yet separate system of dispute resolution was inevitably bound to create a conflict. An individual aggrieved by a failure of the common law to remedy a gross injustice would apply to the court of equity. The Chancellor, if the case warranted it, would grant a remedy preventing the common law court from enforcing its order.

The catharsis occurred in the **Earl of Oxford's Case** (1615) 1 Rep Ch 1, where the court of common law ordered the payment of a debt. The debt had already been paid, but the deed giving rise to the obligation had not been cancelled. The court of equity was prepared to grant an order preventing

this and rectifying the deed.

The clash was eventually resolved in favour of equity; where there is a confl ict, equity prevails. This rule is now enshrined in the Senior Courts Act 1981, s. 49.

A series of maxims underlies the operation of equity, establishing a series of principles. For example: ‘equity looks upon that as done which ought to be done’; ‘he who comes to equity must come with clean hands’; ‘equity will not allow a statute to be used as a cloak for fraud’, are all examples of the maxims.

The remedies developed by equity, such as injunctions and specific performance, are, unlike the common law remedy of damages, subject to the discretion of the judge. Thus a judge may decide that, although a breach of contract has been established, the conduct of the claimant is such that an equitable remedy should not be granted. In addition, if damages are an adequate remedy, then there is no need to substitute an equitable remedy.

In substantive law, equity has frequently refl ected the

reality of transactions between private citizens. It recognised the trust when the common law had refused to acknowledge the existence of a benefi ciary and provide remedies for breach of trust against a defaulting trustee. The concept of the trust has been the vehicle for much creative activity on the part of the courts of equity. The trust has developed from an express agreement between parties to situations where the conduct of parties has led the courts to infer or to impose a trust.

So, equity remains a separate system of rules operating independently of the common law. Until the late nineteenth century it operated in a separate set of courts. So, a plaintiff seeking both legal and equitable remedies would be obliged to pursue an action in separate courts. Much delay and expense ensued. The position was eventually resolved in the Judicature Acts 1873 and 1875 which established a system of courts in which both the rules of equity and common law could be administered. The position had already been ameliorated to some degree by the **Common Law Procedure**

Act 1854, which gave the common law courts power to grant equitable remedies, and the Chancery Amendment Act 1858 (Lord Cairns' Act), which gave the Court of Chancery power to award damages in addition to, or in substitution for, an injunction or a decree of specific performance. A claimant can, therefore seek both damages and an injunction in the same court.

The equitable jurisdiction is, in fact, a personal jurisdiction operating against the conscience of the individual, whereas the common law jurisdiction operates against real property. Thus, an order from a court based on equitable principles preventing a legal order being enforced operates against the conscience of the defendant. In theory, therefore, there is no clash between the jurisdictions. In practice, there is a significant constraint on the common law jurisdiction. The historical distinction does remain, however, in the existence of separate divisions of the High Court, viz., the Chancery Division (which deals primarily with matters which involve equitable rights and remedies) and the Queen's

Bench Division (which deals primarily with matters involving rights and remedies at common law).

So, equity represents a later development of law, laying an additional body of rules over the existing common law which, in the majority of cases, provides an adequate remedy: **'Equity, therefore, does not destroy the law, nor create it, but assists it'** (*per* Sir Nathan Wright LJ in Lord Dudley and Ward v Lady Dudley (1705) Pr Ch 241 at p. 244).

MCQs

1. **There are rules of equity: it must obey the rules of precedent as does the common law, and its development may appear equally rigid and doctrinal.**
   - **i.** True
   - **ii.** False
   - **iii.** Cannot say
   - **iv.** None of these

2. **The equitable jurisdiction is, in fact, a personal jurisdiction operating against the conscience of the**

individual, whereas the common law jurisdiction operates against real property.

i. True
ii. False
iii. Cannot say
iv. None of these

3. **Equity remains a separate system of rules operating independently of the common law. Until the late nineteenth century it operated in a separate set of courts.**

   i. True
   ii. False
   iii. Cannot say
   iv. None of these

4. **An individual aggrieved by a failure of the common law to remedy a gross injustice would apply to the court of equity.**

   i. True
   ii. False
   iii. Cannot say
   iv. None of these

5. **Lord Browne Wilkinson described the operation of equity in relation to the trust as working on the conscience of the legal owner.**

   i. True
   ii. False

iii. Cannot say
iv. None of these

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