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CHAPTER 1

Introduction to Equity

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EQUITY

[1–01] Equity is a body of rules and principles which were developed and administered by the Court of Chancery in England prior to the enactment of the Judicature (Ireland) Act 1877. The aim of this branch of law was to mitigate the severity of the harsh rules of the common law. The aim of the Court of Chancery was to operate as a 'court of conscience'. It sought to avoid the injustice of a rigid application of the common law by providing fair and equitable results. The principles developed in this court became known as equity. Lord Denning MR in *Crabb v Arun District Council* [1976] Ch 179 187 commented that 'Equity comes in true form, to mitigate the rigours of the strict law.'

[1–02] Equity is not a distinct independent system to the common law. It sought to complement the common law, rather than replace it. Equity is still dependent on the common law framework and is supplementary to it. The aim of equity was to improve the common law system and to address its deficiencies by mitigating the harshness of some of its rules. Kenny J. in *Hynes Ltd v Independent Newspapers* [1980] IR 204 218, stated that equity is a 'gloss on or an improvement and reform of the common law' According to *Snell's Equity* (13th ed, 2000):

[1–03] 'Equity is. . . a body of rules or principles which form an appendage to the general rules of law, or a gloss upon them. In origin at least, it represents the attempt of the English legal system to meet a problem

which confronts all legal systems reaching a certain stage of development. In order to ensure the smooth running of society it is necessary to formulate general rules which work well enough in the majority of cases. Sooner or later, however, cases arise in which, in some unforeseen set of facts, the general rules produce substantial unfairness. When this occurs, justice requires either an amendment of the rule or, if (as in England some five or six centuries ago) the rule is not freely changeable, a further rule or body of rules to mitigate the severity of the rules of law. This new body of rules (or 'equity') is therefore distinguishable from the general body of law, not because it seeks to achieve a different end (for both aim at justice), nor because it relates necessarily to a different subject matter, but merely because it appears at a later stage of legal development' (At paragraph [1-03]).

[1–04] Equity is prevalent in a range of different areas and its scope is difficult to define precisely. Lord Upjohn in *Boardman v Phipps* [1967] 2 AC 46, 123, stated that 'Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms.' Equitable jurisdiction is discretionary in nature. However this does not mean that it is exercised in an arbitrary or unfair manner. Black CJ in *Conlon v Murray* [1958] NI 17, 35, noted that '[t]his discretion is not, of course, the arbitrary discretion of the individual judge but is a discretion to be exercised on the principles which have been worked out in a multitude of decided cases'. Greene MR in *Re Diplock* [1948] Ch 465, 481-482, commented that 'if [a] claim in equity exists, it must be shown to have an ancestry, founded in history and in the practice and precedents of courts administering equity jurisdiction.'

[1–05] Equity plays an important role across a wide range of areas, from the family home, to estates and has moved into commercial transactions. Although equity is developing and equitable principles have been improved, refined and altered, the underlying basis for its role remains the same. The basis for equity's role was summarized by Lord Millet who stated that 'The traditional objects of equity have not changed: to relieve against mistake, fraud, accident and surprise; to protect the weak from exploitation and trust and confidence from betrayal; to prevent the unconscionable assertion of legal rights; and to give relief against every kind of unconscionable conduct. It demands not merely honesty and a willingness to meet one's commitments, but integrity, good conscience and fidelity.' (Millet (1995) 9 Trust Law International 35, 36-37).

[1–06] As noted by Virgo 'Equity is not an independent system of law, but it has a distinct identity and function to modify the rigours of the Common Law' (Virgo, *The Principles of Equity and Trusts* (2012) p. 25). Lord Millet also explained the principle, stating that: 'The common law and equity are not two separate and parallel systems of law. The common law is a complete system of law which could stand alone, but which if not tempered by equity would often be productive of injustice; while equity is not a complete and independent system of law and could not stand alone.' ('Proprietary Restitution' in *Equity in Commercial Law* (eds. Degeling and Edelman, 2005, p. 309)).

HISTORICAL BACKGROUND

[1–07] After the Norman invasion of England in 1066, a system of centralized administration of justice was established in England. A system of courts developed and the law applied consisted of statutes and law generally applicable to people, known as the common law. The common law of England and Wales continued to develop throughout the 12th and 13th centuries. After the Norman invasion of Ireland in 1169, the English common law was applied in Ireland.

[1–08] The common law operated a writ system whereby in order to bring a grievance before the courts, a litigant had to use make use of a document known as a writ and no action could be brought unless it operated within one of the existing forms of action. These forms of action were fixed and if an action did not fall within a recognized form of writ, a litigant would not be able to obtain a writ tailored to his specific grievance and no remedy was available. The common law was inflexible and had limited remedies available. Even when a remedy was available it was frequently inappropriate or inadequate and the only remedy available was damages which was not always an effective remedy in the circumstances. There were also many procedural defects and inadequacies, for example parties were not allowed to give evidence, witnesses were not recognized and the verdicts of juries were arrived at on the basis of their own local knowledge of the parties and the background to the dispute.

[1–09] There was growing dissatisfaction with the common law and a practice developed whereby people petitioned the King for justice, where they could not get adequate relief in the common law courts. The Lord Chancellor was the officer who oversaw the administration of the system and as the number of petitions increased, the king delegated his functions to the Chancellor and directed that the petitioner should be given a legal remedy where an appropriate one existed and that where none such existed, the petitioner should be given such a remedy as would be just. This resulted in the development of the Court of Chancery. Litigants were facilitated in avoiding the confines of the writ system and equitable remedies were developed.

[1–10] The court began to issue injunctions restraining a party from exercising his legal rights. This practice curtailed the authority of the common law courts and caused ill-feeling. In the *Earl of Oxford's Case* (1615) 1 Ch Rep 1, 21 ER 485, there was a bitter dispute about the validity of the 'common injunctions' between Edward Coke, the Chief Justice of England and Lord Ellesmere, the Lord Chancellor. King James 1 had to intervene upon advice of the Attorney-General Bacon and the matter was resolved in favour of the Court of Chancery. The Lord Chancellor now had precedence over the common law courts.

[1–11] There was further opposition and criticism of the Court of Chancery. Parliament under Cromwell proposed its abolition in 1653 and in 1660 a Bill to reverse the *Earl of Oxford's Case* was issued which sought to restore the supremacy of common law. The common law judges were resisting the development of equitable jurisdiction on the basis that the decisions from the Court were inconsistent in nature. However the cases coming before the Lord Chancellor started to follow a set of principles and while the Court of Chancery remained a 'court of conscience', a system of precedent began to develop. Lord Nottingham (Chancellor 1673-1682), sometimes referred to as the "Father of Equity", did much to develop the system and a body of doctrines. However by the 19th century, the principles of equity were nearly as rigid as the common law and change was sought. In *Gee v Pritchard* (1818) 2 Swans 402 Lord Eldon LC commented that: 'The doctrines of this court ought to be as well settled, and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this court are to be changed with every succeeding judge. 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' (at p. 414).

[1–12] A further difficulty was that two distinct court systems had developed and each applied its own principles, which were often inconsistent. There was also a huge backlog in the chancery system. In the mid-nineteenth century, reforms began and merger of these jurisdictions was proposed. In 1854 the Common Law Procedure Act was passed (the equivalent in Ireland was the Common Law

Procedure (Amendment) Act 1856). This gave the common law courts the power to grant equitable remedies in limited situations. In 1858, the Chancery (Amendment) Act (Lord Cairns' Act) came into force and gave chancery judges the power to grant the common law remedy of damages in certain circumstances.

[1–13] A major reform of the system took place in England with the enactment of the Supreme Court of Judicature Acts 1873 and 1875 (the Irish equivalent was the Supreme Court of Judicature (Ireland) Act 1877). This Act replaced the system of separate courts exercising common law and equitable jurisdiction and established a unified High Court with two divisions, which had jurisdiction to decide matters of either law or equity. The fusion of the administration of legal and equitable jurisdiction continued with the enactment of the Court of Justice Act 1924 which established a High Court and Supreme Court to take the place of the Supreme Court of Judicature. The Courts (Establishment and Constitution) Act 1961 continued this structure. However, as stated by Kiely, 'The intrinsic difference between legal and equitable rights and remedies remains unaffected' (*Principles of Equity as Applied in Ireland* (1936), p. 9).

[1–14] The potential conflict between legal and equitable principles was addressed in section 28(11) of the Judicature (Ireland) Act 1877, which provided that where any conflict arose between the rules of equity and the rules of the common law, the rules of equity should prevail. This conflict arose in the case of *Walsh v Lonsdale* (1882) 21 Ch D 9 and Jessel MR stated: 'There are two estates as there were formerly one estate at common law by reason of the payment of rent from year to year and an estate in equity under the agreement. There is only one court and equity rules prevail in it.'

FUSION OF LAW AND EQUITY

[1–15] Following the enactment of the Judicature Acts it was generally acknowledged that their effect was to fuse the administration of the common law and equity, rather than a fusion of their principles. Delaney has commented that: 'The Judicature Acts fused the courts of law and equity; they created a substantially uniform system of procedure and pleading; and they provided that in case of 'conflict or variance' the rules of equity should prevail. But there was nothing more than a fusion of jurisdiction, procedure and pleading; the substantive rules themselves remained.' (Delany (1961) 24 MLR 116, 117).

[1–16] However a view was put forward that law and equity were fused entirely. The House of Lords in *United Scientific Holdings Ltd v Burnley Borough Council* [1978] A.C. 904 held that since the Judicature Acts a fusion of the rules of law and equity had occurred, which was more than procedural in nature. Lord Diplock was of the view that the two systems of common law and equity had merged as a result. The finding in this case appears to have been applied by the Irish Supreme Court in *Hynes Ltd. v Independent Newspapers Ltd* [1980] IR 204, where O'Higgins CJ stated that: 'In Ireland the fusion of common-law and equitable rules was initiated by the Supreme Court of Judicature Act (Ireland) 1887, which contains similar provisions in s.28.(7) to those already noted in the English Acts, and was completed by the Courts of Justice Act 1924, and the Courts (Establishment and Constitution) Act, 1961 (at 216). Referring to the House of Lords decision in *United Scientific*, Kenny J. stated that: 'I regard the decision in the Burnley Case as a restoration of a fundamental equitable principle which, unfortunately, has tended to be ignored in many recent decisions' (at 221). However commentators have indicated that it would be unwise to assume that the views in *Hynes* have been accepted in this jurisdiction and that the opinions expressed in *United Scientific* must be regarded as *obiter*.

The theory of substantive fusion has been called a "fusion fallacy". The substantive distinctions between legal and equitable rights and remedies remain. Recently the High Court in Ireland reasserted this view in *Meagher v Dublin City Council* ([2013] IEHC 474) where Hogan J noted that we should "pause to reflect before any far-reaching claims regarding substantive fusion can properly be accepted." He further stated that: "It might also be borne in mind that many equitable principles were originally fashioned to impose particular duties on persons such as trustees and fiduciaries to ensure that they exercised their powers in a manner consistent with the overriding principles of utmost good faith, even if over time these equitable principles were applied more generally and more widely in order to temper the rigour of the common law. Yet these higher duties had been imposed by the Courts of Chancery by reason (in part, at least) of the special obligations which trustees of fiduciaries owe to third parties by virtue of their special relationship with such persons. It would not, however, be necessarily appropriate to impose these higher standards in the ordinary sphere of the law of contract and tort where these underlying principles will generally have little or no application, even though this would (or, at least, might) be a natural consequence of the substantive fusion of law and equity." (at para. 27). **[1–17]**

Hanbury and Martin in *Modern Equity* (20th ed, 2015, at pp. 24-25) summed up the existing opinion that: 'What can be said is that more than a century of fused jurisdiction has seen the two systems, whose relationship is 'still evolving', working more closely together; each changing and developing and improving from contact with each other; and each willing to accept new ideas and developments, regardless of their origin. They are coming close together. But they are not yet fused.' **[1–18]**

MAXIMS OF EQUITY

Over the course of many years, the Court of Chancery formulated general principles, known collectively as 'the maxims of equity'. While they are not positive rules of law, they are broad trends which may operate in certain circumstances. Mason CJ in *Corin v Patton* ((1990) 169 CLR 540, 557) stated that an equitable maxim is 'a summary statement of a broad theme which underlies equitable concepts and principles'. Some of these principles overlap or appear to contradict one another. Some are now of historic interest only and some remain practically relevant. They have played an important role in the development of a number of features of equitable jurisdiction. An understanding of them is important and a useful introduction to the manner in which equity operates. **[1–19]**

The following are the maxims of equity: **[1–20]**

(a) Equity follows the law
(b) Equity will not suffer a wrong to be without a remedy
(c) Equity acts *in personam*
(d) He who seeks equity must do equity
(e) He who comes into equity must come with clean hands
(f) Delay defeats equity
(g) Equality is equity
(h) Equity looks to the intent rather than the form
(i) Equity looks on that as done which ought to have been done
(j) Equity imputes an intention to fulfill an obligation
(k) Where the equities are equal, the first in time prevails
(l) Where the equities are equal, the law prevails

(a) Equity Follows the Law

[1–21] Equity will not permit a remedy that is contrary to the common law or statute. Equity is a supplementary system, which is dependent on the common law. While equity cannot produce a result which is contrary to the common law, it is sometimes necessary in appropriate cases. Certain exceptions apply and in these circumstances equity will take precedence over conflicting rules at common law. In *Graf v Hope Building Corporation* (1930) 354 N.Y.1 at 9, Cardozo C.J. stated that 'Equity follows the law, but not slavishly nor always'.

[1–22] Equity will intervene in an application of the common law if it is believed to be in the interests of fairness to do so or in an attempt to mitigate the harsh results caused by the strict enforcement of the common law. In *McCormack v Grogan* (1869) L.R. 4 H.L. 82, at 97, Lord Westbury stated that 'equity will not allow a statute to be used as an instrument of fraud.' For example, equity would recognize the existence of secret or half secret trusts by waiving the requirement of strict compliance with the necessary testamentary formalities in the interests of preventing fraud.

[1–23] An example of equity following the law is the treatment of property held jointly by two or more owners. This remains relevant today. As noted by Keane (in Equity and the Law of Trusts in the Republic of Ireland, at p. 31), the equitable interests of the owners in the property will be the same as their legal interests, unless the instrument under which the property is held indicates a different intention. This is important where property is owned by spouses or cohabitees and the property may be held in the names of both parties without indicating the nature of the equitable interest which each is to enjoy.

(b) Equity will not Suffer a Wrong to be Without a Remedy

[1–24] Equity will intervene to protect a recognized right which is not enforceable at common law. For example, the enforcement of trusts as against the legal owner of property. The common law regarded the trustee as the legal owner and the beneficiary under a trust would have been ignored.

[1–25] However this maxim should be treated with caution. It does not mean that equity can supply new remedies whenever a wrong is perceived and the common law is considered to be insufficient or unjust. In *L v L* [1992] 2 IR 77, the Supreme Court admitted that the law as it existed in relation to non-financial contributions to the family home was inadequate, but refused to impose a constructive trust in favour of the contributing spouse as this would entail the creation of an entirely new right and instead decided that the issue was for the legislature.

(c) Equity Acts *in Personam*

[1–26] Equitable remedies are personal in nature and are exercised against specific persons rather than against particular property owned by them. Lord Selborne L.C. stated in *Ewing v Orr Ewing* (No. 1) (1883) 9 App. Cas. 34 at 40: "The courts of Equity in England are, and always have been, courts of conscience, operating in personam and not in rem."

[1–27] However this maxim should be treated with a degree of caution because while equitable relief may be personal in nature, equitable proprietary rights are increasingly being granted. The maxim is relevant to disputes relating to property outside the jurisdiction. In *Penn v Lord Baltimore* (1750) 1 Ves Sen 444, specific performance of a land agreement was granted against a defendant who was physically

present in England, although the property in question was located in the United States. Although the defendant objected to the jurisdiction of the court, Lord Hardwicke found that the conscience of the defendant was bound by the agreement and that the dispute was a matter within the jurisdiction of the court which acted *in personam*.

Similarly, in the Irish case of *Lett v Lett* (1906) 1 IR 618, proceedings were in being before an Argentinian court which purported to repudiate an Irish divorce settlement whereby a wife had undertaken not to pursue an further claim against her husband. An injunction was granted to restrain the proceedings in Argentina. Sir Samuel Walker stated that: '[t]he jurisdiction asserted is not against the foreign tribunal, but against the person within the jurisdiction, who has made a contract not to resort to proceedings; and whether such proceedings are in a foreign court or not, is immaterial for the purpose of the equity on which the jurisdiction rests – an equity *in personam*" (at 635). **[1–28]**

(d) He Who Seeks Equity Must Do Equity

In order to be entitled to equitable relief, the claimant must act fairly and in an honourable manner toward the other party. **[1–29]**

The most frequent example in practice is in the granting of an injunction, particularly at the interlocutory stage, where the applicant will often be required to give an undertaking as to damages prior to the granting of injunctive relief. In *Chappell v Times Newspapers Ltd* [1975] 1 WLR 482, the Court of Appeal refused to grant interlocutory relief in circumstances where the plaintiffs refused to give an undertaking not to behave in a certain manner. Lord Denning (at 502) stated that: "[I]f one party seeks relief, he must be ready and willing to do his part in it." Similarly, a person seeking specific performance of a contract can be required, as a condition of granting relief, to perform his part of the contract. **[1–30]**

(e) He Who Comes into Equity Must Come with Clean Hands

This maxim looks at the past conduct of the claimant and requires that the person seeking equitable relief has acted in a bona fide manner. Equitable relief is discretionary and evidence of misconduct or dishonesty in relation to the relief being sought may lead the court the refuse to grant the remedy on the basis of 'unclean hands'. In *Dering v Earl of Winchelsea* (1787) 1 Cox 318, at 319-320, Eyre LCB stated: 'A man must come into a court of equity with clean hands; but when this is said, it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for; it must be a depravity in a legal as well as in the moral sense.' **[1–31]**

The court will decline to intervene on the basis of 'unclean hands' unless there is a sufficient connection between the inequitable conduct and the subject-matter of the dispute. In *Moody v Cox* [1917] 2 Ch 71, 87-88, Scrutton LJ stated that: 'Equity will not apply the principle about clean hands unless the depravity, the dirt in question on the hand has an "immediate and necessary relation" to the equity sued for.' **[1–32]**

The 'clean hands' principle has been applied in a wide variety of situations where equitable remedies have been sought. For example, where the plaintiff has acted unfairly and unreasonably, or where he has attempted to mislead the court. **[1–33]**

(f) Delay Defeats Equity

[1–34] This maxim is enshrined in the phrase *vigilantibus, non dormientibus jura subveniunt*; the law assists the vigilant, not those who sleep. Lord Camden LC in *Smith v Clay* [1767] 3 Bro CC 639, 640n stated: 'A court of equity….has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence.'

[1–35] The concepts of laches and acquiescence are of relevance to this maxim. Laches is where there has been an unreasonable delay in the bringing of proceedings which would render it unjust to grant relief, a plaintiff may be barred from bringing a claim in equity. Acquiescence is where one party infringes another party's rights and that other party does nothing. Equity infers that the latter party has acquiesced to the actions and he may not be permitted to pursue his claim.

[1–36] Simple lapse of time is not normally enough to establish laches, nor is a mere indication that no action may be taken enough to establish acquiescence. The defendant would also need to show that he would be prejudiced by the court allowing the equitable claim to proceed. In *Fisher v Brook* [2009] 1 WLR 1764, at 1781, Lord Neurberger commented that "some sort of detrimental reliance is usually an essential ingredient of laches." The requirement of proving prejudice in order to succeed with a plea of laches was recently emphasized by the Irish High Court in *McCann v Morrissey* [2013] IEHC 288. Acquiescence is usually signified by the failure to seek a remedy when the violation of one's rights has come to one's attention. McMahon J, in *Victory v Galhoy Inns Ltd.* [2010] IEHC 459, at para. 34, suggested that the levels of inactivity required to deprive a person of his rights in such circumstances is high and "must be so reprehensible that it approaches dishonesty".

[1–37] The Statute of Limitations 1957 provides for express limitation periods in relation to a number of equitable rights and thus renders the maxim somewhat obsolete. However the maxim still applies to those equitable claims that are not covered by the Statute.

(g) Equality is Equity

[1–38] Equity is inclined to apply the principle of equality, wherever possible. Equity favours the equal division of property. For example where two or more parties claim to have an interest in the same property, in the absence of agreement to the contrary, equity will assume that they have equal shares.

[1–39] The most common application of this maxim is in the co-ownership of land, where parties may own land together either as joint tenants or as tenants in common. In the absence of any evidence of a joint tenancy, equity will presume a tenancy in common exists. This demonstrates equity's preference for the division of property on an equal basis between tenants in common, as opposed to the right of survivorship in a joint tenancy.

(h) Equity Looks to the Intent Rather than the Form

[1–40] Equity looks to the substance of the transaction, rather than the form of the transaction and does not require unnecessary formalities. Lord Rommilly M.R. in *Parkin v Thorald* (1852) 16 Beav.59 at 66-67 stated: 'Courts of equity make a distinction in all cases between that which is a matter of substance