EQUITY AND THE LAW OF SUCCESSION

SUMMARY

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CHAPTER 1

INTRODUCTION

WHAT IS EQUITY?

In ordinary language, the word carries ideas of fairness, equality and even-handedness. As a technical term of the law, it means the body of law developed by the English Court of Chancery before 1873. After the Judicature Acts of 1873 and 1875 the Court of Chancery was replaced by the Chancery Division of the new High Court and the same procedures were applied to actions at both equity and the common law. New Zealand has never had a separate court of equity, and actions for equitable relief are heard by the High Court following the same procedures as for common law actions.

DEVELOPMENT

Equity as a branch of the law developed from the medieval practice of petitioning the king for relief in cases where the common law provided no effective remedy or where the strict application of the law led to injustice. Kings increasingly delegated this jurisdiction to the Lord Chancellor (the head of the administration) whose office was the Chancery.

As clerics, the late medieval chancellors applied the moral principles that –

- In general, people would not be allowed to exercise their legal powers and rights against the principles of good conscience, and

- People claiming relief under that principle must themselves come to equity "with clean hands".

The fundamental relationship that gives rise to remedies in equity is that of confidence and dependence. The relationship is classified as a **fiduciary** relationship, and the person on whom the burden of confidence and dependence rests is a fiduciary.

From 1474 onwards petitions for relief were addressed directly to the Lord Chancellor. From the 16th Century the chancellors were also lawyers, and a system of precedents and particular rules of law analogous to those of the common law were developed, as well as a Court of Chancery with its own judges, separate from the Chancellor's administrative functions.

One thing that remained was the principle, arising out of the original purpose of the jurisdiction, that equitable remedies could counteract the operation of common law rules in particular cases. The principal instrument by which this power was exercised was the injunction, an order preventing a party from exercising some right. The power was formalized in the Earl of Oxford's case (1615), in which the Lord Chancellor issued an injunction against enforcement of an order by the great common law judge, Sir Edward Coke CJ. The Attorney-General, Sir Francis Bacon, with the authority of King James I, ruled that that in the event of any conflict between the common law and equity, equity would prevail.

MAIN FIELDS OF APPLICATION

The Court of Chancery was concerned with:

- fraud (at common law this meant actual deceit. In equity it included innocent misrepresentation);
- accident (equity would not allow the enforcement of legal rights if it was gained by luck – it was against windfalls);
- things of confidence (mainly the laws governing trusts and wills where the settler or testator replies on the executor or trustee to carry out his or her wishes).

EQUITABLE REMEDIES

Remedies that were developed in the Court of Chancery were:

- injunctions (orders to refrain from doing something).
- orders for specific performance (that terms of a contract are to be complied with) and rectification, and
- orders for an account of profits.

INJUNCTIONS:

Injunctions are powerful weapons because failure to obey them is a contempt of court which is punishable by the courts as if it were a criminal offence.

They can be classified into

- **prohibitory injunctions** which require a person to refrain from doing something; and
- **mandatory injunctions** which require a person to do something – for example, remove trees on a boundary, or remove protesters from property.

Another classification is into

- **interim or interlocutory injunctions** which are usually issued as part of proceedings to maintain a status quo or safeguard property pending a full hearing.
- **permanent/ final/ perpetual injunctions** which are issued at the end of proceedings.

Two important types of interim injunction are

- **Mareva injunctions** issued where there is a danger that the defendant may dispose of his or her assets so as to frustrate any attempt to enforce a judgment against him or her. The court can grant an interlocutory judgment preventing the disposal (usually out of the jurisdiction) of assets of the defendant. The plaintiff has to show four things:
  1. a good arguable case against the defendant;
  2. that the defendant has assets within the jurisdiction;
  3. a real danger the assets may be removed; and
  4. that the overall justice of case requires the making of an order.

- **Anton Piller orders** (mandatory injunctions) usually issued *ex parte* (an urgent hearing without the defendant present) entitling a defendant to demand entry to a business/ residential premises to search and remove documents or items that may be used by a plaintiff in proceedings against him or her. They are commonly used in actions for fraud and actions for breaches of patents and copyright where the defendant's accounts, plans, technical data and items of manufacture can provide the plaintiff with a vital means of proving his or her case. Where questions of criminal liability arise (as in some fraud and copyright actions), the orders will usually contain exemptions for incriminatory material.

RECTIFICATION

Where there is an obvious mistake, the court can order for it to be corrected. The aim is to bring a faulty document into accord with a prior agreement. It is the document being rectified, not the agreement or matter. It usually applies to contract but can apply to leases, easements, insurance policies, and even wills.

EQUITABLE LIEN

Not really a remedy. At common law a lien describes a right to hold property belonging to another person as security for the performance of an obligation or payment of debt.
The holder of a lien (creditor) has the right to hold property belonging to debtor. In equity this is defined as right against property implied by equity to secure discharge of actual/ potential indebtedness. Although called a lien, it is a charge against property and is often based on a contract.

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