1.1 THE FOUNDATIONS OF EQUITY

1.1.1 The nature of equity

Equity is the means by which a system of law balances out the need for certainty in rule-making with the need to achieve fair results in individual circumstances. An expression which has been commonly used to describe the way in which equity functions is that equity ‘mitigates the rigour of the common law’ so that the letter of the law is not applied in so strict a way that it may cause injustice in individual cases.\(^1\) English equity does this by examining the conscience of the individual defendant.\(^2\) Equity, then, is that part of English private law which seeks either to prevent any benefit accruing to a defendant as a result of some unconscionable conduct or to compensate any loss suffered by a claimant which results from some unconscionable conduct, and which also seeks to ensure that common law and statutory rules are not manipulated unconscionably. At its broadest, equity appears to imbue the courts with a general discretion to disapply statutory or common law rules whenever good conscience requires it;\(^3\)

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1. Earl of Oxford’s Case (1615) 1 Ch Rep 1, per Lord Ellesmere LC: ‘to soften and mollify the extremity of the law’; Lord Dudley v Lady Dudley (1705) Prec Ch 241, 244, per Lord Cowper, LC: ‘Equity is no part of the law, but a moral virtue which qualifies, moderates and reforms the rigour, hardness and edge of the law.’ In Samuel Johnson’s dictionary (first published in 1755), the ‘chancery’ is described as being ‘The court of equity and conscience, moderating the rigour of other courts, that are tied to the letter of the law’: this definition quotes the jurist Cowell’s own definition in The Interpreter, a legal glossary of the time. Also, considered below, St German explained that ‘equytie is ordeyned . . . to temper and myttygate the rygoure of the lawe’ (1528–31), quoted in Plucknett and Barton (eds), ‘St German’s Doctor and Student’ 91 Selden Society, London, 1974, 97. See also Lord Kaims’ treatise Principles of Equity, 3rd ed, Edinburgh: Bell and Creech, 1778, 41 which uses the same expressions. See below the discussion of Aristotle’s notion of equity at para 1.1.5 in relation to the rectification of legislation by equity.

2. Earl of Oxford’s Case (1615) 1 Ch Rep 1.

3. This broad use of equity is rare in modern equitable practice, as we shall consider in this chapter and elsewhere throughout this book. See, for example, the discussion of Jaggard v Sawyer [1995] 1 WLR 269; [1995] 2 All ER 189 (para 27.1.1) where the Court of Appeal preferred to apply precedent closely rather than consider themselves to have a broad discretion to act as they saw fit under the terms of the Supreme Court Act 1981, s 50 which purported to permit them to grant interim injunctions in general terms. However, doctrines such as the principle that equity will not permit statute to be used as an engine of fraud (Rochefoucauld v Boustead [1897] 1 Ch 196: see para 1.4.13), the doctrine of secret trust (McCormick v Grogan (1869) LR 4 HL 82; Jones v Badley (1868) 3 Ch App 362; Blackwell v Blackwell [1929] AC 318: see para 6.1.4 below) and the doctrine of equitable estoppel (Yaxley v Gotts [2000] Ch 162:}
however, in practice, modern equity is comprised mainly of substantive and procedural principles which only permit the courts a limited amount of discretion. 4

There are three different ways of understanding equity’s role as part of the English legal system. 5 First, equity can be understood as the means by which English law ensures that the strict application of a common law or a statutory rule does not result in any unfairness when applied in a specific case. To this extent equity is a form of natural justice, 6 which means that it has a moral basis. 7 Equity’s particular moral purpose was described by Lord Ellesmere in the *Earl of Oxford’s Case* 8 as being to ‘correct men’s consciences for frauds, breach of trusts, wrongs and oppressions . . . and to soften and mollify the extremity of the law’. 9 This is a moral purpose in that it both prevents a defendant from taking unconscionable advantage of a situation and also in that it prevents the law inadvertently permitting an unconscionable result. Secondly, equity can be considered, in its formal sense, as constituting the collection of substantive principles developed over the centuries by the Courts of Equity, principally the Court of Chancery, 10 to judge people’s consciences. 11 In this sense, equity should be understood as being a code of technical, substantive rules and not simply as a reservoir

see section 13.1) operate expressly in contravention of the terms of Acts of Parliament with the general intention that no benefit be taken nor any loss suffered as a result of some unconscionable conduct.

4 See, for example, the discussion of *Jaggard v Sawyer* [1995] 1 WLR 269; [1995] 2 All ER 189 (see para 27.1.1 below) which indicates the courts’ reluctance to consider its powers to be broad discretionary powers even if their enactment by statute might suggest that they are capable of being applied in such a way.

5 In the final chapter of this book we will consider how other disciplines in the social sciences use the notion of equity in different senses.

6 *Lord Dudley v Lady Dudley* (1705) Pree Ch 241, 244, *per* Lord Cowper. See, in similar vein, Story, 1839, 1, drawing a parallel with the natural justice understood in Justinian’s Pandects. The approach of seeing a Roman root to these ideas is rejected by Professor Maitland (1936, 6). Perhaps Professor Story’s preparedness to identify a Romanic similarity between the natural justice root to equity and ‘ius’ in the Roman sense used by Justinian is founded on American lawyers’ affection for that sort of natural justice which is set out in the US Constitution.

7 See McGhee, 2005, paras 1–01 and 1–03, who identifies the moral base of equity while also considering the need for the legal conceptualisation of such moral notions as being based on specific principles. See also Spry, 2001, 1, who advances the proposition that ‘equitable principles have above all a distinctive ethical quality, reflecting as they do the prevention of unconscionable conduct’.

8 (1615) 1 Ch Rep 1.

9 As St German described this underlying purpose: ‘. . . in some cases it is good and even necessary to leue the wordis of the law and to folowe that reason and Justyce requyreth and to that intent equytie is ordeyned that is to temper and myttygate the rygoure of the lawe’, quoted in Plucknett and Barton (eds), ‘St German’s Doctor and Student’ 91 *Selden Society*, London, 1974, 97. Or, to attempt a translation of my own into a more modern, English-legal vernacular: ‘. . . in some cases it is good and even necessary to deviate from the strict letter of the law and [instead] to follow what reason and justice require – which is the purpose for which equity is ordained – that is to temper and mitigate the rigour of statute and the common law’.

10 While we will focus on the Courts of Chancery as constituting the most significant Courts of Equity in this book, there were other courts (which are of no importance to the modern legal system) which also operated on equitable principles. After the Judicature Act 1873, the old courts of chancery were replaced by the High Court of Justice, although it could be said that the spirit of the old courts of chancery lived on in the Chancery Division of the High Court which was created by that Act.

11 *Earl of Oxford’s Case* (1615) 1 Ch Rep 1.
of general, moral principles. Thirdly, equity can be understood as comprising the procedural rules and forms of action developed by the Courts of Chancery over the centuries under the authority of the Lord Chancellor. The main equitable principles are considered in section 1.4 below. It should be noted that these second and third aspects of equity differ from the apparent breadth of the first in that they constitute technical rules of law rather than abstract philosophical principles. It is common for English and Australian writers on equity to focus on these latter senses of equity in preference to a consideration of more philosophical notions of natural justice theory; although, it is suggested, an appreciation of these philosophical underpinnings is important if equity is to be understood as a collection of coherent principles and not simply as a ragbag of different doctrines.

In all legal systems the following problem arises: how can we create general common law or statutory rules without treating some individual circumstances unjustly? In the context of the English legal system it is equity which performs this balancing act when set against the rigidity of the common law. In this regard, the work of the German philosopher Hegel has generated the following definition of equity:

Equity involves a departure from formal rights owing to moral or other considerations and is concerned primarily with the content of the lawsuit. A court of equity, however, comes to mean a court which decides in a single case without insisting on the formalities of a legal process or, in particular, on the objective evidence which the letter of the law may require. Further, it decides on the merits of the single case as a unique one, not with a view to disposing of it in such a way as to create a binding legal precedent for the future.

Hegel was one of the foremost philosophers of the last 200 years, not a lawyer, but this definition of the activities of equity in its legal sense is nevertheless particularly useful because it shows us how equity permits the achievement of ‘fair’ or ‘just’ results in situations in which the literal application of statute or common law might otherwise lead to unfairness or injustice. As mentioned, this summary should be treated with

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12 The tendency to think of equity in terms of general principles as opposed to technical devices and strict case law rules was criticised by Vice-Chancellor Megarry in Re Montagu’s Settlement [1987] Ch 264.
13 To emphasise the distinction between the second and third aspects of equity: the second aspect relates to substantive legal rules (such as the trust) whereas the third aspect relates to procedural rules and devices (such as interim injunctions).
14 This is the approach preferred by Professor Maitland in his lectures on ‘Equity’ published originally in 1909 and then revised posthumously in 1936 (see Maitland, 1936, 1). See also Loughlan, 2003, 3; Meagher, Heydon and Leeming, 2002, 3. Professor Martin distinguishes between the ‘wide sense’ of equity as opposed to its narrower ‘legal meaning’ where the legal meaning refers to the substantive principles applied and administered by the Courts of Chancery before 1873, in Hanbury and Martin’s Modern Equity, 16th edn, 2001, London: Sweet & Maxwell, 3 (hereafter ‘Martin, 2001’). Professor Pettit prefers a history of the courts of chancery and an analysis of the Judicature Act 1873 to an abstract definition of the term ‘equity’. Equity and the Law of Trusts, 9th edn, 2001, London: Butterworths (hereafter ‘Pettit, 2001’). See, however, the approach taken by the current author of Snell’s Equity, John McGhee QC, considered at fn 7 above, which is more in tune with the discussion in this book.
15 English equity, however, is also concerned with procedural and interlocutory matters.
16 See, for example, breach of trust in relation to which common law notions of causation play no part.
17 Hegel, 1821, 142, para 223.
some caution because he wrote as a German philosopher rather than as an English lawyer; and yet, Hegel captures the fact that the court is concerned only with the merits of case between the claimant and the defendant, and not necessarily with the broader context of the law. In this way the court can focus on reaching the best result in the circumstances even where a literal application of statute or common law might seem to require a different result.  

Despite this ostensible flexibility, this book will consider some areas in which equity generally (and the trust in particular) seem to have become rigid institutions more akin to contract than to the underlying spirit of equity which treats each case as a unique one.

The underlying argument of this book is that there is a need to understand the elegant simplicity of equity at the same time as the legal system is asked to consider questions asked of it by an ever more complex society. We shall see this development, for example, when we consider how equity allocates right in the home between members of the same family. That will require us to resist the siren call of those who argue for ever more formalistic tests for doctrines like the trust which were originally formed in the grand tradition of equity by the Courts of Chancery. It has been said that certainty is the hallmark of every effective legal system, but it is also true to say that chaos and complexity are the common characteristic of every problem which confronts such a legal system. People only go to court when their problems have become too difficult for them to sort out on their own. Therefore, I would suggest that equity’s flexibility is important in ensuring that the law retains sufficient suppleness to cope with the social developments over which the court is asked to sit in judgment.

Equity and trusts are interesting subjects precisely because their inherent fluidity has enabled them to regenerate themselves regularly over time and yet their technical sophistication has provided lawyers with a range of techniques with which to achieve their clients’ goals in a variety of circumstances. The fundamental principles of equity are part of a philosophical tradition which is identifiable in the thought of the ancient Greeks. Nevertheless, it should be remembered that the English Courts of Equity have never expressly acknowledged that they are operating on any one philosophical basis, although, as will emerge throughout this book, it may appear that they do have such grand aspirations hidden within their judgments. The development of equity through the cases has been far more pragmatic than that.

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18 Cf Dworkin, 1986.
19 See the discussion in Chapter 7 below.
20 See Chapter 15 and Chapter 17, which consider the flexibility of modern family law and human rights law when measured against the rigidity of much of property law.
22 Eg, Oakley, 1997, 27.
23 See Thomas, 1976, 506. This tradition is considered in greater detail below and in Chapter 32.
24 A word on terminology. It is usual to refer to the jurisdiction of the courts of equity in the capitalised form ‘Equity’; whereas the ideas which make up the principles of equity are often referred to instead in the lower case as ‘equity’, a usage which also appears in other social science. In this book the capitalised usage will be reserved for mention only of the system of courts making up the equitable jurisdiction. However, I will more generally use only the lower case to refer both to the jurisdiction, to the ideas which that jurisdiction has generated and also the general notion of equity as broadly akin to ‘fairness’ or ‘just treatment’ (as discussed in greater detail in the text).
1.1.2 The scope of this book: equity and trusts

This book considers both the general doctrines and remedies which form part of equity, and more particularly the law of trusts. The general principles of equity are founded on the maxims which are considered in section 1.4 of this chapter. These maxims have informed the creation of equity over the centuries and continue to be important.25 The principal equitable doctrine is that equity acts *in personam* on the conscience of the defendant, which means that the main focus of a Court of Equity is to consider whether or not the individual defendant has acted in good conscience.26 The law of trusts was born out of equity’s focus on acting on conscience,27 but the subsequent development of trusts law has reflected the increasing use of trusts in commercial transactions in which certainty has been considered to be an important requirement.28 As a result, the ostensible flexibility of equity was displaced first by the development of the doctrine of precedent governing the application of equitable maxims and latterly by the increasing certainty required of doctrines like the trust. So, this book considers the law of trusts in great depth in recognition of the central importance of trusts in English law over the centuries. The remainder of the book is concerned with the other equitable doctrines and understanding of the trust as being a part of the equitable canon. Therefore, this chapter considers equitable maxims in the abstract before the next chapter introduces the trust concept.

1.1.3 Equity and trusts are based on conscience

As explained in the preceding paragraph, the most significant equitable doctrine is the trust, which forms the principal focus of this book: our focus will therefore divide between the law of trusts and general equitable principles and remedies. The most important case in relation to the development of equity and the trust in recent years was arguably that in *Westdeutsche Landesbank v Islington LBC*,29 in which Lord Browne-Wilkinson addressed two main issues, aside from dealing with the appeal before him. First, he set out his version of the core principles of the law of trusts.30 Secondly, he set about re-establishing traditional notions of equity as being at the heart of English trusts law. As opposed to the new principle of unjust enrichment developed (principally) by Lord Goff and a group of academics centred primarily in Oxford,31 Lord Browne-Wilkinson has re-asserted a traditional understanding of the trust as

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25 See, for example, the continued significance of doctrines of conscience in the House of Lords in *Westdeutsche Landesbank v Islington* [1996] AC 669 and the maxim that equity looks upon as done that which ought to have been done in the Privy Council in *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324.

26 Earl of Oxford’s Case (1615) 1 Ch Rep 1.


28 In relation to the increasing commercialisation of trusts law, see, for example, the discussion of *Target Holdings v Redfem* [1996] 1 AC 421 in para 21.2.2. As to the importance of certainty in the ordinary law of trusts see Chapter 3 generally and the authorities following *Knight v Knight* (1840) 3 Beav 148 discussed in that chapter.


30 See section 2.4.

31 See the work of Professor Peter Birks (in particular his *Introduction to the Law of Restitution* (1989) and *Unjust Enrichment* (2003)) and the literature which it has spawned.
being based on the conscience of the person who acts as trustee. So, in *Westdeutsche Landesbank v Islington LBC*, his Lordship went back to basics with the first of his ‘Relevant Principles of Trust Law’:

(i) 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 trust).

As we shall see, the basis of the trust (and indeed the whole of equity) is concerned with regulating the conscience of a person where the common law might otherwise allow that person to act unconscionably but in accordance with the letter of the law. Suppose, for example, that a defendant is permitted by a statutory provision, or a rule of common law, to receive a payment of money as a result of being red-headed. If the defendant had worn a red wig to fool the payer into thinking that she fell within the category of red-headed people, common law might permit the defendant to keep the money on a literal interpretation of the rule. However, equity would prevent the defendant from manipulating that statute for fraudulent purposes on the basis that to allow the defendant to do so would be unconscionable. *Westdeutsche Landesbank v Islington LBC* re-asserts this basic principle of good conscience. A substantial part of the argument of this book is that it is only the traditional equitable notion of focusing on the conscience of the defendant which can make trusts law coherent.

1.1.4 The many senses of conscience

The task of establishing a meaning for the term ‘conscience’ will be, as we shall see throughout the course of this book, a particularly difficult one. The genesis of the term ‘conscience’ in this context is in the early statements of the English jurists that the Courts of Equity were courts of conscience and, more significantly, that the Lord Chancellor was the keeper of the monarch’s conscience. The post of Lord Chancellor was frequently referred to as the position of ‘Lord Keeper’ and, by way of example, Sir Christopher Hatton in particular was known during his time in the position as being ‘the Keeper of the Queen’s Conscience’ during a part of the reign of Elizabeth

32 This debate is considered in depth later in this book and summarised in Chapter 32. Alternatively you may choose to consult the essay at www.alastairhudson.com/trusts/restitution of unjust enrichment.
34 *Rochefoucauld v Boustead* [1897] 1 Ch 196: on which see para 1.4.13.
35 *Ibid*, exemplifying the principle that equity will prevent statute being used as an engine of fraud, discussed at para 1.4.13.
37 This author has considered that case in detail in another book: Hudson, 1999:1. Many of the themes in that book are rehearsed in this one.
38 See the essay which comprises Chapter 32 of this book in this regard.
39 As noted by Meagher, Gummow and Lehane, 2002, 3.
40 Thomas, 1976, 506.
41 Lord Chancellor from 1587–1591.
I. In other words, the rules of equity are historically taken to be the application of the monarch’s personal power to dispense justice and to ensure that good conscience was enforced in that way. As is discussed in Chapter 32, these Lords Chancellor were bishops and therefore the ‘conscience’ with which they were concerned was more a religious conscience than a legal conscience until the beginning of the 17th century. The conscience which concerns equity now is a secular idea of conscience but nevertheless it remains an elusive idea.

While Lord Browne-Wilkinson has stated the law as it exists today in *Westdeutsche Landesbank v Islington LBC*, there are many reasons to comment on, and even criticize, that decision and the direction in which the substantive law has been pointed. As will be explored below, there may be a number of contexts in which this standard of ‘conscience’ will not be the most useful one in all contexts. In particular, it is unclear whether or not a single standard can be created which will cater, for example, both for commercial cases involving cross-border financial transactions and for family cases involving rights to the home. If his Lordship did not intend to create a single standard but rather to erect a concept which will be applied differently in different contexts, it is not clear on what intellectual basis that notion of conscience is to be constructed. This book seeks to map out what this jurisdiction of conscience amounts to today.

Nevertheless, the underpinning concept of that judgment is that equity is concerned with acting on the conscience of a defendant on a case-by-case basis. That means equity is an ethical response which English courts will deploy in circumstances in which other legal rules would otherwise allow a defendant to act unconscionably. Equity will turn to the many claims and remedies considered in this book to address the rights and wrongs of such cases. One of the more sophisticated instruments in equity’s armoury is the trust, which will form the main focus of this book and which is introduced in detail in Chapter 2.

### 1.1.5 Concepts of equity in ancient Greek philosophy

Professor Maitland, in lectures originally published early in the 20th century, would have had us believe that equity is founded on ‘ancient English elements’ and rejected the idea that equity was taken from Roman law. In truth, the provenance of the English courts of equity is a mixture of ecclesiastical law and a body of law which, as Maitland suggested, developed in terms of a line of precedent from 1557 onwards. It seems that that is the most appropriate date because that is when the common law courts and the courts of equity began to diverge most clearly when the common law judges rejected

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42 See in particular the discussion of the term ‘conscience’ in section 32.2.
43 The Lord Keeper appointed by James I was the first non-ecclesiastic: Thomas, 1976, 506.
45 Hudson, 1999:1.
46 As exemplified by *Earl of Oxford’s Case* (1615) 1 Ch Rep 1.
47 Trusts fall into two types: express trusts (deliberately created for a variety of reasons which will be considered below) and trusts implied by law (comprising constructive trusts and resulting trusts which are imposed by the court on the basis of principles considered below). See para 2.2.3 below.
48 These lectures were published in 1909 and exist now as Maitland, 1936 in a posthumous second edition.
49 Maitland, 1936, 6.
Lord Chancellor Thomas More’s offer to rein in his frequent issue of injunctions against decisions of common law courts if they would ‘mitigate the rigour of the common law’. Before that time, there was some suggestion that the idea of conscience could be found even in the common law, as suggested by the remark ‘conscience is aequum et bonum, which is the basis of every law’, even in the ancient common law. Nevertheless, the common law courts and the courts of equity began to diverge markedly from the mid-16th century onwards. However, the basis of equity as a counterpoint to the common law is not an idea which should be considered to be simply English. There are echoes of it in the ancient Greek philosophers when, as Douzinas tells us: ‘Aristotle argued that equity, epieikeia, is the rectification of legal justice nomos in so far as the law is defective. Laws are general but “the raw material of human behaviour” is such that it is often impossible to pronounce in general terms’. As Aristotle described equity in his own words (albeit in translation):

‘For equity, though superior to justice, is still just . . . justice and equity coincide, and although both are good, equity is superior. What causes the difficulty is the fact that equity is just, but not what is legally just: it is a rectification of legal justice.’

In this way, Aristotle considered that equity provides a better form of justice because it provides for a more specific judgment as to right and wrong in individual cases which rectifies any errors of fairness which the common law or statute would otherwise have made. The superiority of equity emerges in the following passage which continues on from the last quoted passage:

The explanation of this is that all law is universal, and there are some things about which it is not possible to pronounce rightly in general terms; therefore in cases where it is necessary to make a general pronouncement, but impossible to do so rightly, the law takes account of the majority of cases, though not unaware that in this way errors are made . . . So when the law states a general rule, and a case arises under this that is exceptional, then it is right, where the legislator owing to the generality of his language has erred in not covering that case, to correct the omission by a ruling such as the legislator himself would have given if he had been present there, and as he would have enacted if he had been aware of the circumstances.

Thus, equity exists to rectify what would otherwise be errors in the application of the

52 Extracts from Aristotle, Ethics, taken from Douzinas, 2000, 42.
53 The concept of justice in the work of Aristotle is too complex to consider here. In short, it divides between various forms of justice: justice in distribution, justice in rectification, justice in exchange and mean justice. On these categories of justice see Bostock, 2000; Leyden, 1985. Equity is presented in Aristotle’s work as a flexible counterpoint to these formalistic attitudes to justice.
54 Aristotle, 1955, 198, para 1137a17, x.
55 A philosophically-loaded term in the Aristotelian tradition but here limited to the context of legal justice as provided for by common law and statute.
56 That is, law aims to set down general principles and not to deal with individual cases.
57 Or judge.
58 Aristotle, 1955, 198, para 1137a17, x.
common law to factual situations in which the judges who developed common law principles or the legislators who created statutes could not have intended. It should be noted that English judges do not quote Aristotle as an authority but for the early judges in courts of equity it can be expected that knowledge of Aristotle would have been a part of their education and therefore that those judges are more likely to have had ideas like Aristotle’s as part of the warp and weft of their attitudes to law. For example, Lord Ellesmere held the following in the *Earl of Oxford’s Case*: ‘men’s actions are so diverse and infinite that it is impossible to make a general law which may aptly meet with every particular and not fail in some circumstances’. This, it is suggested, is almost identical to the passages quoted from Aristotle immediately above. Therefore, it would seem reasonable to argue that Aristotle’s ideas have been one of the philosophical ingredients in the casserole that is equity.

What will be important in this discussion will be the extent to which equity can be concerned to achieve justice, or whether there is some context of ‘justice’ (as Aristotle suggests) which is outside the purview of equity. So it is that we will consider whether equity can be remodelled so as to achieve justice (in the terms that that concept is conceived by ancient philosophers like Plato and Aristotle) or in terms of social justice as conceived by modern social theorists. Within this debate are potentially competing claims by human rights law and equity to constitute the principles on which the legal system will attempt to provide for fairness in litigation and in the dissemination of socially-agreed norms.

### 1.1.6 Kant’s notion of equity

The philosopher Immanuel Kant presented the following notion of equity (or ‘*aequitas*’) in his *The Metaphysics of Morals*:61

*Equity* (considered objectively) is in no way a basis for merely calling upon another to fulfil an ethical duty (to be benevolent and kind). One who demands something on this basis stands instead upon his right, except that he does not have the conditions that a judge needs in order to determine by how much or in what way his claim could be satisfied. Suppose that the terms on which a trading company was formed were that the partners should share equally in the profits, but that one partner nevertheless *did* more than the others and so *lost* more when the company met with reverses. By *equity* he can demand more from the company than merely an equal share with the others. In accordance with proper (strict) right, however, his demand would be refused; for if one thinks of a judge in this case, he would have no definite particulars (*data*) to enable him to decide how much is due by the contract.

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59 (1615) 1 Ch Rep 1, at 6.
60 See Morrison, 1995.
61 Kant, 1996, 390, para 6:234. Kant lived between 1724 and 1804. The *Metaphysics of Morals* was published in two parts in 1797, having been in preparation since about 1765. The reference here is to the most easily accessible version of this work in print at the time of writing. The emphases in the quoted passages are taken from the original.
62 It should be noted that the form of company considered is the joint stock company which existed also in English law, before the decision in *Saloman v A Saloman & Co Ltd* [1897] AC 22, whereby the members of the company were partners and the company’s property was held on trust for the members as beneficiaries by the directors of the company: see Hudson, 2000:1, 107.
This conception of equity does not equate entirely with equity in English law. English equity operates by means of judicial diktat so as to require a defendant to act in good conscience and either to refrain from exercising some common law right or to grant some equitable right to the claimant. However, in the example set out by Kant in the passage quoted above, there is no reason to suppose that in legal terms there would be any requirement on the other partners to this trading venture to grant the claimant any greater right than he had agreed to by way of contract. Importantly, in this sense, English equity is not concerned to act fairly between people in the sense that everybody must be left entirely happy and have suffered no loss. It will not seek to be ‘fair’ in the general sense of that word, but instead will tend to deal only with limited categories of act: that is, those acts which are considered in this book. Rather, English equity is concerned to ensure that there has been no unconscionable behaviour but, for example, there is nothing legally unconscionable in making a profit from someone else’s foolishness or naivety, provided that there has neither been any fraud nor undue influence exercised over that naive fool. Therefore, the idea of conscience which we will identify with English equity is one which is commercially aware and which may act differently in cases involving ordinary people acting in their private capacities as opposed to cases involving business people acting at arm’s length from one another.63

So, English equity is not a general means by which people can protest that they have simply lost money or had their hopes dashed if there has not been any action by the defendant which the courts would consider to be blameworthy or unconscionable. What the substantive principles of equity may allow is a claim based on a form of unconscionable behaviour which English equity does recognise. So, for example, a valid claim recognised by the courts might be one brought by a claimant who was induced to invest in a business venture in reliance on a representation made to her by the other partners,64 or if the other partners made a secret profit from the venture not disclosed to the claimant.65 In this sense, in accordance with Aristotle’s view of equity, the equitable court of conscience takes priority over the strict rules of a common law court.66

1.1.7 Equity as a moral virtue

The general principles of equity, in applying the letter of the law to the circumstances of individual citizens, pre-date the medieval Lords Chancellor through whose offices the various claims and actions applied in the modern Courts of Chancery were developed. It is important to recall that neither Aristotle nor Hegel are authorities in

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63 See, for example, the discussion of equity of redemption of mortgages where ordinary people are protected against oppressive contractual devices imposed on them by banks and other mortgagees (Fairclough v Swan Brewery [1912] AC 565) or, on a different note, the avoidance of liability by a defendant based on its commercial status (Polly Peck International v Nadir (No 2) [1992] 4 All ER 769).

64 This may give rise to a claim in proprietary estoppel: see Chapter 13, especially Gillett v Holt [2000] 2 All ER 289.

65 This may give rise to a claim in constructive trust: see Chapter 12, especially Boardman v Phipps [1967] 2 AC 46.

66 Compare, in this regard, the equitable maxim that equity follows the law (in para 1.4.2) and the principle derived from Earl of Oxford’s Case (1615) 1 Ch Rep 1 that equity may nevertheless override common law principles.
English law, nor have their ideas tended to be cited generally or directly by English judges as legal authorities. However, they do provide an intellectual framework into which many approaches to equity can be placed. Study of the philosophy of the ancient Greeks was long a part of the intellectual furniture of the educated classes in England. Therefore, it should come as no surprise that there is some similarity between the writings of Aristotle on justice and the principles developed by the English judiciary over the centuries, even if one does not cite the other explicitly. Consider, for example, the following description of equity provided in 1705 by Lord Chancellor Cowper:

Now equity is no part of the [common] law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is an universal truth; it does also assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions, and new subtleties, invested and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless: and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it.

What is significant about this description of equity is that it considers equity itself to be a moral virtue. This is similar in tone to Aristotle’s approach to equity as a means of preventing any unfairness which might otherwise result from the rigid application of formal legal rules. Perhaps it could be observed that Lord Cowper was speaking in a different age from that in which Lord Nottingham began the formulation of the more technically-minded equity which we know today. However, it should not be forgotten that for many equity jurists, the assertion that its principles are ‘an universal truth’ is a very significant part of the legal concept of equity.

Equity has a long tradition: this book will aim to highlight its remnants in its modern application. The text which follows will consider the modern uses of equity and in particular the core principles of equity to which modern courts still have recourse. The important first task is to consider the birth of those principles of equity before anything else will make any sense.

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67 Cf Jones v Maynard [1951] Ch 572, 575, per Vaisey J, considering Plato’s notion of equality; see para 1.4.8.
68 Lord Dudley v Lady Dudley (1705) Prec Ch 241, 244, per Lord Cowper LC. The same passage is cited similarly in Snell’s Equity, 2, although attributed to Sir Nathan Wright LK.
69 A good example of this tension is the discussion of the speeches of Lords Browne-Wilkinson and Goff in Tinsley v Milligan [1994] 1 AC 340, considered in detail in para 11.4.6, where the former grants an equitable interest in property on a purely technical basis whereas the latter sought to deny such an interest on the basis that the claimant had committed immoral acts and therefore should not be granted equity’s aid.
70 See, for example, a range of writers including Lord Kaims, Principles of Equity, 1778, 41; I Spry, 2001, 1; and McGhee, 2005, paras 1–01 and 1–03.
1.2 THE BIRTH OF EQUITY

1.2.1 The development of two systems: common law and equity

It is impossible to understand any part of English law without understanding English history first. Even the geographic jurisdiction covered by this discussion is the result of history. The genesis of English polity and the structure of its legal system are generally understood to be the result of the Norman invasion of 1066 by which William I seized control of the entire kingdom. The composition of that kingdom had itself been the result of hundreds of years of consolidation of warring tribes. The development of England and Wales as a single legal jurisdiction results from hundreds of years of wars of conquest fought by the insurgent English against the Welsh. Scotland retained its own, distinct legal system despite the Act of Union of 1707. Now, the history of any part of English law is always subject to debate because documentary proof of these matters is difficult to find. Professor Story, in his 19th century American history of equity, describes the court of equity as being ‘an original and fundamental court, as ancient as the kingdom itself’. The role of a ‘chancellor’ is identified in the Roman law tradition as a form of secretary or chief scribe, and as an official used by the Saxon kings in England, and also across the Catholic church in the Roman tradition. However, for present purposes nothing will be gained by casting our historical net too broadly – instead, I shall begin with the events of the 11th century which are generally taken in our understanding of English law and equity as constituting a sufficiently significant breaking point in the historical chain.

The Norman Conquest is therefore vitally important. It forms the point in time at which the Normans introduced an entirely new legal system to England. This law was common to the whole of the kingdom. Arguably, it was the first time that the kingdom had had such a single legal system. Hence the term ‘common law’ was coined to mean this new system of legal principle created by the English courts which was common to the entire realm, rather than being a patchwork of tribal customs applied unevenly. It is thought that the term ‘common law’ itself derives from the ecclesiastical term ‘ius commune’ which was used to describe the law administered by the Catholic church.

Henry II created the courts of King’s Bench to hear matters otherwise brought before the Crown. From these early, medieval courts the principles of the common law began. Rights were founded and obligations created as a result of the decisions of these early courts. There remained, however, a right to petition the King directly if it was thought that the decision of the common law court was unfair or unjust. So, for example, a tenant of land who was unjustly dealt with in the court of his local lord could seek a remedy directly from the King if he was unsatisfied with the decision of the court. For the monarchy this provided an important safeguard against the power of these courts by reserving the ultimate control over the administration of justice to the

71 Story, Equity Jurisprudence, 1st edn, 1835; 13th edn, 1886.
72 Quoting Lord Hobart, ibid, para 40.
73 Ibid.
74 Maitland, 1936, 2.
75 It has been suggested also that the Lords Chancellor sat on the earliest common law courts, and so the jurisdiction of Courts of Chancery was as ancient as any other.
person of the monarch. However, the proliferation of suits that were brought directly before the King eventually required the creation of a separate mechanism for hearing them. Otherwise the King would be permanently diverted from important matters like war, hunting and effecting felicitous marriages.76

During the medieval period the position of Lord Chancellor was created, among other things, to hear those petitions which would otherwise have been taken directly to the monarch. The medieval Lord Chancellor was empowered to issue royal writs on behalf of the Crown through the use of the Great Seal, but gradually acquired power to hear petitions directly during the 13th and 14th centuries. As a result the Lord Chancellor’s discretion broadened, until some lawyers began to comment that it had begun to place too much power in the hands of one person.77 It is also interesting to note that the courts of equity did not necessarily concern themselves with strict legal rules at all but instead concerned themselves with inquiring specifically into the defendant’s conscience: so, for example, Fortescue CJ declared in 1452 that ‘[w]e are to argue conscience here, not the law’.78 Selden is reputed to have said: ‘Equity is a rogueish thing. For [common] law we have a measure . . . equity is according to the conscience of him that is Chancellor, and as that is longer or narrower, so is equity. ’Tis all one as if they should make the standard for the measure a Chancellor’s foot.’79 This statement implied that Lords Chancellor were thought to ignore precedent and to decide what judgments to make entirely in accordance with their own caprice. The Courts of Chancery were typically comprised only of the Lord Chancellor and his assistant, the Master of the Rolls, until 1813 when the first Vice-Chancellor was appointed.80 Since that time the rules of equity, and in particular the rules relating to the law of trusts, have become far more rigidified81 – a tendency which will be considered in detail in this book.82

The Lord Chancellor was a politician first and foremost. In truth, before Robert Walpole became the first Prime Minister in 1741, it was the Lord Chancellor who would have been considered the ‘prime minister’ to the Crown.83 It was the Lord Chancellor who would summon defendants to appear before him to justify their behaviour. This jurisdiction of the Lord Chancellor, which was hotly contested, arose from the range of writs which he would serve even after a court of common law had given judgment: in fact, the Lord Chancellor would be concerned to ensure that the individual defendant had behaved properly and would not be seeking to overturn any rule of the common law. Nevertheless, by the time of James I it was required that the King intercede to decree once and for all that it was the Courts of Equity which took priority.84 The early

76 It should also be remembered that for these Norman kings, England was a distraction from their main business of protecting their lands in what is now France and elsewhere in Europe.
77 For an account of the sort of issues which the office of Lord Chancellor created at this time see Thomas, 1976, 506.
79 Table Talk of John Selden, 1927.
80 There were no official, methodical law reports of Chancery cases before 1557: Maitland, 1936, 8.
81 Croft, 1989, 29.
82 See in particular Chapter 7.
84 Earl of Oxford’s Case (1615) Ch Rep 1.
Lords Chancellor were all clerics: that is, they were bishops who were Keepers of the King’s Conscience.\textsuperscript{85} Latterly, the Lords Chancellor were secular appointments, some of whom were attracted to the post by the profits which were available to the less scrupulous holders of the post. Indeed the Georgian Lords Chancellor used to charge for the award of the positions of Master in the Courts of Chancery. The Earl of Macclesfield, when Lord Chancellor, was convicted by the House of Lords of embezzling court funds in the early 18th century.\textsuperscript{86} We should not allow the irony of a person who sat as the sole judge in the court of conscience accepting ‘presents’,\textsuperscript{87} either from litigants or from people who wished to sit as judges, to escape us. By today’s standards the courts in this period were very corrupt.

The writs that the Lord Chancellor served were processed by his administrative department known as the Chancery.\textsuperscript{88} The Chancery was therefore simply an administrative department concerned with dealing with petitions sent to it by Parliament\textsuperscript{89} and with sending out the monarch’s writs under seal.\textsuperscript{90} Over time, the Lord Chancellor personally began to hear all of the petitions which would ordinarily have been brought before the monarch. From this beginning, the role of the Chancellor expanded, particularly in the person of Cardinal Wolsey in the reign of Henry VIII. The Chancery emerged as a force in parallel to the Court of Star Chamber\textsuperscript{91} particularly during those dark, intolerant days in English history surrounding the Reformation: the former concerned with ordinary equity, and the latter with ‘criminal equity’.\textsuperscript{93} In time, the number of petitions brought before the Lord Chancellor became so numerous that a separate system of courts was created to hear those cases: the Courts of Chancery. It is thought that the Chancery was so called because its first room had a latticed partition known as a ‘cancelli’ – hence, after some minor adaptation of pronunciation and spelling, the term ‘chancery’ emerged.\textsuperscript{94} Another explanation suggested by Coke was that it derived from the term ‘cancellarius’ relating to the cancellation of the King’s letters

\textsuperscript{85} Thomas, 1976.
\textsuperscript{86} See eg, Hibbert, 1957, 126.
\textsuperscript{87} As Baker refers to these payments: Baker, 2002.
\textsuperscript{88} These writs were subject to a subpoena which meant, quite literally, that the defendant was called to appear on pain of suffering a financial penalty for non-appearance.
\textsuperscript{89} In existence between 1485 and 1641 sitting in permanent session – unlike Parliament – and comprising both the Privy Council and the Chief Justices: thereby constituting the most important power base in the country and used to police the opinions and activities of the seditious or the otherwise untrustworthy.
\textsuperscript{90} In Hale’s account, this was the beginning of the Chancery jurisdiction: see Story, 1886, para 42.
\textsuperscript{92} Any number of standard historical works will explain the level of religious intolerance and persecution of individuals through the reigns particularly of Henry VIII, Mary I and Elizabeth I. The Star Chamber seems to have commenced its activities some time between 1347 and 1487. The name ‘star chamber’ arose because this group sat in a chamber in Westminster with stars on the ceiling – hence ‘star chamber’. At the outset this group dealt both with state matters and with pleas for justice. Its membership was the same as the monarch’s Privy Council for most of its history. It is most (in)famous, however, for its activities in the early seventeenth century (most particularly in the 1630s) in persecuting alleged traitors and insurgents, both in trying and in executing them.
\textsuperscript{93} Maitland, 1936, 19, explaining that, fraud apart, Chancery took no interest in criminal matters, whereas Star Chamber had jurisdiction over many criminal and seditious practices.
\textsuperscript{94} Holland, 1945, 17.
It was in these Courts of Chancery that the principles of equity were developed. The position of Lord Chancellor has encompassed the constitutionally confusing roles of House of Lords judge, politically-appointed Cabinet minister and speaker of the House of Lords.

At the time of writing, government policy is to dissolve the position of Lord Chancellor. Whereas the original policy had been to remove the position entirely, the proposals were diluted so that the Lord Chancellor would lose only his judicial functions in the House of Lords and have his powers in that regard transferred to the Lord Chief Justice. The impact of these proposals on the substance of modern equity, which is the concern of this book, is likely to be minimal. The Lord Chancellor has not been involved in the sole administration of equity since the Judicature Act 1873, which is considered below. Instead the ordinary English courts have begun to hear cases dealing with equity. The Lord Chancellor could only have any personal influence on the direction of the law when sitting as part of the judicial committee of the House of Lords.

1.2.2 The continuing distinction between equity and common law

In order to understand English law at the beginning of the new millennium it is vitally important to understand that there used to be two completely distinct sets of courts in England, and therefore two completely distinct systems of law: common law and Equity. This position continued until the enactment of the Judicature Act 1873 which removed the need to sue in common law courts for a common law remedy, and so forth. However, while the physical separation of the two codes of principles into separate systems of courts was removed in 1873, the intellectual separation of the principles remains.

The distinction between equity and the common law was both practically and intellectually significant before the Judicature Act 1873. Before that Act came into full effect in 1875 it was necessary for a litigant to decide whether her claim related to common law or to equity. To select the wrong jurisdiction would mean that the claim would be thrown out and sent to the other court. So, if a claim for an equitable remedy were brought before a common law court, that common law court would dismiss the claim and the claimant would be required to go to the Court of Equity instead. This problem is explained in Dickens’s *Bleak House* in the following way: ‘Equity sends questions to Law, Law sends questions back to Equity; Law finds it can’t do this, Equity finds it can’t do that; neither can so much as say it can’t do anything, without this solicitor instructing and this counsel appearing . . .’ And so it was that the litigant trudged disconsolately between the various courts seeking someone who could deliver judgment on her claim. The result of the Judicature Act 1873 was that the practical distinction between common law and equity disappeared. However, it is vitally important to understand that the intellectual distinction remains. As considered below, there remains

95 Although, in truth, many courts gave effect to principles which will be defined as equitable in this book (ie, to promote fairness) outside the Courts of Chancery even before 1875: Meagher, Heydon and Leeming, 2002, 5.

96 Story, 1886, para 40.
a division between certain claims and remedies which are available only at common law, and other claims and remedies available only in equity.

The principles of equity remain subject to their own logic, and common law claims to *their* own logic, even though all courts are now empowered to apply both systems of rules. In practice, the Chancery Division of the High Court will still hear matters primarily relating to trusts and property law, whereas the Queen’s Bench Division of the High Court will hear traditionally common law issues such as the interpretation of contracts or matters concerning the law of tort. The reason for this allocation of responsibility has to do with the expertise of the judges in each field, but it has resulted in the perpetuation of particular modes of thought in the different divisions of the High Court.

The key point to take from this discussion is that nothing will make sense unless we understand that there is an important distinction to be made between, on the one hand, common law and, on the other, equity. The two systems operate in parallel but must not be confused one with the other.

1.2.3 The impact of the distinction between common law and equity

The main result of the distinction between common law and equity is that each has distinct claims and distinct remedies. Common law is the system which is able to award cash damages for loss. This is the pre-eminent common law remedy, for example, in cases concerning breach of contract or the tort of negligence. On the other hand, a claimant seeking an injunction must rely on equity because the injunction is an equitable remedy awarded at the court’s discretion, in line with the specific principles considered in Chapter 31.

Suppose the following set of facts. Arthur enters into a contract with Sunderland Association Football Club (SAFC) to deliver five footballs to SAFC each Saturday morning before a home game, in return for payment of £1,000 in advance each month. Suppose that SAFC paid £1,000 in advance for delivery in August, but Arthur then refused to make the delivery. Suppose then that SAFC was required to spend an extra £1,000 to acquire those footballs from another supplier. SAFC have two issues to be resolved. First, SAFC will wish to recover from Arthur the £1,000 spent on acquiring footballs from the alternative supplier. Secondly, SAFC will wish to force Arthur to carry out its contractual undertaking or to repay the £1,000 paid in advance.

The first issue is resolved by a common law claim for damages to recover the £1,000 lost in acquiring alternative footballs.

The second issue, however, will be resolved by a claim for specific performance (an equitable remedy) of the contractual obligation to supply footballs. The second claim will be at the discretion of the court. If Arthur had gone into insolvency, it would be unreasonable, and legally probably impossible depending on the administration of the insolvency, to force Arthur to perform the contract. Alternatively, if it could be shown that both parties had been operating under a mistake as to the number of footballs to be provided, it might be that a court would think it unfair to enforce the contract. In such a situation, the equitable jurisdiction gives the court the discretion to award another remedy, even though the ordinary law of contract would suggest that the contract must be enforced once it is validly created. Equity may
decide to order the contract void on grounds of mistake instead and thus rescind it.97

Therefore, it is necessary to make a distinction between common law and equity. The division might be rendered diagrammatically as shown in the table below. The detail of the available remedies is considered below and variously through this book. What is apparent from this list is that it is only in equity that it is possible to receive tailor-made awards of specific performance or rescission in relation to contracts, or to take effective control over property. Common law is organised principally around awards of money in relation to loss by means of damages, or recovery of specific, identifiable property by means of common law tracing, the common law claim of ‘money had and received’ in relation to specifically identifiable payments of money. Therefore, the common law is concerned with return of particular property or with making good loss, unlike the more complex claims and remedies which are available in equity.

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<th>Common law</th>
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<td><strong>Examples of remedies and responses available:</strong></td>
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<td>Money had and received</td>
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1.2.4 The Judicature Act 1873

It is worth observing that before 1813 there was only one full judge for chancery matters: that was the Lord Chancellor. Consequently, it could take an enormously long time for a case to be heard before that one judge. The Lord Chancellor was assisted by the Master of the Rolls, who in time acquired judicial status.98 It was only early in the 19th century that the weight of cases waiting to be heard by these two people led to the appointment of a Vice-Chancellor for the first time, and later to the appointment of

97 As considered in section 11.5.
98 That is, the Master of the Rolls appeared at first to have been merely a clerk, later a judge in chancery matters, and after 1873 a presiding judge within the new Court of Appeal.
two Vice-Chancellors. Through this passage of time, however, the popular conception of equity – and one which accords with the reality – was that the chancery courts were expensive and caused extraordinary delays. Charles Dickens’s novel *Bleak House* was in part a polemic against the antiquated workings of the chancery courts, with its opening metaphor which presented those courts as being clouded in a dense fog, and an exploration of the hardship which endless chancery procedures caused to those people whose homes and wealth were dependent upon judicial decisions. It should also be recalled, as outlined above, that Lord Macclesfield was convicted of embezzlement while acting as Lord Chancellor and Lord Bacon was also found to have accepted ‘presents’ (which today we would consider to be bribes) in office. So, the reputation of the chancery courts was far from spotless.

By 1873 pressure had built to change the court structure. Two particular objectives were pursued: one to fuse equity and common law, and the second to reorganise the courts. Whereas there had previously been many different courts operating separately from one another (including probate courts, the Queen’s Bench common law courts, and so on), the High Court was organised into a single court but with a number of divisions specialising in different areas: such as the Chancery Division, the Queen’s Bench Division, and so on. Briefly put, the fusion of common law and equity took the shape of permitting any court to award common law remedies or equitable remedies without the need to petition one particular court or another. Instead proceedings were simply begun in the High Court. Similarly, the Court of Appeal became a single court (albeit with many judges) as opposed to having a separate Court of Appeal solely for equity matters. The Appellate Jurisdiction Act 1876 retained a right of appeal to the House of Lords. Significantly section 25 of the Supreme Court of Judicature Act 1873 provided:

‘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 common law with reference to the same matter, the rules of equity shall prevail.’

Thus the principles of equity prevail over the principles of common law. The decision in the *Earl of Oxford’s Case* thus received a statutory form. So, in cases like *Walsh v Lonsdale* where there was a clash between a failure to comply with a common law rule as to the proper creation of a lease (which would have held the lease to be unenforceable) and the equitable doctrine of specific performance of contracts, it was held that the equitable principle of specific performance would give effect to the agreement to provide a lease.

The passage of this legislation was not without its own perturbations. This fusion of common law and equity raised concerns from many equity practitioners. Previously, practitioners and judges before the chancery courts had been specialists in equity. Now, or so the argument ran, there would be practitioners and judges dealing with the culturally different principles of equity who had only previously been trained in common law.

99 Bribes of this sort were taken from people wishing judicial office for themselves or some salaried post in the gift of the Lord Chancellor. It is more difficult to divine from the sources whether or not presents were also received from litigants. These were, nevertheless, criminal acts even at the time.

100 A very full account of this history is presented by Meagher, Gummow and Lehane, 2002, 41 et seq.

101 Judicature Act 1873, s 24.

102 (1882) 21 Ch D 9.
Such people referred to this process of fusion of common law and equity as being, in truth, a confusion of common law with equity. Whether or not that has turned out to be the case can only be established from a study of the materials in this book. There has not, it is suggested, been any obvious step-change between the rigidification of the principles of equity under Lord Eldon and the decisions reached after the 1873 Act. Equity clearly functions now on the basis of the doctrine of precedent, but that is not due in particular to the 1873 Act. As considered below the intellectual sophistication necessary to reach judgments on the basis of conscience on a case-by-case basis and yet in accordance with general principles has emerged in the late 20th century and at the beginning of the 21st century, as considered at the end of the next section.

1.3 UNDERSTANDING EQUITY

1.3.1 Equity: an ethical construct

At its root, equity is concerned to prevent a defendant from acting unconscionably (literally, contrary to conscience) in circumstances where the common law would otherwise allow the defendant to do so. To put that point another way, the courts will intervene to stop a fraudster, shyster or wrongdoer from taking advantage of the rights of another person. I rather like the term ‘shyster’ because it is vague enough to cover a broad range of people, from those who may be deliberately committing fraud, to those who are not acting entirely honestly without being fraudulent, and even to cover those who are carelessly acting in a way which would do harm to others. So we will use the term ‘shyster’ for present purposes to cover the perpetrators of all of those various activities.

Equity is therefore interfering to protect some underlying right of the victim either because of a contract with the shyster, or because the shyster has control over some property which is rightfully the victim’s, or because we can assume that the actions of the shyster will affect the victim in the future in some way. In any of these cases, equity will attempt to intervene to stop the shyster from acting unconscionably. It will then impose a remedy which both prevents the shyster’s wrongdoing and compensates the victim for any consequential loss.

Aside from the discussion of the manner in which this form of claim and remedy operates, there is a question as to the underlying purpose behind this code of principles. Evidently, there is an ethical programme at work here. Most civil code jurisdictions (such as France, Italy and Germany) have a different division in their jurisprudence which is aimed at reaching the same results. Typically on the model suggested by Roman law, they will divide between cases to do with consensual actions (akin to English contract), cases to do with wrongs (akin to English torts) and cases to do with unjustified enrichment. It is this final category which operates as a rough comparator to equity. To prevent unconscionable behaviour there is a catch-all category which enables a claimant to claim that something which would otherwise appear lawful on its face should nevertheless be declared void on account of some factor like fraud, mistake or misrepresentation. This distinction is the root of the ideological conflict between traditional trusts law and the law of restitution, considered in detail in the essays at the end of this book.103

103 Section 31.3.
1.3.2 Mapping a distinction between equity and unjust enrichment

The final part of this book – Part 10 *Theoretical Questions Relating to Equity and Trusts* – considers the growing understanding of a principle of unjust enrichment in English law. As equity has been explained here (preventing the shyster from acting unconscionably) it differs in an important way from unjust enrichment. Unjust enrichment is concerned to isolate an enrichment in the hands of the shyster, to decide whether or not it is unjustly received, and then to reverse that enrichment if it is unjust. Importantly, the extent to which the shyster is required to provide recourse to the victim is simply by giving up the enrichment which has been obtained unjustly.

As will be seen in Part 4 *Trusts Implied by Law*, Part 6 *Breach of Trust and Related Equitable Claims*, and Part 9 *Equitable Remedies*, equity goes beyond simply suggesting restitution of unjust enrichment and operates instead in relation to a much wider code of morality through the notion of conscience.

It is suggested in Chapter 31 of this book that restitution on grounds of unjust enrichment operates as a possible explanation of some equitable institutions but does not account for the whole range of equitable remedies present in English law. The House of Lords accepted the existence of a principle of unjust enrichment in *Lipkin Gorman v Karpnale*[^104] and in *Woolwich Equitable Building Society v IRC (No 2)*[^105], but the scope for the operation of that principle has been greatly restricted by the decision of the majority of the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington LBC*[^106] – particularly in relation to the law of trusts. As to which approach constitutes ‘the law’, the answer is that only time will tell, although this book will proceed on the basis of an analysis of the classical understanding of equity, making reference to the principle of unjust enrichment where appropriate.[^107]

1.3.3 Equity acts *in personam*

The core of the equitable jurisdiction is the principle that it acts *in personam*. That means that a Court of Equity is concerned to prevent any given individual from acting unconscionably. The Court of Equity is therefore making an order, based on the facts of an individual case, to prevent that particular defendant from continuing to act unconscionably. If that person does not refrain, she will be in contempt of court. The order, though, is addressed to that person in respect of the particular issue complained of. It is best thought of as a form of judicial control of that particular person’s conscience.[^108]

The study of equity is concerned with the isolation of the principles upon which judges in particular cases seek to exercise their discretion. It is a complex task to find

[^107]: For a fuller discussion of restitution of unjust enrichment, see www.alastairhudson.com/trustslaw/restitutionofunjustenrichment.pdf.
[^108]: The distinction between an *in personam* and an *in rem* action in this context is that an action *in personam* in equity binds only the particular defendant, whereas an action *in rem* would bind any successors in title or assignees from the defendant (other than the bona fide purchaser for value of any property at issue).
common threads between different cases in which judges are reaching decisions on the basis of the particular facts before them. Therefore, it is always important for the student to read the leading cases and the anomalous cases in the law reports to understand the reasons why judges have reached particular conclusions.

1.3.4 Roots in trade and in the family

So the question arises: where do the morals underpinning equity come from? They are not morals in an avowedly political, or even an explicitly philosophical sense. Rather, judges are generally careful to talk about ‘legal principle’ as though it were some arena of thought divorced from politics, philosophy and all of the other paraphernalia with which human beings seek to impose order on a chaotic world. Equity, and the trust in particular, has been developed primarily in relation to two contexts: trade and the family.

Trade and equity

The history of the city of London stands as a useful mirror to the development of equity. Having been abandoned when Boudicca razed the Roman city to the ground, it was the Saxons’ development of London (or Lyndwych) as a trading port which saw the city grow in importance again. The Tudors, and in particular Henry VIII, were instrumental in promoting trade between England’s capital city and other trading ports. London continues to flourish as a financial and commercial centre today due in no small part to the experience in such matters of the legal system and its personnel.

Consequently, the common law developed to regulate commercial transactions and so forth. At the same time, equity was required to develop to provide a means of resolving disputes which arose out of that commercial activity but which the common law was not able to manage. Therefore, many of the core principles of equity (considered immediately below) concerned the avoidance of transactions procured by means of fraud etc. The minimisation of fraud has remained a key principle of equity. It has also ensured that equity is less well-developed in areas which do not involve fraud or something akin to it. Much of the more difficult case law in the 1990s considered in detail in this book is founded on situations involving mistakes and misrepresentations which were not properly capable of being described as fraudulent. Equity has had more difficulty in applying its principles to morally ambiguous cases than to straightforward circumstances involving good old-fashioned lying and deceit. Indeed, when considering modern banking transactions it is very difficult to know whether or not a banker who knowingly makes a large profit from the inexperience or dim-wittedness of her counterparty ought to be considered to have acted unconscionably. It is far easier to find that she has acted in bad conscience if she can be proved to have lied rather than simply to have engaged in lawful but sharp business practice.

109 Even though the roots of equity have been traced to major philosophical systems in section 1.1 above.
The family and equity

The other context in which these rules have developed is that of the family. Much of the history of English law has seen one rule for the rich and another for the poor. Quite literally, there were once different courts for rich people and for poor people, so that the working class would not come to know of the imperfections in the characters of their supposed social betters. Many would say that the limited availability of legal aid and the high cost of court proceedings means that, even in the 21st century, there is effectively one law for the rich and another for the rest.\footnote{See Hudson, 1999:2, for a discussion of the modern context of these issues.}

It was these well-to-do families, the very stuff of Jane Austen novels like \textit{Pride and Prejudice}, who sought to use trusts and equity to organise succession to their family fortunes. Typically, wealthy families would arrange marriages between their offspring and then create family trusts to administer the property and dowries of each party to the marriage. The rules of the law of trusts therefore developed as a part of equity to administer these situations.

The House of Lords has raised the question in recent cases as to whether the existing principles of equity and trusts are suitable to cope with the broad variety of life in the modern world. As Lord Browne-Wilkinson expressed his view in \textit{Target Holdings v Redfers}:\footnote{[1996] 1 AC 421, 475.}

\begin{quote}
In the modern world the trust has become a valuable device in commercial and financial dealings. The fundamental principles of equity apply as much to such trusts as they do to the traditional trusts in relation to which those principles were originally formulated. But in my judgment it is important, if the trust is not to be rendered commercially useless, to distinguish between the basic principles of trust law and those specialist rules developed in relation to traditional trusts which are applicable only to such trusts and the rationale of which has no application to trusts of quite a different kind.
\end{quote}

Similarly, Lord Woolf advocated ‘a new test’ in his speech in \textit{Westdeutsche Landesbank Girozentrale v Islington LBC},\footnote{[1996] AC 669.} with the aim of recognising the very particular commercial intentions of the parties to cross-border financial transactions in comparison to the concerns of the litigants in early cases involving trusts law which were typically concerned with family property. The question does have to be asked how well a single stream of equitable principles copes with all of the many kinds of issues which are brought before the courts, ranging from domestic disputes as to ownership of the family home to the resolution of very complex, international banking disputes. Lord Browne-Wilkinson in \textit{Target Holdings v Redfers} suggested that rules concerning breach of trust, which were developed in relation to family trusts, may be inadequate to deal with commercial situations.
Teleological morals – whose conscience?

So where does this moral code of equity come from? The answer is that it has been developed in England in accordance with the doctrine of precedent primarily as a judicial support for open markets and to enforce the wishes of the owners of property who wish to create trusts over them by policing the behaviour of trustees. That bald statement will require justification throughout this book. As outlined at the beginning of this chapter, Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC*\(^{113}\) underlined the focus of the trust on the conscience of the particular defendant in each case. It is important to note that in other cases, such as *City of London BS v Flegg*,\(^{114}\) there are situations in which overarching policy concerns, such as the need to protect a viable market in property which favours the interests of mortgagees, should take priority over the equitable property interests of those who live in such property. Therefore, the moral premises of equity and of property law are typically focused on their end-point: that is, on the practical results of any decision. The application of the applicable remedies therefore see the courts applying backwards from those results, in many cases such that the courts seem to be identifying the conclusion which they want to reach and thinking backwards (or, teleologically) from that point.\(^{115}\) In considering the rules that populate this book, it is important to bear in mind the ideology on which these ideas are founded.

1.4 THE CORE EQUITABLE PRINCIPLES

Equity is based on a series of fundamental principles, which are reproduced here. As drafted they are a collection of vague ethical statements, some more lyrical than others. The 12 propositions set out below are culled, as a list, primarily from Snell’s *Equity*.\(^{116}\) At first blush, it is obvious that they are too vague to be meaningful in the abstract. They do not assert any particular view of the world other than that people should behave reasonably towards one another – hardly an alarming proposition in itself. They are rather like the Ten Commandments both in that they are capable of many interpretations and in that they constitute moral prescriptions for the values according to which people should behave. But they are not to be dismissed as merely lyrical pronouncements, because they are still applied by the courts.

Those principles are as follows:

(a) Equity will not suffer a wrong to be without a remedy.
(b) Equity follows the law.
(c) Where there is equal equity, the law shall prevail.
(d) Where the equities are equal, the first in time shall prevail.
(e) Delay defeats equities.
(f) He who seeks equity must do equity.
(g) He who comes to equity must come with clean hands.

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113 *Ibid*.
(h) Equality is equity.
(i) Equity looks to the intent rather than to the form.
(j) Equity looks on as done that which ought to have been done.
(k) Equity imputes an intention to fulfill an obligation.
(l) Equity acts in personam.

I would also add to that list five further principles which cut to the heart of equity:

(m) Equity will not permit statute or common law to be used as an engine of fraud.\footnote{117}
(n) Equity will not permit a person who is trustee of property to take a benefit from that property \textit{qua} trustee.\footnote{118}
(o) Equity will not assist a volunteer.\footnote{119}
(p) Equity abhors a vacuum.\footnote{120}
(q) A trust operates on the conscience of the legal owner of property.

It is worth considering each of these principles, briefly, in turn. The text which follows will highlight these principles in greater detail.

\subsection{1.4.1 Equity will not suffer a wrong to be without a remedy}

This principle is at the very heart of equity: where the common law or statute do not provide for the remedying of a wrong, it is equity which intercedes to ensure that a fair result is reached.\footnote{121} Equity will intervene in circumstances in which there is no apparent remedy but where the court is of the view that justice demands that there be some remedy made available to the complainant.\footnote{122} Under a trust, as we shall see below, a beneficiary has no right at common law to have the terms of the trust enforced, but the court will nevertheless require the trustee to carry out those terms to prevent her committing what would be in effect a wrong against that beneficiary.

\subsection{1.4.2 Equity follows the law – but not slavishly or always}\footnote{123}

With the introduction of the system of petitioning the Lord Chancellor and the steady development of procedures by which applications could be made formally to the Court of Chancery, there was conflict between the courts of common law and the courts of Equity. That each set of courts applied its own rules in studied ignorance of the rules of the other is indicative of this conflict. Consequently it would have been possible for a court of common law and a Court of Equity to have come to completely different

\footnotetext{117}{Eg, see the discussion in \textit{Rochefoucauld v Boustead} below at para 1.4.18.}
\footnotetext{118}{Eg, see the discussion of \textit{Westdeutsche Landesbank v Islington LBC} in Chapter 12.}
\footnotetext{119}{Eg, see the discussion in Chapter 5.}
\footnotetext{120}{Which is quite possibly why the Chancery courts are so dirty! Eg, see the discussion of \textit{Vandervell v IRC} in Chapter 5.}
\footnotetext{121}{Eg, \textit{Sanders v Sanders} (1881) 19 Ch D 373, 381.}
\footnotetext{122}{\textit{Seddon v Commercial Salt Co Ltd} [1925] Ch 187.}
\footnotetext{123}{\textit{Graf v Hope Building Corp} 254 NY 1, 9 (1930), per Cardozo CJ.}
decisions on the merits of the very same case. Therefore, the question arose as to the priority which should be given to each subject in different circumstances.

It is significant that ever since the personal intervention of James I in the *Earl of Oxford’s Case*, the principles of equity have overruled common law rules. At this time Sir Edmund Coke had argued that common law must take priority over equity. That is possibly a useful isolation of language: the common law has ‘rules’ which are applied in *rigor juris* more mechanically than the ‘principles’ of equity, which are necessarily principles governing the standard and quality of behaviour in a more subtle and context-specific way than abstract legal rules. It is, after all, the very purpose of equity that it enables fairness and principle to outweigh rigid rules in appropriate circumstances.

However, equity will be bound to follow statutes in all circumstances. Given the history of equity as a counterpoint to the common law, it will not typically refuse to be bound by rules of common law unless there is some unconscionability in applying a particular common law rule. For example, general common law rules, such as the rule that only parties to a contract will be bound by that contract, will be observed by equity. This principle that statute will be obeyed does not give the common law supremacy over equity in general terms – rather equity will have priority over non-statutory common law rules, as discussed below.

### 1.4.3 Where there is equal equity, the law shall prevail

In a situation in which there is no clear distinction to be drawn between parties as to which of them has the better claim in equity, the common law principle which best fits the case is applied. So, in circumstances where two people have both purported to purchase goods from a fraudulent vendor of those goods for the same price, neither of them would have a better claim to the goods in equity. Therefore, the ordinary common law rules of commercial law would be applied in that context.

### 1.4.4 Where the equities are equal, the first in time shall prevail

Time is important to equity, reflecting, perhaps, its commercial element. Where two claimants have equally strong cases, equity will favour the person who acquired their rights first. Thus, if two equitable mortgagees each seek to enforce their security rights under the mortgage ahead of the other mortgagee, the court will give priority to the person who had created their mortgage first.

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124 (1615) 1 Ch Rep 1; (1615) 21 ER 485.
125 See *Heath v Rydley* (1614) Cro Jac 335, (1614) 79 ER 286; *Bromage v Genning* (1617) 1 Rolle 368, (1617) 81 ER 540.
126 An excellent expression for which I am grateful to Meagher, Heydon and Leeming, 2002, 6, where those authors also record the view of common lawyers that they had decided that they ‘must not allow conscience to prevent your doing law’, thus illustrating the divide between the common law mentality and the equitable mentality culled in large part from the ecclesiastics who served as Lords Chancellor.
1.4.5 Delay defeats equities

Another example of the importance of time in equity is the principle relating to delay. The underpinning of the principle is that if a claimant allows too much time to elapse between the facts giving rise to her claim and the service of proceedings to protect that claim, the court will not protect her rights. This doctrine of not allowing an equitable remedy where there has been unconscionable delay is known as ‘laches’. Some modern cases have suggested that this doctrine should work on the basis of deciding where the balance of good conscience lies in the light of the delay. Clearly, in any case it will depend on the circumstances how much time has to elapse before the court will decide that there has been too much of a delay.

1.4.6 He who seeks equity must do equity

Another theme in the general principles of equity is that a claimant will not receive the court’s support unless she has acted entirely fairly herself. Therefore, in relation to injunctions, for example, the court will award an injunction to an applicant during litigation only where that would be fair to the respondent and where the applicant herself undertakes to carry out her own obligations under any court judgment. A Court of Equity will not act in favour of someone who has, for example, committed an illegal act.

1.4.7 He who comes to equity must come with clean hands

As a development of this principle of fairness, an applicant for an equitable remedy will not receive that remedy where she has not acted equitably herself. So, for example, an applicant will not be entitled to an order for specific performance of a lease if that applicant is already in breach of a material term of that lease. The principle means that you cannot act hypocritically to ask for equitable relief when you are not acting equitably yourself. It is important to look only to the ‘clean hands’ of the applicant; the court will not necessarily try to ascertain which of the parties has the cleaner hands before deciding whether or not to award equitable relief.

127 Smith v Clay (1767) 3 Bro CC 639; Fenwicke v Clarke (1862) 4 De GF & J 240.
130 Nessom v Clarkson (1845) 4 Hare 97; Oxford v Provand (1868) 5 Moo PC (NS) 150; Lodge v National Union Investment Co Ltd [1907] 1 Ch 300. Cf Tinsley v Milligan [1994] 1 AC 340; Rowan v Dann (1992) 64 P & CR 202.
131 Jones v Lenthal (1669) 1 Ch Cas 154; Evroy v Nicholas (1733) 2 Eq Ca Abr 488; Quadrant Visual Communications v Hutchinson Telephone [1993] BCLC 442: that maxim cannot be excluded by agreement of the parties. Halliwell has misread this footnote to suggest that Jones v Lenthal is being used here as authority for the maxim that he who comes to equity must come with clean hands, whereas it is intended only to refer to authority for the proposition that equitable remedies may be denied to those who have acted inequitably, as is suggested in the text as written: Halliwell, (2004) Conv 439, 442. The identification of that case as a founding influence over this doctrine emerges, eg from Snell, 2005, 98.
132 Coatsworth v Johnson (1886) 54 LT 520; Guinness v Saunders [1990] 2 WLR 324.
1.4.8 Equality is equity

Typically, in relation to claims to specific property, where two people have equal claims to that property, equity will order an equal division of title in that property between the claimants in furtherance of an ancient principle that ‘equity did delight in equality’.133 In common with the discussion of Aristotle’s view of justice and equity, Vaisey J has considered the doctrine of ‘equality is equity’ in the following way: ‘I think that the principle which applies here is Plato’s definition of equality as a “sort of justice”: if you cannot find any other, equality is the proper basis.’134

One early example of this principle in action was in the case of *Kemp v Kemp*,135 in which the court could not divine from the terms of the trust which beneficiary was intended to take which interest and therefore resolved to divide the property equally between them. This principle has been extended in the case of trusts relating to homes by the Court of Appeal to mean that on the breakdown of long-standing marriages, where the parties have dealt with their affairs as though they are sharing all of the benefits and burdens, the parties will receive equal title in the family home.136 However, it should be noted that the courts will typically seek to give effect to a trust settlor’s intentions rather than simply divide property equally if at all possible, because in many situations equal division may be the last thing which the owner of property intended.137

1.4.9 Equity looks to the intent rather than to the form

It is a common principle of English law that the courts will seek to look through any artifice and give effect to the substance of any transaction rather than merely to its surface appearance.138 Equity will not ignore formalities altogether – for example, in relation to the law of express trusts, equity is particularly astute to observe formalities139 – but it will not observe unnecessary formalities.140 As we shall see in Chapter 4, even where the parties do not use the expression ‘trust’ the courts will give effect to something which is in substance a trust as a trust,141 and will strike down trusts which are merely shams.142

1.4.10 Equity looks on as done that which ought to have been done

One of the key techniques deployed by the courts in recent years has been the principle that equity will consider that something has been done if the court believes that it ought

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133 *Petit v Smith* (1695) 1 P Wms 7, 9, *per* Lord Somers LC; see also *Re Bradberry* [1943] Ch 35, 40.
134 *Jones v Maynard* [1951] Ch 572, 575.
135 (1795) 5 Ves 849; (1795) 31 ER 891.
136 See *Midland Bank v Cooke* [1995] 4 All ER 562.
139 *Milroy v Lord* (1862) 4 De GF & J 264.
140 *Sprange v Lee* [1908] 1 Ch 424; *Ranieri v Miles* [1981] AC 1050.
141 See *Paul v Constance* [1977] 1 WLR 527.
to have been done.143 One of the older examples of this principle is that in *Walsh v Lonsdale*,144 where a binding contract to grant a lease was deemed to create an equitable lease, even though the formal requirements to create a valid common law lease had not been observed. The rationale behind equity finding that there was a lease which could be effective was the principle that the landlord was bound by specific performance to carry out his obligations under the contract and to grant a formally valid lease to the tenant. Therefore, it was held that the landlord ought to have granted such a lease. In the eyes of equity, then, the grant of the lease was something which ought to have been done and which could therefore be deemed (in equity) to have been done, with the result that an equitable lease was created.145

1.4.11 Equity imputes an intention to fulfil an obligation

This doctrine assumes an intention in a person bound by an obligation to carry out that obligation, such that acts not strictly required by the obligation may be deemed to be in performance of the obligation.146 For example, if a deceased woman had owed a money debt to a man before her death, and left money to that man in her will, equity would presume that the money left in the will was left in satisfaction of the debt owed to that man. This presumption could be rebutted by some cogent evidence to the contrary, for example, that the money legacy had been promised long before the debt arose.

1.4.12 Equity acts *in personam*

This is a key feature of equity,147 which will be explored in greater detail in Chapter 12 on constructive trusts.148 This jurisdiction will operate on the individual defendant whether that individual is within or outwith the English jurisdiction. As Lord Selbourne stated the matter:

> The courts of Equity in England are, and always have been, courts of conscience, operating *in personam* and not *in rem*; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not . . . within their jurisdiction.149

The focus of a Court of Equity in making a judgment is to act on the conscience of the particular defendant involved in the particular case before it. Therefore, equity is acting against that particular person and not seeking, in theory, to set down general rules as to

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143 Although the principle dates back at least to *Banks v Sutton* (1732) 2 P Wms 700, 715.
144 (1882) 21 Ch D 9.
145 *Re Antis* (1886) 31 Ch D 596; *Foster v Reeves* [1892] 2 QB 255; *Re Plumptre’s Marriage Settlement* [1910] 1 Ch 609.
146 *Sowden v Sowden* (1785) 1 Bro CC 582.
147 See para 1.3.3 above.
148 In relation to personal liability to account for breach of trust (*Royal Brunei Airlines v Tan* [1995] 2 AC 378) as well as in relation to the general jurisdiction of equity to police a person’s conscience (*Westdeutsche Landesbank v Islington LBC* [1996] AC 669).
149 *Ewing v Orr Ewing (No I)* (1883) 9 App Cas 34, 40. Cf *Duke of Brunswick v King of Hanover* (1848) 2 HLC 1; *United States of America v Dollfus Mieg et Cie SA* [1952] AC 318.
the manner in which the common law should deal with similar cases in the future. Of
course, over the centuries, the courts have come to adopt specific practices and rules
of precedent as to the manner in which equitable principles will be imposed, just as
common law rules have developed by means of the application of the doctrine of
precedent. This topic will, in effect, occupy us for much of the remainder of this book.

1.4.13 Equity will not permit statute or common law to be used as an engine
of fraud

While this principle is not strictly part of the list of equitable principles which is
reproduced in the classic books such as Snell’s Equity150 or Modern Equity,151 it does
appear to form the basis for a number of cases in equity (particularly in the 19th
century).152 It is a good explanation of the general operation of equity in relation to
common law and statute. Whereas equity will not usually contradict common law or
statute (it is said), it will act in personam against the conscience of a defendant to
prevent that defendant from taking inequitable advantage of another person.

The best example is probably the secret trust, considered in Chapter 6 below. Secret
trusts arise in situations in which a person making a will has sought to create a trust
without recording that intention or the terms of the trust in the will (hence the expres-
sion ‘secret trust’).153 The Wills Act 1837 requires that the will be treated as containing
all of the terms by which the deceased’s estate is to be distributed. However, where
one of the deceased’s personal representatives (who was informed of that secret
trust by the deceased person) seeks to ignore the terms of the secret trust by relying
on the strict application of the Wills Act, equity will prevent that person from per-
petrating what is effectively a fraud on the intended beneficiary of the property under
the secret trust.154

1.4.14 Equity will not permit a person who is trustee of property to take
benefit from that property as though a beneficiary

As considered in detail below, a trust is created by transferring the common law title
in property to a trustee to hold that property on trust for identified beneficiaries.155
A further fundamental principle of equity is that even though the trustee is recognised
as being the ‘owner’ of the trust property by common law, the trustee is not to be
permitted to take all of the rights in the property in her capacity as trustee. Rather, a
trustee is required to hold the trust property on trust for the beneficiaries under the
terms of the trust. This technique of both enabling and forcing one person to hold
property for another person is a unique feature of English law (and of systems derived
from English law).

152 Rochefoucauld v Boustead [1897] 1 Ch 196; Lyus v Prowsa Developments Ltd [1982] 1 WLR 1044.
154 McCormick v Grogan (1869) LR 4 HL 82.
155 Fletcher v Fletcher (1844) 4 Hare 67.
1.4.15 Equity will not assist a volunteer

The principle that equity will not assist a volunteer occurs frequently in this book. In line with the commercial roots of many of these doctrines, equity will not assist a person who has given no consideration for the benefits which she is claiming. Therefore, someone who is the intended recipient of a gift, for example, will not have a failed gift completed by equity interpreting the incomplete gift to be a trust or some other equitable structure. As will emerge from the discussion of trusts law in Chapter 2, beneficiaries under trusts are the only category of true volunteers who acquire the protection of equity exceptionally if a trust has been created.

1.4.16 Equity abhors a vacuum

In considering rights to property, equity will not allow there to be some property rights which are not owned by some identifiable person. Thus, a trustee must hold property on trust for identifiable beneficiaries, or else there is no valid trust. Similarly, it is generally considered at English law that no person can simply abandon their rights in property – rather, that person retains those proprietary rights until they are transferred to another person. To do otherwise would be to create a vacuum in the ownership of property. The doctrine of resulting trusts can be understood as operating on this basis.

1.4.17 A trust operates on the conscience of the legal owner of property

The most significant of the equitable doctrines is the trust, under which a beneficiary is able to assert equitable rights to particular property and thus control the way in which the common law owner of that property is entitled to deal with it. The trust is considered in the next chapter. As will emerge, the key tenets of the trust are that the legal owner of property will be obliged to hold it on trust for any persons beneficially entitled to it where good conscience so requires: this can be due to an express declaration of trust, or to the imposition of a trust implied by law by the courts. This principle is in line with the earliest reported cases on equity which were concerned to ‘correct men’s consciences’.

1.4.18 Equity and fraud

It would not be an exaggeration to suggest that many of the principles of equity are aimed at the avoidance of fraud, or the avoidance of the results of fraud. Many of the doctrines considered in this book will be orientated around the avoidance of fraud, whether by trustees, or in the doctrine in *Rochefoucauld v Boustead* (considered in detail in Chapter 5), or in the operation of secret trusts (considered in Chapter 6). Lord

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156 Milroy v Lord (1862) 4 De GF & J 264.
157 Vandervell v IRC [1967] 2 AC 291, HL.
159 Earl of Oxford’s Case (1615) 1 Ch Rep 1, per Lord Ellesmere.
160 [1897] 1 Ch 196.
Browne-Wilkinson in Westdeutsche Landesbank Girozentrale v Islington LBC\textsuperscript{161} set out his view that the operation of the trust centres on the prevention of any unconscionable (as opposed to strictly ‘fraudulent’) act or omission. The notion of fraud here is different from that under, for example, the tort of deceit.\textsuperscript{162} This indicates the increasing breadth of equitable doctrine beyond the category simply of straightforward fraud. Fraud remains difficult to prove, attracting a high standard of proof, and many actions which we may consider worthy of censure will not necessarily be fraudulent. So equity developed the canons of so-called ‘constructive fraud’ to cover situations in which there was not normal fraud but there were acts tantamount to fraud – an example of which is the exertion of undue influence on a person to procure their agreement to a contract.\textsuperscript{163}

Nevertheless, the doctrine in Rochefoucauld v Bousted\textsuperscript{164} is instructive in this regard. The doctrine is simply stated: statute and common law shall not be used as an engine for fraud. For example, if a rule of the common law were to state that no transfers of lollipops were to take place after 1 January 2001, but I knew full well that I had entered into a binding contract with X under which X paid me £1,000 on 31 December 2000 so that I would transfer my lollipop to him, it would be a fraud on X for me to seek to rely on the statute to allow me to keep my lollipop and X’s £1,000. Under another principle of equity, the equitable interest in that lollipop would transfer automatically to X at the moment at which our contract was formed.\textsuperscript{165} In these ways equity precludes me from relying on the fruits of my dastardly behaviour even though the common law or statute may permit me to do so. Equity operates to achieve a higher form of justice than that sought by the common law in individual cases. What is important is to understand the philosophy which underpins the activation of equity in such circumstances. That discussion is introduced in the following section.

1.5 PLACING EQUITY IN CONTEXT

1.5.1 The development of equity over time under the steerage of different judges

There are two general approaches to equity as a subject, as will emerge during the course of this book. The first view, typically held by those who have been schooled in the practice of chancery courts, is that equity possesses a laudable flexibility predicated on an understanding of equity’s subtle principles: people who subscribe to this view consider that equitable discretion is a positive thing. The second view, typically held by those who have been schooled in the common law tradition rather than equity, is that equity’s flexibility can lead to irrational and random decision-making and that equity would be better if it was reorganised so as to make it more akin to common law with its more rigid and more predictable rules. It is suggested that neither of these views has any complete claim to truth and that both of these views suggest mere caricatures of equity.

\textsuperscript{161} [1996] AC 669.
\textsuperscript{162} Derry v Peek (1889) 14 App Cas 337.
\textsuperscript{163} Barclays Bank v O’Brien [1993] 4 All ER 417, considered in Chapter 20.
\textsuperscript{164} [1897] 1 Ch 196.
\textsuperscript{165} Walsh v Lonsdale (1882) 21 Ch D 9. See now Neville v Wilson [1997] Ch 144, which explains this principle on the basis of constructive trust.
and of common law whereas in truth, both doctrines have elements of rigidity and elements of flexibility. As will emerge through this book, there are many principles of trusts law which resemble rigid common law doctrines – for example the requirements of certainty in the creation of an express trust – and there are others which appear to be based on broad judicial discretion but which are in truth predicated on a detailed understanding of the underlying principles – for example in areas such as equitable estoppel and common intention constructive trusts. A very clear history of equity is presented by Professor Baker and an excellent, if older, history presented by Professor Story. What follows here is a potted account of some of that history which will give us a flavour of the background to the discussion to follow in this book.

Through equity’s history, then, there have been judges who have been enthusiasts for a broadly discretionary equity and judges who have scorned it. The most obvious example of this division of opinion arose in the *Earl of Oxford’s Case* which is the first case in the official reports of chancery cases. In that case there was a debate between Coke, the great common lawyer and chief justice of the King’s Bench, and Lord Ellesmere, the then Lord Chancellor, as to whether it was the common law courts or the courts of equity which should take priority if both wanted to deliver judgments which contradicted one another. Coke had, for example, taken to releasing prisoners who had been committed by the Lord Chancellor for contempt of injunctions by using the old doctrine of habeus corpus. It was decided by King James I that it was the courts of equity which should take priority, and so Lord Ellesmere delivered his seminal judgment in that case (as quoted in para 1.1) to the effect that the purpose of equity is ‘to correct men’s consciences’. It is important to note that it required the King’s intervention to decide which of the two legal jurisdictions was to take priority.

It was, of course, an odd situation which had permitted two streams of courts to exist in parallel, and therefore in conflict, in the first place. A part of the conflict between the King and the common law courts for some centuries had been whether or not the monarch was entitled to introduce new jurisdictions, such as the ever-expanding jurisdiction of equity and of the court of Star Chamber, or even to intervene in judicial decisions directly. Therefore, the primacy of equity over common law was not simply a technical legal question, it was also a matter of political controversy. It would be the equivalent now of the Queen seeking to reverse a decision of the Court of Appeal or seeking to direct the Court of Appeal which decision to reach: it would be unthinkable in a democratic society and would precipitate a constitutional crisis. Back in the early seventeenth century, at a time when the Catholic King James I had succeeded the Protestant Elizabeth I to the throne – all part of an age-old and bloody conflict between Protestant and Catholic, and only a generation before the religious and political conflict that precipitated the English Civil War – it was a matter of tremendous significance that the common law judges were considered to be subordinate to the decisions of the King’s principal minister, the Lord Chancellor.

After these overtly political events, the history of equity thereafter could be explained

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168 (1615) 1 Ch Rep 1.
as being a history of the differing attitudes of different judges, some of whom were equity enthusiasts and some of whom were equity sceptics.

Sir Heneage Finch, better known as Lord Chancellor Lord Nottingham, is generally credited with bringing a large amount of orderliness to equity in the 17th century. 169 For example, it was Lord Nottingham who developed the principles of perpetuities which prevented devices like trusts from existing in perpetuity: importantly Lord Nottingham’s developments simplified the law on perpetuities which previously had been caught between various different types of ‘contingency’. The two volumes of Lord Nottingham’s Chancery cases, published by the Selden Society, are a record of one man’s determination to regularise the disparate principles of earlier courts. This work was continued by Lord Hardwicke and Lord Eldon, as subsequent Lords Chancellor. Lord Eldon, for example, pronounced 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. 170

This line of thought can be seen right the way into the 20th century where it was regularly suggested that the courts would only activate equitable doctrines if they could be shown to be predicated on clear authority and not simply because they appeared to be ‘just’ or ‘right’ or ‘conscionable’. 171 As is considered below, there is a suggestion that at the end of the 20th century and in the 21st century equity’s heritage as a reservoir of good conscience is nevertheless being reclaimed. However, for present purposes we shall concentrate on equity in the post-Elizabethan period, that is from the 17th century onwards.

At this time there was no systematic reporting of court decisions like there is now. 172 Different court reporters could produce very different accounts of what a judge had said in the course of his judgment. There were very few books on law – and there were certainly many, many fewer books than are available now, and the books which were available were not as painstakingly referenced and researched as modern books. It is thought that the first book concentrating solely on equity was Francis’s Maxims of Equity published in 1727. Consequently, it was difficult for legal principles to develop systematically. Principles therefore developed by reference to vague maxims and half-remembered remarks of earlier judges – indeed it might be a criticism of some legal historians that they attribute too much intellectual prowess to some ancient judges whose decisions often contained little internal consistency and even less relation to

169 Cook v Fountain (1676) 3 Swan 585.
170 Gee v Pritchard (1818) 2 Swans 402, 414.
171 Re Diplock [1948] Ch 465, 481. See Lord Jessel MR in Re National Funds Assurance Co (1878) 10 Ch D 118, 128: ‘This court is not, as I have often said, a Court of Conscience, but a Court of Law’; meaning that courts of equity were bound by principles and precedent just like the common law courts.
172 Although in 1617 Lord Chancellor Bacon did appoint an official reporter to sit at his feet so as to record his judgments.
early cases. Therefore, the work of someone like Lord Nottingham in seeking to regularise legal principle was very significant. Today, of course, we have electronic databases giving access to every decision that is reached by the High Court, no matter how trivial in the grander scheme of things, and there are many textbooks which have organised and categorised the law into readily comprehensible categories. How things have changed.

Nevertheless, equity is constantly in flux, and constantly being developed. On the question of the level of reverence which we should accord to ancient precedents, Sir George Jessel MR in the Court of Appeal in 1880 said the following:\textsuperscript{173}

\begin{quote}
It must not be forgotten that the rules of Courts of Equity are not, like the rules of the Common Law, 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. . . . We can name the Chancellors who first invented them, and state the date when they were first introduced into Equity jurisprudence; and, therefore in cases of this kind, the older precedents in Equity are of very little value. The doctrines are progressive, refined, and improved: and if we want to know what the rules of Equity are, we must look, of course, rather to the more modern than the more ancient cases.
\end{quote}

So, here we have a call not to fixate on the heritage theme-park nature of some equity scholarship – instead we must have a gimlet-eyed focus on the modern applications of principle. Nevertheless, tracing some of the fundamental doctrines of equity, such as the notion of conscience, can only be done satisfactorily if one has an eye to history.

As for the ostensibly broad notion of ‘conscience’, back in the 17th century Lord Nottingham preferred to think of it as being a technical question. In \textit{Cook v Fountain}\textsuperscript{174} Lord Nottingham held that:

\begin{quote}
With such a conscience as is only \textit{naturalis et interna},\textsuperscript{175} this court has nothing to do; the conscience by which I am to proceed is merely \textit{civlis et politica},\textsuperscript{176} and tied to certain measures: and it is infinitely better for the public that a trust, security, or agreement, which is wholly secret, should miscarry, than that men should lose their estates by the mere fancy and imagination of a chancellor.\textsuperscript{177}
\end{quote}

So, the idea of conscience was still in play but it was not a ‘conscience’ as that term was ordinarily understood; instead the form of conscience with which Lord Nottingham was concerned was a conscience that is a strictly legal and civil concept as opposed to a religious, moral or philosophical notion. This determined march towards regularisation of equity was very different from the attitudes of judges from earlier

\begin{footnotesize}
\begin{enumerate}
\item Re Hallett’s Estate (1880) 13 Ch D 696.
\item (1676) 3 Swan 585, 600.
\item That is, ‘arising naturally’ and ‘internal’.
\item That is, concerning ‘civil law matters’ and ‘political matters’.
\item This is a reference to Selden’s jibe that the principles of equity in their application seemed to change from Chancellor to Chancellor much as the length of his foot would vary from Chancellor to Chancellor: \textit{Table Talk of John Selden}, ed Pollock, 1927, 43.
\end{enumerate}
\end{footnotesize}
centuries who had concerned themselves solely with inquiring into the defendant’s conscience, such that Fortescue CJ had declared in 1452 that ‘[w]e are to argue conscience here, not the law’.\(^{178}\) So, Lord Nottingham held that a contract would not be rectified where it would be conscionable to do so because it was ‘binding in conscience but not in equity’: meaning that the two ideas, a general moral conscience and the technical rules of equity, were different things.\(^{179}\)

Later judges also took as their goal the corralling of equity into more rigid rules. So, Lord Eldon hoped that he had introduced order and predictability to equity in his work as Lord Chancellor.\(^{180}\) Indeed, many of the principles which we shall consider in detail in Part 2 of this book relating to the formation of express trusts are still based on decisions of Lord Eldon and the judges of the Court of Appeal in Chancery, such as Turner LJ, in the early 19th century.

At the end of the 19th century, as was discussed in the preceding section, the Judicature Act 1873 rang enormous changes in the interaction between equity and common law. As Professor Maitland expressed matters in his lectures (published posthumously)\(^{181}\) by this time it could not be thought that equity and the common law were antagonistic to one another because equity was dependent upon the existence of common law – in effect, without common law rules on which to pass comment there would not have been equity. One is tempted to respond ‘up to a point, Lord Copper’.\(^{182}\) The history of equity and common law had been forged precisely by the determination of equity to establish itself as a competing jurisdiction within England and Wales, as discussed above, and not simply to carry on as the common law’s shadow. In the modern era perhaps we could consider equity in this fashion. Even in the modern era, however, there are substantive doctrines like the trust, proprietary estoppel, injunctions, and so forth which comprise equity and which are not in any way parasitic on the common law – rather, they exist in their own right.

The first 60 or 70 years of the 20th century saw one trend (arguably among others) towards great rigidity in decision-making. Judges like Viscount Simonds, many of whose judgments we shall study in great detail in Chapters 3, 4 and 5,\(^{183}\) were primarily concerned to look at the drafting of trusts literally and to invalidate trusts which had been imperfectly drafted. Trusts law in particular hardened into a system of rules which were reminiscent of the rigidity of the common law. This tendency is considered in detail in the essay that comprises Chapter 7.

However, the late 20th century saw a liberalising tendency in the decisions of Lord Denning as he dominated the large flow of cases through the Court of Appeal, in his

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\(^{178}\) Mitch 31 Hen VI, Fitz Abr, *Subpnea*, pl 23, cited by Baker, 2002, 108. It should be noted that this opinion was not without its dissenters, however. Many judges in chancery courts considered themselves to be operating on the basis of precedent and in accordance with legal principle as opposed to functioning on a purely case-by-case basis. See the dicta of Blackstone J quoted by Story, 1886, para 18.

\(^{179}\) *Honywood v Bennett* (1675) Nottingham Rep (73 Selden Society) 214.

\(^{180}\) *Gee v Pritchard* (1818) 2 Swan 402, 414.

\(^{181}\) Maitland, 1936.

\(^{182}\) This expression is used by a newspaper editor in Evelyn Waugh’s satirical novel *Scoop* in which that editor dare not disagree explicitly with the newspaper’s proprietor, Lord Copper, and so instead of saying ‘no’ to his patron, the newspaper editor says ‘up to a point, Lord Copper’.

\(^{183}\) For example, *Grey v IRC* [1960] AC 1; *Leahy v Att-Gen NSW* [1959] AC 457; *Oppenheim v Tobacco Securities* [1951] AC 297.
role as Master of the Rolls with the power to decide which cases he heard himself and which judges sat alongside him on the three person panel. When I studied law in the late 1980s and early 1990s many of the then recent decisions I was called upon to read were reversals of Lord Denning’s liberalising doctrines such as ‘the deserted wife’s equity’, promissory estoppel, and the proprietary effect of contractual licences. Lord Denning was perhaps one of the clearest examples of a ‘pure equity’ judge in that he was concerned to achieve ‘fair’ results no matter what the strict legal rules would seem to have required.

Lord Browne-Wilkinson has been presented already in this chapter as the modern judge who reclaimed and re-expressed the place of conscience at the centre of trusts law – a concept which will sustain much of this book. There were other judges who had referred back to trusts law’s reliance on conscience from time to time but at the time that Lord Browne-Wilkinson gave judgment there had been a number of contradictory academic and judicial currents which had suggested different ideas, such as the civilian idea of restitution of unjust enrichment. However, when we consider the full range of Lord Browne-Wilkinson’s judgments in the field of equity – such as his decision in the High Court in Re Barlow\(^\text{184}\) and in the House of Lords in Tinsley v Milligan\(^\text{185}\) – it emerges that he was no woolly-minded moralist, but that he was a pragmatist and, in Tinsley v Milligan, a careful technical thinker when identifying the source of a claimant’s rights as opposed to denying that person a proprietary right because she was coincidentally involved in a criminal act which related at one remove to that property.

By contrast, Lord Goff gave a dissenting speech in Tinsley v Milligan which took the moral high line by suggesting that that claimant could not acquire any rights in property which she had paid for in equity because she had also committed a criminal offence: thus giving effect to an ancient equitable principle that one may not have an equitable remedy if one has acted unconscionably oneself. This view of Lord Goff’s was ironic because it was Lord Goff’s book, titled The Law of Restitution and published first in 1966 with Gareth Jones, which had begun a movement in English law which ultimately argued for a change in direction away from traditional ideas of equity. Lord Goff can be identified in his judgments with a concern to achieve ‘justice’ in the broadest possible sense, for example in his dissenting speech in Westdeutsche Landesbank v Islington\(^\text{186}\) and in Tinsley v Milligan or his speech in White v Jones.\(^\text{187}\) By contrast again, it was Lord Millett who began to fly the flag for the modish principle of restitution of unjust enrichment in the House of Lords, picking up on all of the significant academic trends in the areas of this book which relate to trusts implied by law and breach of trust. The effect of this principle would have been to introduce even greater rigidity to those areas of equity which, even in the modern era, are still typified by their flexibility.

Among judges more recently at the time of writing it is a group of judges whose most prominent member is Lord Walker who are turning the clock backwards towards ideas of giving judgment so as to avoid unconscionability. So, for example, the development of proprietary estoppel by Walker LJ in Jennings v Rice\(^\text{188}\) has signalled a return to

\(^{184}\)[1979] 1 WLR 278.
\(^{185}\)[1994] 1 AC 340.
\(^{186}\)[1996] AC 669.
\(^{187}\)[1995] 1 AC 207.
courts awarding rights in property or to compensation on the basis that that is conscionable. The tendency to understand courts as having a general discretion to make orders, for example requiring disclosure of information relating to a trust fund, has appeared in Lord Walker’s judgment in *Schmidt v Rosewood*. The presence of the former family law academic, Baroness Hale, in the House of Lords is also an intriguing presence for the future.

1.5.2 Equity in a broader context

The most honest approach is to accept that equity, in its English, legal sense, no longer has any single intellectual core in the form of a code or philosophy. Rather, it is something which must be observed in and assembled from the decisions of the Courts of Chancery down the ages: a stream of thought which has been resistant in the main to abstract philosophising. In this sense it does not have an intellectual pedigree of the sort which can be assembled for human rights thinking or for human rights law. Equity is not divined from philosophical foundations; rather, equity is found in the law reports, albeit derived on the basis of case law precedent and the principles set out earlier in this chapter. While that is true of equity up to now, this book will suggest that that is not sufficient for the future. In the notion of conscience mentioned frequently in Chancery decisions by judges like Lord Browne-Wilkinson, it is possible to detect broad parallels with the ideas of Plato and Aristotle. Consequently, it is by reference to this idea of conscience that it might be possible to manufacture an underlying philosophy for equity. The notion of conscience is itself one which can be traced into much ethical philosophy, as I attempt to do in Chapter 32, and it is in that soil that intellectual roots sufficient to cope with the challenges of the 21st century might yet be grown. As yet the courts have been reluctant to explain what is meant by conscience, or how we might understand it as informing all of the principles of equity. Rather equity is comprised of its history rather than any particular ideas.

The outlines of equity’s historical roots have been considered in this chapter. In truth, those historical foundations have much to do with an understanding of equity as merely a reservation of power to the Crown, at the time when Henry II created a new court system, which subsequently devolved in practice to the Lord Chancellor. At the time of writing, the discussion of equity in all of the books has moved beyond any need to consider the ambit of monarchical power – only essays on constitutional law consider the continuing significance of the Royal Prerogative. And yet there is a need to understand the intellectual core of equity as being grounded in this royal power. In searching for any historical core to this jurisdiction we encounter the disputes about the comparative power of the ecclesiastics and the secular lawyers. The creation of the post of Lord Chancellor and the rise of the Tudor Lords Chancellor have far more to do with political expediency than any early Enlightenment drive for a humanist management of claims for effective social justice.

189 [2003] 3 All ER 76.
190 Eg, *Jones v Maynard* [1951] Ch 572, 575, *per* Vaisey J.
191 See section 1.1.
192 See section 32.1.
193 Thomas, 1976, 506.
On the one hand we can be confident that equity exists so as to dispense Solomon’s justice where the common law or statute would act in some way unfairly. On the other hand we might be nervous of equity as a means of permitting judicial legislation beyond the democratic control of Parliament. We are right to be concerned when such norms are developed by an unaccountable and powerful judiciary, even though we may consider many of their judgments to be perfectly desirable in their own contexts. It is in relation to equity that Ronald Dworkin’s idealised judge Hercules would have most difficulty putting his integrity to work in finding the ‘right answer’. Any suggestion that the solution to questions of justice and equity can be decided by reference to some matrix of rule-application is doomed either to failure or to the generation of injustice. But for Hercules, equity does offer the possibility of being sufficiently free to reach the ‘right’ conclusion, and so to do justice between the parties to any particular case in the broadest possible sense.

As considered above, the roots of equity-type thinking are to be found in Aristotle’s and Plato’s discussions of justice. What we are left with by Aristotle’s determination, that circumstances must decide the appropriate rule and that concrete rules cannot always be set out in advance and then applied without pause for reflection, is that the justice of a decision can be evaluated only after the decision is made. As such, equity becomes a conversation in which the judgment is one communication within a larger discourse as to the shape of justice in society.

For this writer, equity is the place in which our society should discuss the ways in which we will provide procedural justice through the courts, as well as in the political system which generates statutory rights before they come to law. Equity should be concerned to ensure equality of outcome in individual cases so that there is fairness between litigants (applied more broadly through the legal system’s web of advice and informal dispute resolution outside courts). Equity has a significant procedural role to play in ensuring that the application of legal rules in individual cases does not allow unfairness. To adopt the words of the great Welsh socialist Aneurin Bevan, equity as a tool of social justice will enable us to ensure that ‘the apparently enlightened principle of “the greatest good for the greatest number” cannot excuse indifference to individual suffering’. Equity forces us to consider the plight of the individual in this complex world and to save that individual from being caught up in the legal machine or exposed to irremediable suffering.

194 Dworkin, 1986.
195 See section 1.1 above.
196 Bevan (1952), 1978.