

# 1

## An Introduction to Equity and Trusts

1.01 The term “equity” is, in a general sense, associated with notions of fairness, morality and justice. It is an ethical jurisdiction, originally of canon law descent.<sup>1</sup> On a more legalistic level, however, “equity” is the branch of law that was administered in the Court of Chancery prior to the Judicature Acts 1873 and 1875.<sup>2</sup> This was a jurisdiction evolved to achieve justice and to overcome the rigours and deficiencies of the common law.<sup>3</sup>

As Lord Cowper LC rather grandly explained in *Lord Dudley v Lady Dudley*:

“Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is a universal truth; it does also assist the law where it is defective and weak . . . and defends the law from crafty evasions, delusions, and new subtleties intended as 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 law. Equity therefore does not destroy the law, nor create it, but assists it”.<sup>4</sup>

Although an ethos of conscience pervades this aspect of the law, equity never bestowed a totally unfettered jurisdiction on the Court of Chancery to do what was fair in the settlement of a dispute.<sup>5</sup> Embodying aspects of ecclesiastical law and Roman law, equity developed and gradually emerged as a distinct body of law. In time, the system became as hidebound by rules and principles as its common law counterpart.<sup>6</sup>

<sup>1</sup> See generally, H. Coing, “English Equity and the *Denunciatio Evangelica* of the ‘Canon Law’” (1955) 73 L.Q.R. 223.

<sup>2</sup> Equity was, as Lord Neuberger MR noted in his Keating lecture (delivered at Lincoln’s Inn on 19 May 2010) entitled “Equity, ADR, Arbitration and the Law: Different Dimensions of Justice”, para.30, “the common law’s twin administered by the Court of Chancery, its jurisdiction arising from the prerogative of grace”. This is available at <http://webarchive.nationalarchives.gov.uk/201311202154599/http://judiciary.gov.uk/media/speeches/2010/speech-lord-neuberger-19052010> [Accessed 14 April 2017].

<sup>3</sup> As Lord Neuberger MR observed in his lecture “Equity, ADR, Arbitration and the Law: Different Dimensions of Justice”, 19 May 2010, para.31, “Equity arose as a second doorway to justice as a consequence of defects, weaknesses and limits in the common law”. It was fashioned so that “the justice system could properly ensure that substantive justice could be done” (para.30).

<sup>4</sup> (1705) Prec. Ch. 241 at 244.

<sup>5</sup> Sir George Jessel MR explained in *Re National Funds Assurance Co* (1878) 10 Ch. D. 118 at 128 that, “This court is not, as I have often said, a Court of Conscience, but a Court of Law”.

<sup>6</sup> Lord Neuberger MR admitted in his lecture “Equity, ADR, Arbitration and the Law: Different Dimensions of Justice”, 19 May 2010,

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