# Equity: Principles, Practice and Procedure

By Geoff Lindsay SC, 25 November 2003

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I Introduction

1. Over several years before 1973 the second year “Law of Property” course for law students at the Australian National University had acquired a reputation as a bogeyman subject. Successive generations of students had stumbled upon its high failure rates before they had even contemplated course content. They were beaten before they started.

2. That was the problem that the late Professor Douglas Whalan confronted when, in 1973, he became ANU’s lecturer in property law. He tackled the problem in the undergraduate hothouse by cooling the temperature. He encouraged everybody to relax…and, having relaxed, to experience the joy of learning. On 1 April 1973 he delivered an entire lecture on the profound ramifications of a non-existent Law Reform Commission Report that had recommended, he said, that the archaic concept of “fee simple” be abolished. He was a natural born teacher.

3. For many practising lawyers the study of Equity still awaits a Professor Whalan. Equity is not everywhere taught as a separate subject. It is at times hidden away as ancillary to other subjects, such as property law. As great as they are, leading Equity texts, and the judgments upon which their analyses are based, appear often to glory in the esoteric and distinctions which, if not obscure, are elusive.

4. That is no less so because, in the years since Owen Dixon in Parker v The Queen (1963) liberated Australian jurisprudence from the self-imposed shackles of blind adherence to English precedent, the Australian legal system has stridently embraced independence of thought. Having determined that there is such a thing as “the common law” for Australia, the High Court of Australia has set about defining its content. Inevitably, in the search for “principle” in the Equity arena there have been tensions between those actively searching for “unifying concepts” (such as Mason CJ and Deane J) and those (such as Gummow J) for whom the genius of Equity is its intellectual resistance to such concepts and its defiance of systemization.
5. The object of this paper is not to repeat what can be found in standard Equity texts, but
to encourage readers to look to those texts; to provide guidance on how to read the
texts; and, perhaps, to provide information (or, at least, insights to Equity practice) that
are not readily found there. The paper is predicated upon an opinion (not novel) that
even a summary, practical guide to the Equity jurisdiction must be informed by an
understanding of its history and the philosophical tensions that define both its content
and the manner of its exercise.

6. For any reader who doubts the practical importance of an understanding of the history of
Equity, and its philosophical foundations, the recent judgments of the High Court of
Australia in Tanwar Enterprises Pty Ltd v Cauchi [2003] HCA 57; 77 ALJ 1853; 21 ALR
359 and Romanos v Pentagold Investments Pty Ltd [2003] HCA 58; 77 ALJR 1882; 201
ALR 399 are required reading. There the Court examined the concept of “conduct
against good conscience” – which it preferred to describe as “unconscientious” rather
than “unconscionable” – in the context of applications for equitable relief against
forfeiture (for breach) of contract. The Court’s emphasis on a need to ground equitable
relief on a finding of unconscientious conduct, rather than a general notion of what would
be a fair result, reflects a deep-seated concern amongst many Equity lawyers about
broad appeals to discretionary justice wherever unfairness can be characterized as
“unconscionable”. There is judicial resistance to the idea that “unconscionable conduct”
is, in Equity, the equivalent of “negligence” at Common Law.

7. For anybody who thinks Equity lawyers lack passion a close examination of Harris v
Digital Pulse Pty Ltd (2003) 56 NSWLR 298 is highly recommended. There the Court of
Appeal, by a majority, held that a punitive award of money cannot be made in Equity, by
analogy with an award of exemplary damages in tort, for breach of a fiduciary duty, at
least (Spigelman CJ held) where the duty arises in the context of a contractual
relationship. The competing judgments of Hayden JA (in the majority) and Mason P (in
dissent) are fine examples of different philosophical approaches to the development of
equitable principles, as is the moderating judgment of the Chief Justice. Echoes of Lord
Eldon (representing “orthodoxy”) and Lord Mansfield (representing “liberalism”) can be
heard more than faintly.
8. The didactic point to be made here is that none of these judgments can be fully appreciated, if understood, without a thorough grounding in the history and philosophy of the Equity jurisdiction inherited from England; faithfully preserved and developed in New South Wales; and the subject of divergence in the common law diaspora. Buried in law reports, sometimes more revered than read, are profound debates between gifted professionals about law, life and society.

II An Historical Perspective of Equity

(II.1) The NSW Perspective

9. For those practitioners who take the trouble to delve into its history and rationale, the Equity jurisdiction can be a source of fascination and fulfilment.

10. However, not everybody has that turn of mind. In fact, there is historical justification for the view that the legal profession of NSW owes its present strong tradition in Equity to the fact that, in the early years of the Supreme Court of NSW, the Equity jurisdiction was an unwanted, if not illegitimate child.

11. Upon its establishment in 1824 (pursuant to the Third Charter of Justice issued under the authority of the New South Wales Act 1823 (UK)) the Court was a tribunal exercising plenary power. Although the powers of its judges to sit alone (without a Full Bench or assessors) or with a jury were constrained, the Court was empowered to administer both Law and Equity. In the view of some eminent lawyers but, it must be said, not others the Court’s structure was similar to that introduced in England by the Judicature Acts of 1873 and 1875 to permit English judges to administer Law and Equity concurrently. As is common knowledge in Australian legal circles, for a hundred years after 1875 NSW steadfastly rejected the Judicature Act system and held to a court structure in which Law and Equity were administered separately by distinct branches of the Supreme Court of NSW.

12. How, and why, did the Supreme Court of NSW come to reject what is sometimes described – always controversially in New South Wales - as the “fusion” of Law and Equity when almost all the common law world (in England, Australia, Canada, New Zealand and the United States) was for it? How, and why, did New South Wales
lawyers maintain their opposition to the *Judicature Act* system until the commencement of the *Supreme Court Act* 1970 (NSW) in 1972? Why is the echo of that opposition – in passionate debate about “fusion fallacies” – still important to an understanding of the Equity jurisdiction?

13. These questions are too large for anything but a superficial answer in this paper. A solid Equity tradition having been established in the colony between 1837 and 1880, New South Wales practitioners deliberately rejected the *Judicature Act* model when Parliament enacted the *Equity Act* 1880 (NSW). They reaffirmed their adherence to the separate administration of Law and Equity when the *Equity Act* 1901 (NSW) was enacted to consolidate subsequent developments. They successfully resisted antagonism to the NSW system in early judgments of the High Court of Australia. And they outlasted several campaigns for the enactment of legislation on the *Judicature Act* model, until Herron CJ in the 1960s put in train the proposals, and a Law Reform Commission structure, that led to enactment of the *Supreme Court Act* 1970: J.D. Heydon, “The Role of the Equity Bar in the Judicature Era” in Lindsay and Webster, *No Mere Mouthpice* (2002) 71 at 71-72.

14. Perhaps the resilience of Equity in New South Wales owes much to the succession of Equity practitioners who taught the subject at what was, between 1890 and 1971, the State’s only university law school – at the University of Sydney. In a publication to celebrate the Law School’s centenary in 1990 Gummow J attributed much to the fact that throughout the history of the Law School the teaching of Equity had been marked by the involvement of practitioners who later joined the Bench, themselves then to deliver judgments which served to instruct subsequent generations of students. He singled out the enduring contribution of Frederick Jordan, who lectured in Equity from 1909 and maintained a direct link with the University until his death in 1949. As Chief Justice of NSW (1934-1949) Jordan contributed to the sixth and last edition, as he had to earlier editions, of his revised lecture notes, *Chapters on Equity* in New South Wales (1947). With the support of R.P. Meagher QC those “notes” were republished in 1983.

15. Given the pre-eminence of Meagher, Gummow and Lehane’s *Equity: Doctrines and Remedies* (of which Heydon J is a current editor), the presence of Gummow and Heydon JJ on the High Court, the presence of Meagher JA on the NSW Court of Appeal,
and the service of the late John Lehane on the Federal Court of Australia, no Australian practitioner can ignore the Gummow thesis on the strength of the Equity tradition in NSW. Each judge was a product, and producer, of the Sydney Law School tradition.

16. The Gummow thesis is persuasive for the period, post 1890, when the Law School was established. However, it says nothing about the earlier period when, without the Law School, NSW deliberately choose not to embrace the Judicature Acts. To attribute the NSW attitude to innate conservatism – which seems to be a common explanation for what is characterized as “delay” in adopting to the Judicature Acts system – is too easy. It does not explain why a conservative colonial mindset, on this topic, deliberately declined to follow (as it, and other colonies, generally did follow) the mother country’s lead. Part of the answer might be found in the fact that the formative period in NSW’s legal system –the colony was taken, by the Australian Courts Act 1828 (UK), to have received English law as it stood on 25 July 1828 but its engagement with the rule of law, and Equity of a sort, commenced with the First European Settlement in 1788 – coincided with the birth of modern Equity during Lord Eldon’s chancellorships, which came to an end in 1827. However, that does not explain the position in places such as Tasmania, South Australia or Illinois, where a theory based upon conditions prevailing at the time of a colony’s birth provides no consistent story. As fascinating or insightful as such theories might be, history – like Equity – defies neat explanations.

17. It should not be thought, however, that it was only Equity practitioners who supported the preservation of the Equity jurisdiction as a separate phenomenon in New South Wales. The State’s Common Law practitioners themselves were anxious to preserve: (a) the formulary system of pleading that was abolished, in favour of Equity pleadings, by the Supreme Court Act 1970; and (b) the common law system of trial by jury, for which political campaigns had been fought in colonial New South Wales in the name of democracy, and which only began to be restricted in 1965. Perhaps the common lawyers simply did not like Equity work.

18. Francis Forbes, the first Chief Justice of New South Wales (1824-1837), was certainly in that mould. He discouraged the “Chancery” side of the Supreme Court’s jurisdiction. In 1827 he wrote: “In an early stage of society there is comparatively but little occasion for resorting to a Court of Equity”. Resort to “Equity”, which was had (despite doubts about
jurisdiction) to the Supreme Court's predecessor, declined for a decade following the establishment of the Court under Forbes' Chief Justiceship in 1824, and it was only after Forbes' retirement that the concept of an “Equity judge” took root.

19. Upon Forbes’ retirement James Dowling was appointed Chief Justice. He served in that office between 1837-1844. His promotion to Chief Justice created a vacancy on the Court which was filled by John Walpole Willis. Willis J, who arrived in the Colony in 1837, was a controversial judge who lacked a judicial temperament and what would today be described as inter-personal skills. Pushy and abrasive, he was ostracized by his fellow judges on the Court and he created havoc wherever he served in the British Empire. Nevertheless on him, perhaps, lies the mantle of the “Father of Equity” in New South Wales. He was, de facto, the State’s first “Equity Judge”, the first judge of the Court enthusiastic for the Equity jurisdiction.

20. Willis J was a knowledgeable Equity lawyer who came to New South Wales with ambitions to sit in Equity and a reluctance to waste his talents on common law work. Between 1837 and 1840 his fellow judges humoured him to the extent that they acquiesced in him exercising the Court’s Equity jurisdiction alone despite the fact that, strictly, the Court’s jurisdiction in Equity could only be exercised by a Full Bench. In that irregular way he was the Court’s first “Equity Judge”.

21. His abrasive nature served him ill in 1840 when, upon enactment of the Administration of Justice Act 1840 (NSW), the Supreme Court acquired statutory authority for the appointment of a “Primary Judge in Equity” empowered to hear and determine “without the assistance of the other judges...all causes and matters at any time depending... in Equity and coming on to be heard and decided at Sydney”. Dowling CJ, with whom Willis J had had a stormy relationship attended on one occasion by fisticuffs in the Judges’ Robing Room, took it upon himself to be the Court’s first Primary Judge in order to thwart, and to be rid of, the troublesome judge. Willis J was sent to a colonial equivalent of Coventry as the first resident Supreme Court Judge at Port Phillip (Melbourne), then still part of New South Wales. There he managed to discharge his duties in such a manner as to be summarily dismissed. Although the Privy Council subsequently held that his removal from office was legally improper it was, in a practical sense, effective. The Australian court system was rid of him. He was gone from the
country. Occasionally he is acknowledged to have made a substantive contribution to establishment of the Equity side of the Supreme Court but, more often, the focus is on his colourful career.

22. This much is certain. The separate administration of Law and Equity in the Supreme Court of NSW owes something to the common lawyers’ early disdain for Equity, and their desire to live separately and apart from the Colony’s Father of Equity.

23. Willis J is not the only controversial Equity judge in the history of the Supreme Court. Another who repays study is John Fletcher Hargrave, the father of the more famous aviator, Lawrence Hargrave. He served as Primary Judge in Equity between 1865-1881 or thereabouts and, in 1873-1881, as the Court’s first Judge in Divorce. He managed to irritate the Court’s longest serving Chief Justice, Sir Alfred Stephen, to such an extent that Stephen CJ attributed his retirement to a need to be rid of him, and he joined other powerful forces in sustained denigration of the allegedly mad misogynist judge who exercised jurisdiction in Divorce.

24. Nevertheless, through the work of a succession of Primary Judges and (as they were called in and after 1892) Chief Judges in Equity, as well as the other judges who also exercised the Court’s Equity jurisdiction, a strong Equity tradition was established in New South Wales.

(II.2) Historical Differences between Law and Equity

25. Although Australia has long boasted its own eminent Equity judges, not all of whom (Owen Dixon, for example) have come from New South Wales, the stubborn adherence of New South Wales to the separate administration of Law and Equity until 1972, coupled with the subservience of the Australian court system to that of England until the 1980’s, served perhaps to focus attention in New South Wales on the historical origins and traditions of the Equity jurisdiction in England. The English tradition that underpinned, and sustained, the State’s separate “Equity Court” in a hostile local environment required deliberate devotion.

26. A concentrated, but passing, review of the history of English Equity is no mere indulgence. An understanding of the historical origins of the jurisdiction is necessary to an understanding of modern Australian law. Familiarity with famous aphorisms about
the jurisdiction is equally necessary. They are part of the common experience upon which clinical analyses of the jurisdiction are based.

27. Given the functional purpose of this historical review, there is merit (at the risk of oversimplification) in keeping in mind distinctive features of Law and Equity shortly before the time when English law was received in NSW. There were fundamental differences in principles, practice and procedure. Traces of those differences remain.

28. At each point in the narrative, it must be remembered, “procedure” often governs “substantive law” however much abstract theory might intend otherwise. Sir Henry Maine famously wrote in 1886 that “[so] great is the ascendancy of the Law of Actions in the infancy of the Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure….” Building on that statement, F.W. Maitland wrote in 1909 that “[the] forms of action we have buried, but they still rule as from our graves”. 

29. In Common Law courts formulaic “writs” (often claiming damages or property as of right), on settled causes of action coupled with a system of pleadings that developed from oral pleadings, were directed towards the definition of either a single factual issue suitable for determination by a jury or a decisive question of law for determination by the judges. Parties were precluded from giving evidence in their own cause because their evidence was thought to be tainted by self-interest. A cause, once determined by a jury, was generally at an end, although, because the courts formally entered judgments to give effect to jury verdicts, there was a limited opportunity for litigants to move the court, after verdict, for judgment or a new trial.

30. In Chancery a single judge (the Lord Chancellor), assisted by subordinate judicial officers, reviewed the whole of the circumstances of a case with the benefit of a “bill of complaints” and a trail of paper that included elaborate pleadings, discovery, interrogatories and reports of evidence taken (in effect) on commission by the subordinate officers. The Court had a more liberal attitude than the Common Law courts as to who might be a party to proceedings (as was necessary if it was to enforce a wide range of trusts, for example), though it generally required all parties interested in
property the subject of an adjudication to be joined, or represented, in proceedings. The object of the Court’s review was to determine whether conduct of the respondent to a claim was unconscientious and, if so, whether (in the discretion of the judge) relief should be granted to the claimant to compel the respondent (by orders, such as injunctions and orders for specific performance, able to be granted or withheld on terms and enforced by contempt proceedings) to purge his conscience. The Court was empowered to examine parties, on oath, but, because there was only one judge (the Chancellor), he generally determined cases “on the paper” without personally ever having seen a witness. A case, when determined, remained open for further review on motion to the Court.

(II.3) The Historical Origins, and Traditions, of English Equity

31. English legal history can be found in many, or few, volumes. Sir William Holdsworth’s classic *History of English Law* (1903-1956) spans 16 volumes, with an additional volume for a general index. Professor J.H. Baker’s *An Introduction to English Legal History*, now in its 4th (2002) edition, is a modern, readable, readily available single volume text.

32. One of Australia’s greatest legal historians, Sir Victor Windeyer, can still be profitably read in his *Lectures on Legal History*. Now out of print, copies of the Second Edition (revised in 1957) are readily available in second hand bookshops. Although Australian legal history has shifted its focus since Sir Victor wrote, his exposition of the English history that underpins Australian history is succinct, and it is informed by personal familiarity with practice at the NSW Equity Bar absent a *Judicature Act* system.

33. The history of English Equity is sometimes taken back to classical times (with references to Aristotle and the jurisdiction exercised by the Roman praetors) as if an historical continuity – even if only in an underlying philosophy – is there to be found by a discerning reader. Sometimes the origins of Equity are suggested to have been lost in English antiquity because the jurisdiction was always, one way or the other, there to be exercised. Certainly, *Glanvill*, the treatise attributed to Henry II’s justiciar (1180-1189), mentioned equity as an ingredient in the Common Law. That work is regarded as a seminal recognition of the Common Law, administered by the King, as the law and custom of the realm.
34. Mostly, the story is told by the development, ossification and moderation of the Common Law in royal courts (King’s Bench, Common Pleas and Exchequer) that gradually emerged from the King’s Council as, by writs issued under the authority of the King, subjects were commanded to show cause why the King’s judges should not give judgment against them. The King justified his displacement of old feudal courts by claiming to be the fountain of all justice and by intervening in local affairs to prevent a breach of “the King’s peace”. Those twin concepts were explicitly essential to the Writ of Trespass, for example. Subjects seeking royal aid initiated court process by purchasing a writ from the staff of the Chancellor, the King’s secretary. In time the writs issued by the Chancery became formulaic as standard precedents were used to address standard problems. Bureaucracy is ever present. Gradually, the writs came to define the facts that would, if proved, support a remedy at law: a legal right. Each writ carried its own procedural, remedial and evidentiary incidents. What we would call substantive law emerged from the intricacies of the writ system.

35. The strength of that system – the development of known rules through regular procedures – was also a weakness of the Common Law. Without a writ, there was no remedy, no right enforceable at Law. Without moderation, the law could produce outcomes that were unacceptably harsh. Subjects oppressed by the Law sought relief from the King – more especially the Chancellor as delegate of the King – praying his intervention to protect them. Their petitions for relief were documented in the form of a “bill of complaints”, and the Chancellor issued a “subpoena” commanding the person to whom the bill was addressed to attend before the Chancellor for examination of the merits of the petitioner’s complaints.

36. Sir Victor Windeyer tells us that “conscience” was asserted to be the foundation of Equity, as “custom” was appealed to as the basis of the common law. The Chancellor came to be spoken of as the “keeper of the King’s conscience”.

37. As the early Chancellors were clerics they defined their task as one of examining whether a respondent’s conduct was against good conscience and, so, called for intervention. An early classic exposition of this approach is found in Christopher St
Germain’s *Dialogues Between a Doctor of Divinity and a Student of the Common Law* (1523-1532). In the 20th century Professor T F T Plucknet described *Doctor and Student* in the following terms:

“This work is very important for the history of English legal thought and particularly for the ideas which underlie equity. According to St Germain, the philosophical justification for equity was to be found in the canon law which had long accepted the principle that the circumstances of human life are so infinitely various that it is impossible to make a general rule which will cover them all. Equity in some form or other is therefore a necessity if injustice is to be prevented. No amount of ingenuity can devise a system which will do justice by rule, for life is bigger than any generalisation that can be made about it. And so discretion based upon conscience is bound to enter into any legal system which is at all adequate. The principle of equity St Germain declared to be conscience, and this was a typical conception of moral theology and canon law. As Sir William Holdsworth has observed, these Dialogues appeared at a critical moment. As the result of the impending Reformation the long line of ecclesiastical chancellors was soon to end, and if the fundamental notions upon which they had acted were not to be forgotten, then some such book as this was a prime necessity.” [Emphasis added]

38. The appearance of *Doctor and Student* coincided with a change in how the law was recorded. The old *Year Books* ceased to be compiled in 1535. At about the same time “reports” of cases began to be published under the names of distinguished lawyers. Those reports are now mostly available as the “nominate reports” published in the *English Reports*. The availability of law reports, including reports of decisions of successive Lords Chancellor, provided an essential foundation for the development of principles based upon a consideration of precedents.

39. The theological (and, perhaps, some of the moral) imperative underlying the broad discretionary approach of early Chancellors gradually gave way to the development of legal principle as lawyers replaced theologians in the office of the Chancellor. Principles, in time recognized as principles of Equity, came to govern how Chancellors performed their duties. Sir Thomas More (1528-1532) was the first of the lawyers who served in
that office. His immediate predecessor, Cardinal Wolsey (1515-1529), overreached himself in his disdain for lawyers. More made peace between the common law courts and Chancery.

40. An old rhyme, attributed to Sir Thomas More and quoted by the arch common lawyer Sir Edward Coke (1552-1634), illustrates the primary concerns of early chancellors:

“These three give place in court of conscience,
Fraud, accident, and breach of confidence.”

41. More famous (but not recommended as an authority calculated to persuade a modern Equity judge to a broad view of his or her jurisdiction) is the following passage from a compilation of observations attributed to John Selden (1584-1654) published posthumously in 1689:

“Equity in Law is the same that the Spirit is in Religion, what every one pleases to make it, sometimes they go according to Conscience, sometimes according to Law, sometimes according to the Rule of Court. Equity is a Roguish thing, for Law we have a measure, know what to trust to, Equity is according to Conscience of him that is Chancellor, and as that is larger or narrower, so is equity, ‘Tis all one as if they should make the Standard for the measure, a Chancellor’s Foot, what an uncertain measure would this be? One Chancellor has a long Foot, another a short Foot, a third an indifferent Foot. ‘Tis the same thing in the Chancellor’s Conscience”. [Emphasis added]

42. A battle for supremacy between the Common Law courts (championed by Coke as Lord Chief Justice) and Chancery (championed by Lord Ellesmere as Chancellor) culminated, in the *Earl of Oxford’s Case* (1615), in a determination by King James I that, in cases of conflict, Equity prevailed over the Law. The current NSW embodiment of that principle is found in the *Law Reform (Law and Equity) Act 1972* (NSW), section 5, which reads: “In all matters in which there was immediately before the commencement of this Act or is any conflict or variance between the rules of Equity and the rules of common law relating to the same matter, the rules of Equity shall prevail”.

43. Reflecting the rationale of the Equity jurisdiction identified by St Germain, we find the following observations of Lord Ellsmere in the *Earl of Oxford’s Case*: 
"The cause why there is a Chancery is for that men’s actions are so divers and infinite, that it is impossible to make any general law which may aptly meet with every act and not fail in some circumstances. The office of the Chancellor is to correct men’s consciences for frauds, breach of trusts, wrongs, and oppressions of what nature soever they be, and to soften and mollify the extremity of the law”.

44. With the development of principles, grounded in slowly improving law reports, the objective character of “the King’s conscience” progressively asserted itself. Lord Nottingham (1673-1683), traditionally called the “Father of Modern Equity”, recognized in Cook v Fountain (1676) that the conscience of the Chancellor was not his natural or private conscience but a civil and official one.

45. Conventionally, modern Equity is said, however, not to have emerged until the chancellorships of Lord Eldon (1801-1806 and 1807-1827), although substantial steps towards the modern law were taken by Lord Hardwicke (1736-1756) and Lord Thurlow (1778-1783 and 1783-1792). The timing of these developments could, in part, explain differences in American and Australian approaches to Equity. Whereas America’s formative period pre-dated the emergence of modern English Equity, Australia’s post-dated it.

46. Another factor of importance in the same vein might be found in the precedence of Sir William Blackstone’s Commentaries on the Laws of England throughout the British diaspora, especially in America. The first edition was published between 1765-1769. The 8th edition, the last to be published in the author’s lifetime, was published in 1778. By 1854, 74 years after his death, another 15 editions had been published. Blackstone was a common lawyer, not much taken with Equity, who reflected the views of his patron, Lord Mansfield (1705-1793), the Chief Justice of the King’s Bench.

47. Although Mansfield’s attempts to fuse principles of Law and Equity found favour with Blackstone, they were rejected by the generation of English judges who followed him. That generation defined the relationship between Law and Equity in the years following the American Revolution, when the seeds of NSW’s legal system were sown.
48. Even Jeremy Bentham (1748-1832), who generally admired Mansfield, criticised Mansfield’s endeavours, by judicial legislation, to fuse Law and Equity. One has a sense of a fear of a Chancellor’s foot emerging in the Court of King’s Bench. In an allusion to Mansfield Bentham wrote in his Comment on the Commentaries (a commentary on Blackstone’s Commentaries):

“Should there be a Judge who, enlightened by genius, stimulated by honest zeal to the work of reformation, sick of the caprice, the delays, the prejudices, the ignorance, the malice, the fickleness, the suspicious ingratitude of popular assemblies, should seek with his sole hand to expunge the effusions of traditionary imbecility, and write down in their room the dictates of pure and native Justice, let him but reflect that partial amendment is bought at the expense of universal certainty; that partial good thus purchased is universal evil; and that amendment from the Judgment seat is confusion”.

49. Holdsworth’s assessment that Mansfield’s approach to Law and Equity was probably influenced by his Scottish background – in Scotland Law and Equity were administered in the same tribunals – offers a reminder of how fluid, at the establishment of New South Wales’ legal system, were the legal principles and procedures that we subconsciously now assume always to have been axiomatic. Only in 1815, and then experimentally, was trial by jury in civil causes introduced into Scots legal practice. New South Wales was at the same time struggling with similar experiments, albeit in the unique context of a remote convict settlement. It was a small world even in the late 18th and early 19th centuries. We need to guard against thinking otherwise lest, in self-absorption, we overlook insightful connections.

50. Had Lord Mansfield succeeded in achieving some sort of fusion between the principles of Law and Equity, Holdsworth assures us that the history of English law would have taken a different course. The obvious example, from the perspective of a modern Australian lawyer, is what was once called “the law of quasi-contract” but which we now call the law of restitution.

51. “Fusion”, when it did come to 19th century England, came in the form of a series of statutes that culminated in the Judicature Acts of 1873 and 1875. The separate Common Law Courts and Chancery were abolished. They became Divisions of the High
Court of Justice, as the Supreme Court of NSW has Divisions. The Queen’s Bench Division was the equivalent of our Common Law Division; the Chancery Division, our Equity Division.

52. It is probably a mistake to assess the *Judicature Acts* in isolation from reforms earlier effected in the jurisdiction and practice of Chancery; the jurisdiction and practice of the Common Law Courts; and the law of evidence applicable in those Courts. Chancery was empowered, and directed, to determine a disputed legal right or title as a step in protecting it against invasion (1852) and empowered to award damages in addition to or in substitution for an injunction or specific performance (1858). Common Law Courts were empowered to receive evidence from the parties to proceedings (1843), and to allow discovery, grant injunctions and recognize equitable defences (1854). Other procedural changes were introduced piecemeal.

53. Australian lawyers educated by “Meagher, Gummow and Lehane” are unlikely to be surprised by controversy attaching to the question whether the effect of the *Judicature Acts* was (as foreigners and heretics might have it) to “fuse” Law and Equity or (as Australian orthodoxy holds) simply to enable distinct principles of Law and Equity to be administered by a single court. What might come as a surprise, however, is historical evidence that debates about “fusion” have an antiquity that goes back well beyond the 19th century and the likes of Lord Mansfield. In his *Memoirs* Sir John Rolt (a minor but important advocate of the process that culminated in the *Judicature Acts* shortly after his death) supported “fusion” by reference to a legal text advocating fusion in 1656.

54. If we examine different attitudes to Law and Equity across time and space we are, perhaps, driven to conclude that those attitudes reflect philosophical and cultural divisions that are unlikely, ever, to be wholly quiescent - whatever attitudes might, at one time or in another place, be characterized as “orthodox” or “heretical”.

55. Of importance for practising lawyers is the need to be aware of such divisions and to accommodate them with a sense of pragmatism as well as principle.

### III The Meaning of Equity

56. Nobody seems to know how to define the term “Equity”. Those who do know, or should, tell us it cannot be done.
57. In any event, attempts to define the term usually begin, and end, with resort to history. Hence the emphasis on history in this paper.

58. Definitions by reference to institutional history are common. Recognizing the limits of his own definition before resorting to historical exposition, F.W. Maitland wrote in his classic *Equity: A Course of Lectures* (1909):

“*I intend to speak of Equity as of an existing body of rules administered by our courts of justice. But for reasons which you will easily understand a brief historical prelude seems necessary. For suppose that we ask the question – What is Equity? We can only answer it by giving some short account of certain courts of justice which were abolished over thirty years ago. In the year 1875 we might have said ‘Equity is that body of rules which is administered only by those Courts which are known as Courts of Equity’. The definition of course would not have been satisfactory, but now-a-days we are cut off even from this unsatisfactory definition. We have no longer any courts which are merely courts of equity. Thus we are driven to say that Equity now is that body of rules administered by our English courts of justice which, were it not for the operation of the Judicature Acts, would be administered only by those courts which would be known as Courts of Equity.*

This, you may well say, is but a poor thing to call a definition. Equity is a certain portion of our existing substantive law, and yet in order that we may describe this portion and mark it off from other portions we have to make reference to courts that are no longer in existence. Still I fear that nothing better than this is possible. The only alternative would be to make a list of the equitable rules and say that Equity consists of those rules. This, I say, would be the only alternative, for if we were to inquire what it is that all these rules have in common and what it is that marks them off from all other rules administered by our courts, we should by way of answer find nothing but this, that these rules were until lately administered, and administered only, by our courts of equity.” [Emphasis added]

59. The derivative character of legal reasoning is apparent even in this area. Sir Victor Windeyer approached “the meaning of Equity” by quoting, as we have done here, the observations of Maitland. He described “Procedure in Equity” by quoting Story’s influential *Commentaries on Equity Jurisprudence* (first published in America in 1836, with an English edition published in 1884), at the same time noting that Story closely followed Blackstone.
60. Book III of Blackstone’s *Commentaries* dealt with Equity (under the rubric of “Private Wrongs”) in terms that focus on the following passage:

“…wherein (it may be asked) does [the] essential difference [between Law and Equity] consist? It principally consists in the different modes of administering justice in each; in the mode of proof, the mode of trial, and the mode of relief. Upon these, and upon two other accidental grounds of jurisdiction, which were formerly driven into those courts by narrow decisions of the courts of law, - viz. the true construction of securities for money lent, and the form and effect of a trust or second use; upon these main pillars hath been gradually erected that structure of jurisprudence, which prevails in our courts of equity, and is inwardly bottomed upon the same substantial foundations as the legal system which hath hitherto been delineated in these commentaries; however different they may appear in their outward form, from the different taste of their architects.” *Emphasis added*

61. Of this, and in explaining why the views of Mansfield and Blackstone were rejected by the next generation of English judges, Holdsworth wrote:

“The passage from Blackstone [based on Mansfield] which has just been cited shows the fallacy of the premises upon which the views of Mansfield were based. In the first place, both Mansfield and Blackstone ignored the fundamental difference between the point of view of the courts of law and the courts of equity, which is apparent from the very earliest period in the history of the equity administered by the court of Chancery. Equity, from the first, has always acted *in personam*. It always took all the circumstances of the case and the conduct of the parties into consideration; and its remedies were, for that reason, always discretionary. The courts of law gave, as they were bound to give, the judgment to which the parties were entitled, taking into consideration only the facts pleaded and proved by the evidence. They could not travel out of the record. In the second place, both Mansfield and Blackstone underrated the effect upon substantive rules of the working, for several centuries, of the differences ‘in the mode of proof, the mode of trial, and the mode of relief’. These procedural differences had accentuated the fundamental difference between law and equity. They had thus given rise to many substantial differences, which tended to grow more fundamental as the variant effects of the two procedures were worked out in detail”. [Emphasis added]

62. It seems that any definition of the term “Equity” is at best an approximation squarely based upon history, observation of actual practice, and an appreciation of an underlying philosophy.
63. Drawing these threads together Holdsworth wrote as follows of a particular example of Equity technique that is offered here for its illustration of that technique rather than for the contemporary significance or otherwise of any rule of law:

“Just as considerations of conscience made for the flexibility of the principles of equity and their capacity for expansion, so one particular effect of this element of conscience has had the effect of giving to the court of Chancery a wider jurisdiction in respect of foreign land than that possessed by courts of law. From the first equity had acted upon the conscience of the defendant, in order to purge and rectify it. It therefore acted in personam; and though the methods by which the court enforced its decrees were no longer wholly personal, though it could sequester or deliver possession of the property of the defendant as well as imprison him for disobedience to its process, it did not cease to adhere to its original idea that it could proceed against the person of anyone who was within its jurisdiction, and order him to fulfil his equitable obligations. This application of the principle that equity acts in personam, which is at the present day its most important though not the only application, appears in several of Hardwicke’s decision. It was finally sanctioned in the case of Penn v. Lord Baltimore – a suit to establish an agreement as to the boundaries of Maryland and Pennsylvania which was, as Hardwicke said, ‘of a nature worthy of the judicature of a Roman senate rather than of a single judge’. The court, as Hardwicke pointed out, had no jurisdiction to adjudicate on the original right as to the boundaries – that fell under the jurisdiction of the Privy Council. But ‘the conscience of the party was bound by this agreement; and being within the jurisdiction of this court, which acts in personam, the court may properly declare it as an agreement.’ It is true that since this particular agreement was made in England, the parties could sue at common law for the breach of it. But the court of Chancery alone could order it to be specifically performed; and since it could order it to be specifically performed, it could do what a court of law was unable to do – exercise, by means of its jurisdiction over persons within that jurisdiction, a power to give orders as to the disposition of land situate out of its jurisdiction.

Thus the older characteristics of the equitable jurisdiction of the court of Chancery – its dependence upon the law, the manner in which it compelled individuals to use their legal rights and to order their conduct in accordance with the dictates of
conscience, and its consequent action upon the person of the individual litigant were combined with the later characteristics of that jurisdiction – its tendency to develop settled rules and therefore definite bodies of equitable doctrine. The older characteristics, though modified by the later characteristics, helped to correct the rigidity produced by the latter, and so gave equity a capacity for expansion and development which was very necessary if English law was to meet the new needs of a changing age.” [Emphasis added]

64. In time, rights and obligations initially characterized as “in personam” sometimes ripened into rights and obligations in rem, of property. So it was that the law of trusts developed.

65. Whatever the precise meaning of “Equity”, and whether equitable rights and obligations operate in personam or in rem, Maitland assured us in his Equity lectures of 1909 that Law and Equity are not inherently in opposition: “Equity came not to destroy the common law but to fulfil it”.

66. This secular allusion to the New Testament (Matthew, chapter 5 verse 17) might be thought to provide as much comfort to common lawyers as the Christian scriptures provide to devotees of the Old Testament. The Common Law has not been destroyed by Equity any more than the Old Testament by the New, but the terms upon which they co-exist are never entirely settled to the satisfaction of all.

IV The Ambit of Equity Jurisdiction

(IV.1) The Traditional Tripartite Classification System

67. Meagher, Gummow and Lehane deal with the traditional divisions of the equitable jurisdiction into “exclusive”, “concurrent” and “auxillary” jurisdiction by attributing the system of classification to Story’s Equity Jurisprudence (1st ed, 1836), noting that Story might have borrowed it from Fonblanque, and concluding as follows: “The only distinction worth drawing – and this is a distinction which has real consequence – is the distinction between the exclusive jurisdiction, on the one hand, and jurisdiction in aid of legal rights, on the other hand”.
68. Holdsworth says of the tripartite classification system that, although it was implicit in the equitable jurisdiction all through the 18th century it was made explicit by Fonblanque in his Treatise of Equity, the first edition of which was published in 1793-1794. Australian lawyers should, again, note the coincidence between the birth of modern Equity and the birth of our own legal system.

69. Given the half-heartedness with which Meagher Gummow and Lehane embrace the tripartite system, a more emphatic exposition of it in Ashburner's Principles of Equity (2nd ed, 1933) is noted for those interested in pursuing it further. Ashburner was republished in Australia in 1993 with a laudatory "Foreword" from R P Meagher QC. With the writings of Sir Frederick Jordan, it wears the badge of orthodoxy.

70. For present purposes, we may, in passing over them, describe the three heads of Equity jurisdiction in the following terms:

   a. The “exclusive jurisdiction” of Equity was that jurisdiction (such as the enforcement of trusts) that only a Court of Equity, and not a Common Law court, could exercise.

   b. The “concurrent jurisdiction” was said to be jurisdiction exercised in Equity where similar, if not identical, relief might be available in an action at Law. Examples cited were cases of fraud, recovery of money paid under mistake of fact, and some actions for account or contribution.

   c. The “auxiliary jurisdiction” was said to be jurisdiction exercised in Equity in aid of legal rights or to regulate, or facilitate the regular conduct of, proceedings at Law.

71. Although there may never have been universal agreement on the ambit of the “concurrent” and “auxiliary” jurisdictions (and Meagher, Gummow and Lehane correctly question the utility of those heads of jurisdiction in a Judicature Act system) the tripartite classification of Equity jurisdiction serves the didactic purpose of reminding us of differences and similarities in principles applicable, and remedies available, at Law and in Equity.
72. The nature of Equity work is such that close attention needs to be given, in each case, to a precise identification of the jurisdiction sought to be invoked. That generally follows from Equity’s insistence upon an examination of “all the circumstances of the case”.

73. In the days before the *Supreme Court Act 1970* Equity judges would ask counsel to identify the “equity” (as they now enquire of a “cause of action”) relied upon to justify a grant of relief. Although the terminology of old “Equity” might have given way – courtesy of provisions such as *Part 15 rule 26* of the *Supreme Court Rules 1970* (now *rule 14.28* of the Uniform Civil Procedure Rules) – to language reminiscent of the Common Law, the jurisprudential focus of an Equity judge remains substantially the same. There is need to identify a distinct head of jurisdiction as a prerequisite to its exercise. The Court needs to be satisfied that there is “an equity” – a factual setting in which Equity, in accordance with established principles, intervenes to provide a remedy where there is no remedy, or only an inadequate one, at Common Law.

74. The nature of the jurisdiction invoked determines the elements needed to be addressed and the relief (if any) available to a claimant for relief. It is here that Meagher, Gummow and Lehané’s distinction between: (a) Equity’s exclusive jurisdiction; and (b) so much of its auxiliary jurisdiction that pertains that equitable relief granted in aid of a legal right, comes into play.

75. In practice these days, cases are often conducted without any express reference to the “exclusive” or “auxiliary” jurisdictions – knowledge of which is, perhaps, assumed – but advocates ignore the distinction between the two heads of jurisdiction at their peril. It can be decisive.

(IV.2) **Equity’s Exclusive Jurisdiction**

76. For practical purposes it still remains true that damages (the traditional common law remedy) are not, as such, available in Equity’s exclusive jurisdiction. The waters might be muddied if an expansive view is ever taken in Australia of “equitable compensation” (the guiding principles governing which are perceived, by some commentators, to be capable of development in a direction analogous to common law damages) or if *section 68* of the *Supreme Court Act 1970* (the NSW equivalent of *Lord Cairns Act 1858* (UK)) applies but, even then and perhaps especially then, close attention to the jurisdiction
invoked will be required. As an illustration of that point note that, whereas the tendency of Common Lawyers is to assess damages “at the date of breach” (in both contract and tort) because an injured party has a right to compensation for his or her injury at and from that time, the tendency of Equity lawyers is to assess compensation “at the date of hearing” because (in accordance with Equity’s traditional approach) it is necessary to examine all the circumstances of the case, and to do justice between the parties by a discretionary grant of relief, at that time: *ASA Constructions Pty Ltd v Iwanov* [1975] 1 NSWLR 512 at 516-519; *Madden v Kevereski* [1983] 1 NSWLR 305. Cf. *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15; 196 ALR 481 at paragraphs [35]-[50].

77. Leaving aside these areas of debate, a practical point of distinction between the exclusive and auxiliary jurisdictions of Equity is that in the former, unlike in the latter, relief cannot be declined upon the discretionary ground that damages are an adequate remedy to which the claimant for relief should be left. According to traditional Equity jurisprudence, damages are simply not available in cases to which the exclusive jurisdiction applies. A remedy, if granted, must be found in Equity’s armoury of discretionary relief. Thus, for example, a beneficiary of a trust has no right to common law damages against a defaulting trustee but an Equitable order for the taking of accounts may be available, subject to any discretionary defences the trustee might raise.

**(IV.3) Equity’s Auxiliary Jurisdiction**

78. When the auxiliary jurisdiction is invoked the Court’s reasoning process is, or should be, different, and the range of available relief that requires consideration might include Common Law damages. These facts necessarily affect the conduct of a case in at least three ways:

a. A claimant for relief must establish a common law right, either under the general law (in contract, tort or, to the extent that the law of restitution is not in truth equitable in character, restitution) or a statute, in aid of which equitable relief (eg an injunction or an order for specific performance) is sought.

b. Even if the legal right is established the claimant needs to persuade the Court that he or she should not, on an exercise of the Court’s discretion, be left to his or
her remedy in damages at Law. That is, the claimant must establish that damages are not an adequate remedy.

c. Consideration needs to be given to a range of policy objections to a grant of equitable relief in aid of legal rights. For example:

i. There is a debate, sometimes thought to have been resolved in the negative but not in fact definitively resolved, about whether a grant of equitable relief requires that the right to be protected be a “property” right or something akin to such a right. This debate generally arises in connection with cases about voluntary associations, especially religious or political associations (eg *Cameron v Hogan* (1934) 51 CLR 358 at 378 and *Scandrett v Dowling* (1992) 27 NSWLR 483), or injunctions to restrain personal torts such as an assault (eg *Corvisy v Corvisy* [1982] 2 NSWLR 557).

ii. Equitable relief might be refused if a grant of relief is directed towards restraint of commission of a crime and the Court is minded to leave the criminal law to take its ordinary course (eg *Gouriet v Union of Post Office Workers* [1978] AC 435 at 481).

iii. Equitable relief might also be refused if enforcement of relief, whether by way of specific performance or injunction, would require (as might be the case in relation to a contract for personal service) a degree of supervision beyond the Court’s capacity to administer (eg *J C Williamson Ltd v Lukey & Mulholland* (1931) 45 CLR 282; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1).

79. These sorts of policy issues do not arise only in the auxiliary jurisdiction. In one guise or another they might arise in the exclusive jurisdiction (eg in the enforcement of the obligations of a trustee) and be taken into account on a discretionary defence or in the moulding of relief. They might also arise in the context of a statutory power such as section 66 of the *Supreme Court Act 1970*. *Corvisy v Corvisy*, which dealt with restrain
of an assault, provides an example of that. Another example is found in the Court’s reluctance to interfere with freedom of speech by granting injunctions against defamatory utterances. Nevertheless, the auxiliary jurisdiction provides a fertile field for a consideration of policy issues because inherent in the jurisdiction is the existence of a question whether or not a claimant for relief should be left to pursue a remedy (inadequate though it might be) for which the law otherwise provides.

80. Decisions by Equity Judges about what they will, or will not, endeavour to compel by a grant of equitable relief are often driven (although not always expressly explained) by an appreciation of the practical limits of compulsion in a free society; a desire not to bring the Court into disrepute by overreaching its powers of compulsion; and a philosophical predisposition towards an attempt to redress unconscionable conduct by inducing an unconscientious respondent to accept voluntarily, or at least to conform to, the Court’s assessment of what the dictates of good conscience require. Pragmatism and principle combine to influence the Court’s discretionary decision.

81. The jurisdiction to grant Mareva injunctions (or, as we were directed in Cardile v LED Builders Pty Ltd (1999) 198 CLR 380 to call them, “asset preservation orders) is capable of affecting a decision to grant, or withhold, relief in Equity’s auxiliary jurisdiction insofar as it provides an assurance to the Court that, if a claimant for relief is left to a remedy in damages at Law, that remedy will not be frustrated by a disposal of assets from which an award of damages might be satisfied. Patterson v BTR Engineering (Aust) Pty Ltd (1989) 18 NSWLR 319 provides practical guidance to proof of grounds for a Mareva injunction.

82. It is not always easy to assess whether a court can be persuaded to grant relief in the auxiliary jurisdiction. Routine border-line cases include claims for the enforcement of franchise agreements, and contracts for the sale of goods that have qualities of uniqueness and are not readily replaceable on an available market.

(IV.4) A Modern System of Classification

83. In the nature of things no system for the classification of Equity jurisdiction is likely to be so comprehensive as to be free of exceptions and qualifications or to outlive its utility. This needs particular emphasis here because:
84. Much of the work of Equity judges involves the exercise of statutory jurisdiction which, of its nature, might vary from time to time and from place.

85. In New South Wales there has been, for many years, a close association between the Equity and Commercial jurisdictions exercised by the Supreme Court notwithstanding that there is, in traditional terms, a large common law element in commercial causes.

86. With those qualifications, the Equity jurisdiction (most closely identified in New South Wales with the Equity Division of the Supreme Court of NSW) might usefully be classified by reference to:
   
   a. the general law (comprising Equity’s exclusive and auxiliary jurisdictions);
   
   b. the nature of remedies available in Equity under the general law; and
   
   c. the statutory jurisdiction ordinarily exercised by Equity judges.

(IV.5) **Equitable Remedies**

87. The range of remedies available under the general law in Equity reflects: (a) the broad range of cases in which Equity was traditionally called upon to intervene in the administration of the Law; and (b) the discretionary nature of its intervention. Part 5 of Meagher, Gummow and Lehan contains 10 separate chapters, each devoted to a particular remedy, under the general heading “Remedies”.

88. An enumeration of the remedial orders available to an Equity judge does not sufficiently describe the nature, or width, of the judge’s powers unless it allows for the ability of the judge to mould the Court’s relief to do justice between parties who have submitted to its jurisdiction. Relief is “moulded” by a determination to grant or withhold relief on terms. Where the operation of orders is conditional upon a party bringing about a particular state of affairs, in order to obtain the benefit or to avoid the burden of the orders, self-interested parties might be enticed to engage conduct (eg a payment of money to a third party) that they could not be ordered, without difficulty, to undertake. Whereas Common Law judgments tend to assume a simple, standard form (such as an award of damages expressed in a dollar amount), Equity orders are routinely specific to the particular case and they often require complexity of form.
89. Historically, the key equitable remedies are orders for specific performance and injunctions. Spry’s *Equitable Remedies* (6th ed, 2001) reflects that fact in the emphasis with which it deals with them.

90. In practice, the grant of a final injunction or an order for specific performance is routinely accompanied by a declaration of right that sets out in pithy form the foundation upon which injunctive relief or specific performance is ordered. Customarily, injunctions and orders for specific performance are described as relief granted “consequentially” upon the grant of a declaration.

91. Because the Supreme Court is directed (by section 63 of the *Supreme Court Act 1970*) to determine all matters in controversy between parties to proceedings, it is generally reluctant to make declarations without a grant of consequential relief designed to compel parties to give effect to the declaratory determination of their entitlements: *Neeta (Epping) Pty Ltd v Phillips* (1974) 131 CLR 286 at 296 and 307. If there is a simple question in dispute (such as the construction of a contract) and the parties to that dispute formally record that they are agreed on an outcome consequential upon determination of that dispute, the Court might be persuaded to confine its judgment to a declaration, reserving liberty to apply in respect of consequential orders. However, even then it is likely to need to be persuaded as to the utility of a bare declaration.

92. Although Equity lawyers are accustomed to describe orders as “an injunction” or “an order for specific performance” and that terminology is generally reflected in the form of such orders, there might be little (if any) jurisprudential difference between orders that attract those labels. An order that a contract be “specifically performed” might be substantially the same as a mandatory injunction referrable to a particular contractual duty. In deciding whether or not to make such an orders an Equity judge will look to the substance of what is sought to be achieved as well as the form of orders designed to achieve it. An order for the specific performance of a contract of personal service might be no less objectionable (because it requires constant supervision by the Court) if it is recast as an injunction.

93. Having said that, an order for the specific performance of a contract is generally regarded as a manageable form of order (without descending, as might sometimes be necessary, to a series of discrete orders for performance of particular acts) and there is,
because of concerns about the practicality of enforcement, a preference for formulating injunctions in negative (rather than mandatory) terms. As Oliver Wendell Holmes Jnr wrote in the *Common Law* (1881), the life of the law has not been logic but experience. If a party ordered to perform a contract fails to do so, the Court might be able (under section 100 of the *Supreme Court Act* 1970 – now section 94 of the *Civil Procedure Act* 2005) to order that it be performed vicariously. If a party restrained from engaging in particular conduct nevertheless engages in it, the prohibition embodied in a negative form of injunction provides a familiar standard against which to judge the contemnor’s contempt. On the other hand, non-compliance with a mandatory injunction exposes the Court to criticism if, having raised an expectation that something ordered will be done, it cannot achieve that end.

94. An aspiring Equity lawyer in New South Wales should at least be familiar with the jurisdiction of the Supreme Court of NSW:

a. to grant declarations (as to which, see section 75 of the *Supreme Court Act* 1970).

b. to grant injunctions (as to which, see sections 66 and 68 of the Act and Part 28 rule 7 of the *Supreme Court Rules* 1970 – now rule 25.8 of the Uniform Civil Procedure Rules).

c. to make an order for specific performance (as to which, see sections 68 and 100 of the Act; as to the later, now section 64 of the *Civil Procedure Act*).

d. to make orders for the preservation, or division, of property under the supervision of an officer of the Court such as a receiver and manager (pursuant, for example, to section 67 of the Act and Part 28 rules 1, 2 and 7 of the Rules – now rules 25.1, 25.3 and 25.9 of the *Uniform Civil Procedure Rules*) in a variety of cases, including partnership disputes.

95. It is also necessary to bear in mind that because, historically, Equity judges tended to determine the outcome of proceedings “in principle” and then to refer the proceedings to a Master (now, Associate Judge), for accounts, or other ancillary steps, to be taken there might be different expectations, between Bench and Bar, about the ambit of the determination a judge is expected to make. The only way to deal with the possibility of
such a difference in expectations is to raise it expressly and (if need be) to have it dealt with in terms of an order (under Part 31 rule 2 of the Supreme Court Rules 1970 – now rule 28.2 of the Uniform Civil Procedure Rules) for the separate decision of questions of “liability” and “quantification”.

96. Another trap for young players in the Equity jurisdiction arises from a promiscuous use of the expression “liberty to apply” and the fact that even well-drafted final orders might require a degree of curial supervision in their implementation. A reservation of “liberty to apply” is not an invitation to make a fresh substantive claim for relief. If a party has failed to make a claim for relief that could have been made at the final hearing, a reservation of liberty to apply will not enable it to be litigated after judgment. A reservation of liberty to apply in relation to a final judgment or order does not of itself enable the judgment or order to be amended; it is restricted to matters concerning implementation: Dowdle v Hillier (1949) 66 WN (NSW) 155; Phillips v Walsh (1990) 20 NSWLR 206 at 210.

97. Another trap to avoid is the risk of proceeding to a final hearing in Equity (as one might be tempted to do given the urgency attaching to some Equity disputes) without a comprehensive assessment of the causes of action upon which a party might rely. According to the principle generally identified in Australian law by reference to Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589 at 604, the Common Law principles as to estoppel by judgment involve not only res judicata (concerned with the merger of causes of action into a judgment) but also issue estoppel (concerned with matters of fact or law necessarily decided by an earlier judgment), and an estoppel arises not only in respect of causes of action actually litigated but also those which ought reasonably to have been determined by the litigation. A party who rushes to judgment (eg on a claim for an injunction), without having the Court expressly accede (whether by orders pursuant to Part 31 rule 2 of the Supreme Court Rules 1970 or otherwise – now, rule 28.2 of the Uniform Civil Procedure Rules), to a reservation of other available claims to relief (eg a claim to damages), might find that he or she is precluded later from pursuing them.
(IV.6) The Interlocutory Restraining Orders

98. The speed with which a party moves towards a final hearing in Equity proceedings often depends upon whether or not interlocutory orders (eg by way of injunction or for the appointment of a receiver and manager) have been made to preserve the status quo pending a final hearing. A party who has the benefit of a restraining order that limits an opponent’s freedom of action generally has to give an undertaking as to damages (in terms defined, in the Supreme Court of NSW, by rule 25.8 of the Uniform Civil Procedure Rules, formerly Part 28 rule 7 of the Court’s Rules): Commonwealth v John Fairfax & Sons Ltd (1980) 147 CLR 39 at 59; National Australia Bank Ltd v Bond Brewing Holdings Ltd (1990) 169 CLR 271 at 277. A party whose freedom of action is preserved pending a final hearing often has an exposure (under the general law or on an undertaking as to damages) to an award of damages. That fact underlies discussions, usually in the context of an application for an interlocutory injunction, about “the balance of convenience”.

99. On an application for an interlocutory injunction the Court generally has to be satisfied of three things before any injunction will be granted. First, that there is a serious question to be tried (or, as it used to be called and sometimes still is called, a prima facie case): Australian Coarse Grain Pool Pty Ltd v Barley Marketing Board of Queensland (1982) 57 ALJR 425; 46 ALR 398; Kolback Securities Ltd v Epoch Mining NL (1987) 8 NSWLR 533 at 535C-536C. Second, that the balance of convenience favours the grant of an injunction. Third, where damages are an available remedy, an award of damages at a final hearing would be an inadequate remedy.

100. To be satisfied that there is a serious question to be tried, the Court has to be satisfied that the applicant’s claim for final relief is one that the Court has jurisdiction to entertain; that the applicant has standing to make that claim; that the applicant has a “cause of action”; and there is before the Court evidence which, if believed, would support that cause of action.

101. Because disputes of fact can generally only be resolved at a final hearing the Court is generally pre-disposed against allowing cross examination on credit, or entertaining debate about the merits of conflicting evidence about the facts at an interlocutory stage. Cross examination might be allowed only if there is some objective assurance that it
might elicit facts decisive to the interlocutory application, and not merely canvass disputes capable of resolution only at a final hearing.

102. If there is a substantial question about the financial capacity of an applicant for an interlocutory injunction to satisfy an undertaking as to damages in the event that he or she fails at a final hearing, evidence of his or her impecuniosity (and as to the availability or otherwise of security for an undertaking) might be material to the balance of convenience: *Cambridge Credit Corp Ltd v Surfers’ Paradise Forrests Ltd* [1977] Qd R 261.

103. On an ex parte application for an injunction the applicant has a duty to disclose to the Court all material facts, including facts and contentions upon which an absent party (if present) might rely. A breach of that duty can result in any injunction obtained by concealment (deliberate or otherwise) being dissolved: *Thomas A Edison Ltd v Bullock* (1913) 15 CLR 679; *Garrard v Email Furniture Pty Ltd* (1993) 32 NSWLR 662.

(IV.7) **The Statutory Jurisdiction in Equity**

104. Insofar as statutes govern not only the principles to be applied, but also applicable remedies, they defy any attempt to force them into any overarching system of classifying the work routinely undertaken by Equity practitioners. The only generalization that can safely be made about the statutory jurisdiction customarily exercised by Equity judges is that its existence, nature and operation necessarily depend on the terms of the particular statute.

105. Much, but not all, of the statutory jurisdiction is almost administrative in character. If the factual elements of a statutory claim are made out then, although a grant of relief remains discretionary, an order contemplated by the statute will, in the ordinary course, be routinely made.

106. That is not to suggest that cases of that character lack potential for adversarial contest. Rather, the point is that the ambit of dispute is confined (as is an entitlement to relief) by statute. Examples of this class of case include applications under sections 66G, 88K, 89 and 102 of the *Conveyancing Act 1919* (NSW), as well as a myriad of applications under the *Corporations Act 2001* (Cth).
107. Claims to relief under the *Family Provision Act* 1982 (NSW) might not immediately present themselves as having the same character because each case depends for its determination on an assessment of the particular circumstances of a deceased; his or her testamentary dispositions; and the persons to whom or she might be held to have owed a duty to make provision. However, true though that is, even a short exposure to a few FPA applications often suggests to practitioners patterns that can be reproduced in a variety of cases. The Court is rarely interested in (and rarely required to determine) personal grievances that often motivate parties affected by the death of the deceased. A lawyer who recognizes that fact and counsels his or her clients against “higher” expectations, can relatively quickly and effectively focus the Court’s attention on the fundamentals likely to affect a judicial determination: the size of an Estate; the terms of the deceased’s Will and any other expression of testamentary intent; the relationships between the deceased, beneficiaries under the Will or on an intestacy and competing claimants; the personal circumstances and perceived needs (financial and non-financial) of the persons to whom the deceased might have owed a moral obligation to make provision from his or her estate or notional estate; and any prescribed transactions that might support a designation of property as notional estate.

108. If there were allowed but one word of caution to an Equity practitioner about to embark on a case within the Court’s statutory jurisdiction, it would be: Always check the statute – never trust your memory of its provisions!

109. If the indulgence of a supplementary word of caution were permitted, it would be: Formulate your claim for relief, prepare your evidence and present your case explicitly by reference to the terms of the statute upon which you rely.

V Practical Advocacy in Equity

110. In one sense the principles of good advocacy in Equity proceedings are substantially the same as the principles of good advocacy generally. The object of an advocate is to seek to persuade a decision-maker (often, but not always, a judge) to act, or to refrain from acting, in a particular way. In order to be persuasive an advocate must have a clear objective; understand the perspective of the decision-maker and each of the
competing interests that have to be addressed by the decision-maker; and present evidence and submissions in an orderly way. Preparation is generally essential.

111. In another sense, there is something special about advocacy in Equity proceedings. Although advocacy skills can be, and usually are, capable of adaptation from one jurisdiction to another, the techniques employed by an Equity advocate are not necessarily those of the Common Law advocate. There is often a greater emphasis in Equity on the marshalling of documents and legal argument whereas, at Common Law, there is often a greater emphasis on cross examination and findings of fact. Because of the discretionary nature of equitable relief, an advocate before an Equity judge generally needs to endeavour consciously to act (and to be seen as acting) fairly. The rough and tumble of a Common Law trial, and “jury addresses” in lieu of carefully calibrated submissions, are generally out of place in an Equity hearing.

112. Although simplistic views of jurisprudence can be an invitation to error, an insight into Equity advocacy can be obtained by remembering that:

   a. Equity Courts focus on the restraint of unconscientious conduct and the compulsion of performance of duties. As we have seen, this is reflected in Equity’s principal remedies, injunctions and orders for specific performance.

      Courts exercising Common Law jurisdiction provide a contrast. Common Law Courts tend to leave each party freedom of action, allowing the Court’s principal remedy (damages) to be viewed by a bold party as a price to be paid for breach of his or her obligations. Reflecting that philosophy, O W Holmes Jnr wrote in The Common Law (1881): “The only universal consequence of a legally binding promise is, that the law makes the promissor pay damages if [a] promised event does not come to pass. In every case it leaves him free from interference until the time for fulfilment has gone by, and therefore free to break his contract if he chooses.”

   b. Equitable relief is generally discretionary (albeit that a court’s discretion must be exercised judicially) whereas, at least in theory, courts exercising Common Law jurisdiction adjudicate on claims of right. Equitable relief can be moulded (by the imposition of conditions) to meet the particular circumstances of a case whereas
Common Law relief generally cannot (either there is an entitlement to a remedy or there is not).

113. Be careful to remember that Equity’s “discretionary defences” (eg laches and acquiescence, unclean hands) are available only in answer to a claim for equitable relief within the discretion of the Court. They are not available to a claim for Common Law relief (eg damages) that is available, if at all, as of right.

114. In Equity close attention needs to be given to: (a) the source and nature of the jurisdiction sought to be evoked; (b) the facts said to favour a grant of relief in exercise of that jurisdiction; and (c) the possibility that there might be discretionary defences to the claim. This is as close as an Equity lawyer gets to a “cause of action” unassisted, as common lawyers are, by historical derivatives of old style forms of action.

115. Given the variety of orders that can be made in Equity, the importance of establishing a jurisdictional foundation for such orders, and the fact that Equity judges are called upon to examine all the circumstances of a case before granting relief, an Equity advocate needs to be prepared to answer the following questions from the Bench:

   a. What orders do you seek? (Translated, from the judge’s perspective, that is, “What do you want me to do?”)

   b. What is my jurisdiction to make those orders? (Translated, “How can I do what you want?”)

   c. What is your evidence? What are your submissions? (Translated, “Why should I do what you want anyway?”).

116. To be in a position to answer these questions an Equity advocate generally needs:

   a. to work according to the principle, “Work backwards in preparation in order to present the case forward in court”. That is, in preparation an advocate needs to determine at the outset the orders he or she seeks, and to make sure that evidence is available in support of those orders, so that when called upon to present the case persuasively the evidence can naturally unfold towards what appears to be a reasonable, if not inevitable, conclusion.
b. to master the documents, both in terms of evidence (affidavits, witness statements and bundles of documents) and aids to presentation (such as Chronologies, Procedural Summaries and Outline Submissions).

117. As the orderly conduct of Equity proceedings often requires (a) a range of formal documents to be identified and (b) competing forms of orders to be the subject of debate before being settled by a judge, and as there are no “prescribed forms” or readily available precedents for such aids to the presentation of Equity proceedings, the following precedents are offered as attachments to this paper:

a. Attachment “A” is a “Procedural Summary” designed for provision to the Court on the opening of a hearing so that formal documents material to the hearing can be identified and marked off as necessary.

b. Attachment “B” is a draft of “Short Minutes of Orders” together with explanatory notes.

VI Practice Books

118. Since the first edition of Meagher, Gummow and Lehane was published in 1975 a number of Australian Equity texts have been published. They can, and should, be consulted according to personal taste. Useful reference can also be made to Heydon and Loughlan’s *Cases and Materials on Equity and Trusts* (6th ed, 2002) for a clear exposition of the law and contentious issues.

119. The profession is not as well served by pure “practice” books. Nevill and Ashe, *Equity Proceedings with Precedents (NSW)* (1981) remains the first port of call for many practitioners despite the reservations of some about the form of some of the precedents. For practical purposes, it is a safe book upon which to rely; but the correct formulation for an injunction is, “ORDER that the defendant by itself, its servants and agents be restrained…”, not “ORDER that the defendant, its servants and agents be restrained…”.