Traditional Approach and Fusion Theory

The Court of Judicature Acts 1873 fused the administration of law and equity by the creation of High Court of Judicature exercising both law and equity and gave supremacy to equity in cases of conflict. There has been a never-ending debate on whether the Act, should be considered as having effected of the fusion of law and equity.

The orthodox view is that the jurisdiction has been fused but not the system. The changes made by the Judicature Act gave no rise to new cause of action, defence or remedy. The famous statement concerning the relationship of law and equity by Professor Ashburner was the traditional approach or interpretation of the relationship between law and equity. Under the traditional approach, a court exercising jurisdiction in both law and equity was requisite to maintain the separation of equitable doctrine from common law rules.
whereby legal rights remain legal rights, and equitable rights remain equitable rights, though administered by the same court.

Apart from the traditional approach, there are however statements made by some judges to the effect that the system is fused and it is often referred to as the “fusion theory”. This approach believes that the Act codifies law and equity into one. This theory is well contradicting with the traditional approach.

Sir George Jessel in the case of Walsh v Lonsdale said that “there are not two estates as they were formerly, one estate in common law...and an estate in equity...There is only one court, and equity rules prevail in it.” To some, this judgment represents the essence of fusion fallacy while some is of the view that the reasoning does not contradict the traditional approach.

Apart from Sir George Jessel, Lord Diplock is also one of the strongest supporter of the fusion theory. He stated in the case of United Scientific Holdings Ltd v Burnley Borough Council that “the innate conservatism of English lawyers may have made them slow to recognise that by the Judicature Act 1873 the two systems of substantive and adjectival law formerly administered by courts of law and Equity have surely mingled now”. By virtues of the statement made by Lord Diplock, he is implying that the Judicature Act has indeed merged together the substantive law not only the administration part of it.

Lord Simon of Glasdaile also commented on Professor Ashburner’s vivid metaphor whereby he stated that the two streams flowing into one channel must now have a different conclusion. Thought it may take time before the water of the two confluent streams to thoroughly intermixed, there has to be time when the process in complete. Lord Simon was saying that the substantive aspect of law and equity would eventually fused though the process might take some times.

The view was not welcomed by the supporters of the traditional approach who described the attempt to rationalize and incorporate legal and equitable cause of action and remedies as examples of the ‘fusion fallacy’. Fusion fallacy involves the administration of a remedy or the modification of principles in one branch of the jurisdiction. Fusion fallacy is assuming the creation of a new body of law containing elements of law and equity but in character quite different from its components.

2.0 Criticisms Against the Fusion Theory

2.0.1 The Enactment of the Judicature Act and Section 25(11) of the Act.

The enactment of the The Court of Judicature Acts if we were to look at it literally, it shows that the jurisdiction was not fused but only vesting the power of administration under one tribunal, The Supreme Court. The very basic purpose of the act is to amalgamate the superior courts into one Supreme Court of Judicature to overcome the disadvantages in the separate courts system that cause injustices and hardships. Even though The Supreme court was directed to administer both law and equity, the substantive part of equity (the rules) remained distinct from those of law.

In other words, the Judicature Acts fused the administration of law and equity by making obtaining in one court both equitable and legal remedies possible to reduce legal costs but the substantive part of equity and law remains distinct as equity did not replace the law but assisted it by mitigating the rigidities of the law.

In the case of Bank of Boston Connecticut v European Grain and Shipping Ltd, Lord Brandon stated that “the principle that the Judicature Acts, while making important changes in procedure, did not alter and were not intended to alter the rights of the parties.” This statement further illustrates the true existence of the Act as to only amalgamate the procedures but not the substantive parts of law and equity.
Another point to note is that section 25(11) of the Act states that if there were conflict between common law and equity, equity shall prevail. If the common law and doctrines of equity were intended to be fused, such provision would not be inserted as the section foresee the possibility of a conflict arising between the two separate systems. The section illustrates that the intention of the legislation was not to fuse the systems but to enable both the law and equity be administered at the same time in the same Court and that is why there are still possibilities of a conflict to arise because they are not of the same ingredients or same foundation.

The Judicature Act acknowledged the two sets of principles. Equity still is a ‘gloss’ on common law because it illustrates that both law and equity do not mingle but equity only acknowledges the law and provides as a supplement to law where and when it is necessary.

2.0.2 Crossover of Remedies

It is vital to make sure that the common law principles are not mixed up with equitable doctrines or rules as it will lead to confusion and inconsistency. An example of this can be seen in the case of Harris v Digital Pulse whereby exemplary damages which is a common law remedy should not be awarded in a case of breach of fiduciary duty which is an equitable duty though the decision was later reversed on appeal. Another example would be at common law there is no remedy for innocent misrepresentation. In equity, plaintiff may rescind contract in an event of innocent misrepresentation but no remedy of damages. In the case of Redgrave v Hurd, the court used the Act to hold that common law damages were available for innocent misrepresentation because recession available so damages should be too. Based on the decision of the cases, there was uncertainty on the remedies given in each cases and it has lead to confusion. Another prolific case is the case of Hedley Byrne v Heller which criticised for idea that compensation may be awarded against a fiduciary who causes loss due to equitable fraud.

As discussed above, equity is still a gloss on common law, it should only jump in when remedies under the common law is deemed to be inadequate. The relationship is not a mutual relationship or a give-and-take relationship as if a dispute requires equitable doctrine to resolve the dispute, it would mean that the common law was inadequate and there is no need to use or bring in the common law remedies.

In an event whereby justice could not be served via an order of compensation or it is insufficient, remedies under equity such as injunction, specific performance would then be ordered where damages were inappropriate. Equitable remedies are unlike damages as it cannot be claimed as a right. Equitable remedies are granted based on discretion. It should not be given in a situation whereby damages are sufficient.

Incorporation of common law and equity should be done in a more appropriate approach through the
development of common law to incorporate certain principles that were previously under the equitable doctrines. If common law remedies were available for all breaches of equitable duties, we could be in a hot soup full of confusion. For example, exemplary damages may be awarded in cases of breach of contract, simply because the judge feels that it is appropriate to do so even though contract law would not administer such a relief.

2.0.3 Maxims of Equity

Maxims of equity generally are not law but just mere guidelines when making a decision. The maxim of equity which is equity looks to the intent rather than the form, the maxim equity follows the law, will not suffer a wrong without remedy and looks on that as done which ought to be done all support anti-fusion stand and highlighting further distinctions between the law and equity. These maxims illustrate that equity is a gloss to common law and it is not of the same substance with common law.

Equity also are based on the conscience of the party against whom the relief is sought as it in an act in personam which is totally different with common law which operates in rem. This further enhance the fact that they are both two separate systems.

3.0 Fusion Fallacy

It is said that Walsh v Lonsdale promotes fusion fallacy. In my opinion, Walsh v Lonsdale decision indeed promotes fusion fallacy and is against the supposed view of unanimity between law and equity. The Walsh v Lonsdale case which held that the distress in that case was lawful despite there not being a common law lease promotes the idea that the law and equity has been fused substantively as now there is only one lease and there is no distinction between legal and equitable leases. The court further ordered specific enforcement of the lease. This is a perfect example of fusion fallacy.

This case was heavily criticised and a lot of suggestions was made that different approach should have been taken instead and the case was decided wrongly. In the case of Chan v Cresdon, the court decided that an equitable interest is not equivalent to a legal interest. This would mean that the landlord could not enforce the legal right to enforce the guarantee and proves that the approach taken under the case of Walsh v Lonsdale was indeed wrong.

However, it is understandable that the decision was made to ensure justice is done by integrating the use of remedies. However, justice could not be served without uncertainty and consistency. Fusing law and equity substantively would defeat the very purpose of equity which is to complement law and not to replace it or exist in it.

There is no doubt that both law and equity work closely side by side and even perfecting and completing one another but still they remain separate entities.

Sommers J in Elders Pastoral Ltd v Bank of New Zealand stated that “neither law nor equity is now stifled by its origin and the fact that both are administered by one court has inevitably meant that each has borrowed from the other in furthering the harmonious development of the law as a whole.” In my opinion, even without fusing the substantive part of law and equity, the whole legal concept could still be developed harmoniously in ensuring justice is served. Even the step is possible, there is still no urgent call for it and it is better for it to be remained separated.

4.0 Conclusion
It is of the opinion that with reference to various sources that the implementation of the Judicature Acts did not fused common law and equity substantively. It is possible for it to be fused but it is not necessary for it to be so. Equity and law remain two separate and independent systems of law.

The statement made in Ashburner’s Principles of Equity whereby “The two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters” is clear view on the positions of both Equity and the Common Law. Hence, the two separate systems run side by side in the courts to allow Equity to serve as a lubricant to the wheel of justice.

REFERENCES:

1. Cases/Legislation

Bank of Boston Connecticut v European Grain and Shipping Ltd [1989] AC 1056

Chan v Cresdon [1989] HCA 63

Elders Pastoral Ltd v Bank of New Zealand [1990] NZPC 3

Harris v Digital Pulse Pty Ltd [2003] NSWCA 10

Hedley Byrne v Heller (1964) AC 465
Judicature Act 1873-75.

Redgrave v Hurd (1881) 20 Ch D 1

United Scientific Holdings Ltd v Burnley Borough Council [1978] AC 904


2. Books and Journals

Brown, Denis, Ashburner’s Principle of Equity (Butterworth & Company, 1933)


McGhee, John, Snell’s Equity (Sweet & Maxwell, 31 ed, 2005)


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