

**Aristotle and All That:  
Finding the Foundations of Fiduciary Law**

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**Introduction**

[1] This address concerns the development of the modern law of equity, and of fiduciary duty, from their ancient origins. It begins with Aristotle.

[2] Rather than drawing parallels between specific modern rules of equity and the great ancient thinkers of Greece and Rome, I follow broadly the influence of Aristotelian thinking on subsequent developments in the thinking of continental Europeans through to England in the Middle Ages, and particularly on the development of the Court of Chancery.

[3] I should say at this stage that the meaning of the word “equity” changes in the speech and depending on context. When I say “modern equity”, that should be taken relative to the timescale this speech addresses, and correlates to the last 250 years over which the English courts, and its cognate jurisdictions, have developed the law of equity. The law of equity, in turn, seeks to alleviate injustices away from rigorous application of law.

[4] There is one bright thread that runs through the entire history on which I am about to speak. It is the irrepressible tendency of western legal systems to alleviate the injustice that a strict application of inflexible legal rules can work – and to thwart the opportunistic misuse of powers conferred for the benefit of others. Modern

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\* I express my appreciation to my clerk, Sean Brennan, for the research undertaken by him for this paper.

equity's response is encapsulated in the maxim that "equity regards as done that which ought to be done".<sup>1</sup> Its spirit pervades many modern legal systems.

### **Aristotle on equity**

[5] It is generally agreed that the tradition of equity began in earnest with Aristotle.<sup>2</sup> The concept now translated as "equity", Aristotle called "epieikeia". Rather than the technical meaning that "equity" now has, epieikeia was a normative concept that essentially meant "that which is appropriate" or "right". The translation to "equity" is therefore fitting, even on an impressionistic basis.

[6] Predictably, the word "epieikeia" appears much earlier than in the writings of Aristotle. One of the first uses of that word appears in Homer's *Illiad*. In Book Twenty-Three, Achilles, hosting the funeral games, suggests it would be "epieikeia" for the person who came last in the games to nevertheless receive a prize. The word was there used to mean that which ought to be done, or was "right" in the circumstances there.

[7] In the mid-fifth century BC, writers then began contrasting "mild epieikeia" with "stubborn justice".<sup>3</sup> At times, too, epieikeia was used to mean "leniency",<sup>4</sup> or something less strict than law.<sup>5</sup>

[8] Aristotle's treatment of epieikeia is found principally (although not exclusively) in the *Nicomachean Ethics*. Aristotle opens Book Five, Chapter Ten stating:<sup>6</sup>

Our next subject is equity and the equitable (to epieikes), and their respective relations to justice and the just. For on examination they appear to be neither absolutely the same nor generically different; and while we sometime praise

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<sup>1</sup> That maxim lay at the heart of the decision in my first Privy Council appeal: acting for the Hong Kong Government making a proprietary claim to proceeds of bribes paid to one of its prosecutors: *Attorney General for Hong Kong v Reid* [1994] 1 NZLR 1 (PC).

<sup>2</sup> Darien Shanske "Four Theses: Preliminary to an Appeal to Equity" (2005) 57 Stanford Law Review 2053 at 2056.

<sup>3</sup> At 2056.

<sup>4</sup> See for example Richard Schlatter (ed) *Hobbes's Thucydides* (Rutgers University Press, 1975) at 198.

<sup>5</sup> Shanske, above n 2, at 2057.

<sup>6</sup> Aristotle *Nicomachean Ethics* (translated ed: W D Ross (translator) *Nicomachean Ethics* (Digireads, 2005)).

what is equitable and the equitable man ... at other times, when we reason it out, it seems strange if the equitable, being something different from the just, is yet praiseworthy; for either the just or the equitable is not good, if they are different; or, if both are good, they are the same.

[9] Aristotle distinguishes between what is equitably just and what is legally just. Equitable justice is “a correction of legal justice”, though that correction is not itself legal. The need for that correction arises from the promulgation of general laws. Those general or “universal” laws are likely to work injustices if applied strictly in all cases. To determine how to “correct” legal justice, Aristotle says we must ask how the lawmaker would have decided the case had he been aware of it. Aristotle recognised that not all matters could properly be provided for or determined by the law.<sup>7</sup> In those instances, specific decrees rather than general rules should be issued in order to meet the difficulties of particular cases:<sup>8</sup>

Hence the equitable is just, and better than one kind of justice — not better than absolute justice but better than the error that arises from the absoluteness of the statement [of law].

[10] A person who is equitable is one who is “no stickler for his rights in a bad sense but tends to take less than his share though he has the law [on] his side”. Being equitable is superior to a strict adherence to the law. Aristotle expands on this in *Rhetoric*. There he says *epieikeia* is unwritten law. Written laws are brutish instruments capable of manipulation by skilled rhetoricians. He describes what it means to behave with *epieikeia*:<sup>9</sup>

And it is *epieikeia* to excuse things characteristically human. And to look not to the law but toward the lawgiver; and not to the letter of the law, but to the intention of the lawgiver; and not to the action but to the purpose; and not to the party but to the whole; not to how someone is not, but to how he was, either always or most of the time; and to remember being treated well rather than badly, and the good received rather than done. And to be patient though being wronged. And to prefer to be judged by reason over deeds. And to prefer to go to arbitration rather than court. For the arbitrator sees the equitable, but the citizen-juror only the law. And it was because of this that the arbitrator was invented, so that *epieikeia* might prevail.

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<sup>7</sup> This was a point made also by Saint Thomas Aquinas, himself much influenced by Aristotelean analysis, in the 13th century in his *Summa Theologie*: “it is impossible to institute a legal rule that will not be inadequate in some situation.” II.II 120, 1. Lord Ellesmere made the same point about his own jurisdiction in the *Earl of Oxford’s case* (1615) 1 Ch Rep 1 at 6.

<sup>8</sup> Aristotle, above n 6, at ch V.10.

<sup>9</sup> At ch V.10.

[11] The analogies between Aristotle’s *epieikeia* and English equity are palpable. In short, as one commentator aptly puts it, Aristotle’s approach to equity is “particularised justice”.<sup>10</sup> It is a rejection of the rigorous application of law in order to do what is right in a particular case.

### **Reception of Aristotelian equity in Western legal traditions**

[12] The next step in this historical narrative inevitably follows the annexation of Greece by the Roman Republic in 146 BC. Hellenism and Aristotelian thinking pervaded the Mediterranean in this time and for many years subsequently. While the Roman Republic adopted a portion of Greek’s codified law, there is little suggestion it included in any meaningful sense Aristotle’s *epieikeia*. That is hardly surprising: Aristotle stated that his equity was “unwritten law”.

[13] The extent to which principles of equity were adopted at all into Roman law has been hotly debated for centuries. I simply seek here to look at elements of the Roman law that reflect the pervasiveness of Aristotle’s teachings and have analogues with the modern law of equity.

[14] I want to dwell on the fundamental idea that something is needed to alleviate the rigours of the law. It manifests in a manner familiar to modern equity scholars in the following passage of Cicero’s *De Officiis*:<sup>11</sup>

Injustice often arises also through chicanery, that is, through an over-subtle and even fraudulent construction of the law. This is that gave rise to the now familiar saw, “More law, less justice” [*summum ius, summa injuria*]. Through such interpretation also a great deal of wrong is committed in transactions between state and state; thus, when a truce had been made with the enemy for thirty days, a famous general went to ravaging their fields by night, because, he said, the truce stipulated “days,” not nights. Not even our own countryman’s action is to be commended, if what is told of Quintus Fabius Labeo is true ... appointed by the Senate to arbitrate a boundary dispute between Nola and Naples, he took up the case and interviewed both parties separately, asking them not to proceed in a covetous or grasping spirit, but to make some concession rather than claim some accession. When each party had agreed to this, there was a considerable strip of territory left behind them. And so he set the boundary of each city as each had severally agreed; and the

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<sup>10</sup> Shanske, above n 2, at 2059.

<sup>11</sup> Cicero *De Officiis* (translated ed: Walter Miller (translator) *Cicero: De Officiis* (Harvard University Press, Cambridge, Massachusetts, 1938)) at 1.10.33.

tract in between he awarded to the Roman People. Now that is a swindling, not arbitration.

[15] This is a call to the same broad equitable principle articulated by Aristotle. But Cicero expands upon it further and gives a familiar example: there are circumstances where it would be wrong for *an individual* to rely strictly on their legal rights. In those circumstances, that person should concede something even though that would be contrary to their interests.

[16] Aristotle called this principle of relaxing the law where the circumstances require it *epieikeia*. The Romans called it “*aequitas*”. Broadly, that translates to “fairness” — though *aequitas* was used in some post-classical texts in the sense of a justification for modifying laws in favour of a weaker party. *Aequitas* and *epieikeia* have many similarities. Darien Shanske comments:<sup>12</sup>

Though clearly no simple conclusion is possible, it seems fair to conclude that Roman law had absorbed some aspects of *epieikeia* from Aristotle and Greece generally, such as looking to intent, particularly through Cicero, while other aspects of equity in Roman Law were homegrown, particularly the praetor’s discretion and the connection between equity and international law.

Thus Aristotle’s conception of “equity” maintained currency in Rome.

[17] William Buckland and Peter Stein identify two Roman doctrines in particular, if they may be so called, that are very much reminiscent of modern principles of equity.

[18] First, they note the praetor, a sort of magistrate, applied the principle that parties should be held to their intentions when transacting even if they failed to comply with particular forms prescribed by the law.<sup>13</sup> That is an exposition of the wider principle concerning the injustice of rigorous application of law and the opportunistic misuse of powers.

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<sup>12</sup> Shanske, above n 2, at 2061.

<sup>13</sup> W W Buckland and Peter Stein *A Text-Book of Roman Law from Augustus to Justinian* (3rd ed, Cambridge University Press, Cambridge, 1963) at 55.

[19] The second example they identify is that “Roman lawyers recognised expressly a general principle that no one ought to be enriched to the detriment of another”,<sup>14</sup> or put another way, no one should be unjustly enriched.

[20] I finish this part by looking in a little more detail at what the Romans called the “fideicommissum” or committal to honour. This, which I will call for simplicity’s sake “the Roman trust”, was a structure that shared remarkable similarities with the modern express trust, although a true parallel cannot be made. For example the first line of David Johnston’s book *The Roman Law of Trusts* reads “[t]rusts did not exist in Roman law”.<sup>15</sup> And in William Buckland’s collected lectures, *Equity in Roman Law*, one of the introductory sections is simply and dismissively entitled “No Trust Concept”.<sup>16</sup> Nevertheless obvious analogues can be identified, and the rationale for the Roman trust can once again be explained by reference to Aristotle’s equity. Some history, and ancient succession law, is necessary here.

[21] The Roman trust developed over the course of approximately six centuries beginning in the time of Cicero and ending in the time of Justinian. Initially it was used as a tool to circumvent perceived problems in the law of succession which heavily prescribed the form a will was required to take to be valid. Its origin is typically associated with two concepts: “commendationes” and “mandate”.<sup>17</sup> In their wills, Romans would frequently “commend” property to others for safe-keeping together with an expression of intention that the property be passed on to a third party (hence “commendationes”). But that commendation was not legally enforceable. “Mandate” on the other hand, involved a request to do something and, unlike commendationes was regarded as a request made *inter vivos*. Mandate would be included in a will and, unlike commendationes, generated legally-enforceable obligations. But it had its limits. Critically, mandate could not be entered for performance *after* the testator’s death. Indeed, it terminated upon the death of *either* party. Owing to those limitations (and, perhaps interestingly, the *legal* enforceability

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<sup>14</sup> At 55.

<sup>15</sup> David Johnston *The Roman Law of Trusts* (Clarendon Press, Oxford, 1988) at 1. He goes on to say, however, that “trust” is the ideal word in legal English to translate the Latin fideicommissum.

<sup>16</sup> William Buckland *Equity in Roman Law* (William S Hein & Co, New York, 2002).

<sup>17</sup> Johnston, above n 15, at 22.

of mandate) the form the Roman trust eventually took was more in the nature of commendationes.

[22] The Roman trust then began to emerge during the time of Cicero and can be seen in one of his speeches in 70 BC, and recorded in *in Verrem*.<sup>18</sup> In that case the testator, a “P Trebonius” hoped to benefit his brother, “A Trebonius” who was proscribed by Sulla and denied by the *lex Cornelia* from receiving a testator’s property. The testator required that the heirs promise on oath that they would pass on to the proscribed brother no less than half of what they each received under the will. It was, apparently, impossible for their heirs to obtain possession of the estate without making that promise, although it is not clear why. A freedman did so promise but the other heirs refused. They claimed they were being asked to swear an oath contrary to the laws prohibiting assisting the proscribed. Gaius Verres, the magistrate, granted them possession of the estate. Cicero agreed with that so long as the heirs who declined to make the oath were concerned. But he took issue with Verres’ conclusion that the freeman be denied possession of part of the estate, which should have been a separate matter. The freeman felt bound to swear an oath to his patron and had done so. P Trebonius, the proscribed brother’s entitlement, if any, depended on restitution but the issue depended on the status of the oath. It cannot therefore be said a trust arrangement arose, but Cicero’s recognition of the significance of the freeman’s oath is important here.

[23] The Roman trust then became enforceable in the time of Augustus:<sup>19</sup>

It should be noted therefore that at first all trusts were unprotected, because nobody was compelled against his will to make over what he had been asked to: if testators left something to people to whom they were unable to leave inheritances and legacies, they entrusted it to the faith of those who were able to benefit under the will: and for this reason they are known as trusts, because they were dependent on no legal bond but solely on the decency of those to whom they were entrusted. Subsequently it was the late emperor Augustus who first intrusted the consuls to interpose their authority, after he had more than once been moved by personal reasons either because someone was said to have been asked ‘by the emperor’s safety’ or on account of the glaring perfidy of certain people. Because this seemed just and was popular, it was gradually turned into a permanent jurisdiction; and trusts became so much favoured that at length a special praetor was appointed to give judgment on them and he was called the fideicommissary praetor.

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<sup>18</sup> Cicero *II in Verrem* 1.123-4.

<sup>19</sup> Johnston, n 15 above, at 29-30.

[24] An interesting comparison can be made to the medieval feoffment to use device – which I will return to. But the Roman trust arose as a solution to the injustice that legal formality would cause, and was applied in a paralegal setting. There is little indication that the obligations of the person entrusted with the property were any greater than complying with the express intentions of the testator. That is, the rigorous set of obligations fiduciaries now find themselves in is not found to any great extent in the ancient Roman law.

[25] From these beginnings, where does equity arise next?

### **Equity in the middle ages**

[26] Roman law and Roman legal concepts diffused throughout the European continent during height of the Roman Empire and well after its fall with Justinian’s codes eventually providing the underpinning of common law across western Europe and England.<sup>20</sup> Britain was no exception. Britain had of course been a Roman province for almost 400 years, until 410 AD. The influence of Roman law, in particular on land tenure, remained in fragmented post-Roman Britain.<sup>21</sup> Between the years 600 and 1035 several codes were promulgated by different British kings. In about 600 Ethelbert, King of Kent, compiled a code of Kentish laws in Roman fashion, imitative in method if not content of Justinian’s code (known to Ethelbert through Saint Augustine).<sup>22</sup> Other kings followed his lead, notably Alfred and Canute. Canute visited Rome and, following his return, undertook a great deal of codification in both Denmark and England, both of which he reigned over. The development of law over the period 600–1066 was heavily marked by Roman influence and Christianity. I will return to this shortly.

[27] William the Conqueror’s decisive victory in the Battle of Hastings in 1066 completed the Norman conquest. Despite his penchant for systematising the administration of governance in England, no sweeping legal change was made immediately following the conquest. The law as it then existed was largely left to

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<sup>20</sup> Howard L Oleck “The Historical Nature of Equity Jurisprudence” (1951) 20 Fordham L Rev 23 at 32.

<sup>21</sup> Edward D Re “The Roman Contribution to the Common Law” (1961) 29 Fordham Law Review 447 at 459.

<sup>22</sup> At 459.

develop on its own, William recognising the early common law system as essentially sound, and its continuation as assisting the maintenance of post-conquest peace.<sup>23</sup> But Roman law continued to press across the channel with William: his Archbishop of Canterbury, Lanfranc, had been a scholar both of Roman law and Aristotelean philosophy. So too was his successor but four, Theobald, primate from 1139 to 1161. It was Theobald who brought the Roman law scholar Vacarius to England to teach at Oxford. His studies of Justinian's codes influenced directly Bracton's more chauvinistic studies of English law in the 13th century.<sup>24</sup> And Theobald's successor, Thomas Becket, was another who had studied Roman laws at Bologna.

[28] The origins of equity in English law, however, are popularly understood to today's lawyers to begin with the establishment of the Chancellor and the Court of Chancery. But even before the development of the Court of Chancery, the law had an inbuilt flexibility mechanism. As is necessary in any developed legal system, judges had certain discretions to alleviate from the strict application of the law where to do otherwise would result in an injustice. It was, crucially, a part of the *legal* system. Over time, however, the law calcified. Judges abandoned their ancient powers of discretion.<sup>25</sup> Writs became ossified, and judges became unusually deferential towards Parliament, particularly in the early-to-mid 1300s.<sup>26</sup> The burden on the work of the Court of Chancery grew steadily. As John Selden once observed, "Equity in Law is the same thing that the Spirit is in Religion".<sup>27</sup>

[29] At this stage I should say something about how the office of the Chancellor and the Court of Chancery arose. Central to the early part of this history was the idea that the King has "ever been considered the foundation of justice".<sup>28</sup> As the source of law, the King was — at least in theory — to adjudicate on all disputes. Plainly that was unworkable, and no doubt unappealing to the early Kings. Fora were established

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<sup>23</sup> As Robert Tombs puts it, slightly extravagantly, "The Normans added nothing to it because it worked and helped them to rule": *The English and their History* (Allen Lane, London, 2014) at 46.

<sup>24</sup> At 33. See also Thomas Scrutton *The Influence of Roman Law on the Law of England* (Cambridge University Press, Cambridge 1885) at 120–121.

<sup>25</sup> Theodore F T Plucknett *A Concise History of the Common Law* (5th ed, Butterworth & Co, 1956) at 675.

<sup>26</sup> At 157–158.

<sup>27</sup> John Selden *Table Talk* (Pollock Ed, 1927) 43. Later in this passage Selden goes on to make his celebrated observation about the measure of Equity being the Chancellor's foot.

<sup>28</sup> John Campbell *Lives of the Lord Chancellors* (7th ed, London, 1885) vol 3 at 34.

that would undertake the bulk of this work: the King's courts. Applications could, and were, nevertheless made directly to the King for relief from the application of the law. These too became burdensome for an individual King to manage. The officina justitiae was established to administer these applications.<sup>29</sup>

[30] The role of the Chancellor was established during this period. The Chancellor was the King's chief secretary and a member of the Council. He kept the Great Seal. When the officina justitiae eventually ceased to exist, the Chancellor became the most important of the Crown's administrators.<sup>30</sup> The mediaeval Chancellors were mostly clerics. The Chancellor was after all the keeper of the King's conscience. Who better to exercise that conscience than a person learned in Christianity? Every Chancellor from 1380 to 1488 was a cleric.<sup>31</sup> The last but one was Wolsey, in Henry VIII's time.

[31] The Christian influence over the Chancery cannot be overstated. Two important and informative features emerge from this. First, clergy were well trained in both canon law and Roman law. Secondly, Christian morality had inherited from Judaism a firmly individualistic outlook. Salvation of an individual's soul was dependent on the acts of that person during their life time. The development of English equity operated "in personam", that is, upon the conscience of the defendant. While the Court of Chancery was not an ecclesiastical court, for a long time its presiding officer would be ecclesiastic. The principles that subsequently developed therefore applied a Christian morality with a Roman legal form.

[32] Indeed, through the Chancellor "it was only natural that the doctrines and methods of the civil law should find entrance largely into this branch of the English law".<sup>32</sup> In the light of this, the Court of Chancery has been described as "Roman to the backbone".<sup>33</sup> In short, English equity was invented and administered by clerical Chancellors who were heavily indoctrinated with Roman law. The influence of Roman law on the English law of equity is undeniable.

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<sup>29</sup> Re, above n 21, at 478.

<sup>30</sup> W J V Windeyer *Lectures on Legal History* (2nd ed, Law Book Company of Australia, Sydney, 1957) at 252.

<sup>31</sup> Scrutton, above n 24, at 153.

<sup>32</sup> James Hadley *Introduction to Roman Law* (D Appleton and Co, New York, 1880) at 47.

<sup>33</sup> Scrutton, above n 24, at 2.

[33] The Chancellor's Court was by Tudor times a well-established institution. Only with St Thomas More were Chancellors regularly appointed from the ranks of practising lawyers.<sup>34</sup> By this point the Court of Chancery had had several hundred years to be absorbed of Christian values and Roman law.

### **Fiduciary Law**

[34] What is the origin of the fiduciary, then, and how is it connected with Roman law?

[35] It is widely accepted that the fiduciary duty was first developed in the context of English real property. The concept of the fiduciary arose from the concept of the "feoffment to use", a sort of forerunner to today's express trust. The "use", derived from the Latin "ad opus" meaning "on his behalf" appears first to have been used in medieval England to allow land to be held on behalf of religious orders who had pledged to vows of poverty and were therefore unable to own land.<sup>35</sup>

[36] It was subsequently used by landowners, beginning in the 14<sup>th</sup> century, to effectively pass on land after death but avoid feudal inheritance rules.<sup>36</sup> Land could be devised by will only to the eldest male heir. If that heir was an infant, the feudal lord of the heir gained wardship rights, at great potential profit to both lord and king. By feoffment to use land was instead conveyed to a group of joint tenants (the feoffees – in effect, trustees) who held the land for landowner's benefit during his life and his heir's benefit (the *cestui que use*) until devise according to the terms of use. There are many Chancery decisions enforcing uses of this kind. This is all rather reminiscent of the Roman fideicommissum; it developed for similar reasons involving the holding of land for persons legally incapacitated.

[37] But a rapacious Henry VIII, seeing profits diverted from his Treasury, put paid to this device in *Lord Dacre's Case* in 1535 – with the connivance of his pliable

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<sup>34</sup> Windeyer, above n 30, at 253.

<sup>35</sup> F W Maitland *Equity: A Course of Lectures on Equity* (2nd ed, Cambridge University Press, 1969) at 34–35.

<sup>36</sup> D J Seipp "Trust and Fiduciary Duty in the Early Common Law" (2011) 91 Boston L Rev 1011.

Chancellor, Sir Thomas Audley.<sup>37</sup> In 1533 the 8<sup>th</sup> Lord Dacre of the South died. The heir was his 18 year old grandson, Thomas, and the estate (which included Herstmonceux Castle in Sussex) was devised to feoffees to be held until Thomas came of age. This furnished the test case Audley and the King sought. The common law Judges were assembled, together with Audley and Master of the Rolls Sir Thomas Cromwell. Courageously, the Judges split on the legitimacy of the use. This would not do. The King commanded the Judges to attend upon him and to agree in their opinion. And “those who were of opinion that the will was void would have the King’s good thanks”. The Judges no longer divided. Of how they were thanked I am less sure.<sup>38</sup>

[38] At the same time the Court of Chancery began to develop a body of decisions relying on concepts such as “trust” and “confidence”.<sup>39</sup> Breach of trust or confidence would often sound in a remedy in the Court of Chancery even if the common law courts would turn the applicant away. Breaches of trust or confidence in certain relationships began common place even in the absence of a contract between the parties. That was so, for example, in relationships involving employees and agents, professional advisors, guardians and, of course, those we would now call trustees.<sup>40</sup>

[39] These developments were not limited to Chancery. As David Seipp reminds us, common law actions for account (by landowners against bailiffs and rent collectors) and for waste (against guardians who abused wardships of infant heirs) also had a fiduciary character.<sup>41</sup>

[40] Eventually these concepts evolved into the well-worn (and much abused) word “fiduciary” that we now so frequently use for a relationship based on powers

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<sup>37</sup> *Lord Dacre’s Case* (1535) 1 Spelman’s Reports 228.

<sup>38</sup> Thomas, the 9<sup>th</sup> Lord Dacre, came into the estate the following year. He did not enjoy it long. In 1541 he and seven other young men went poaching in an adjacent estate. A gamekeeper was killed, and Thomas and his cronies were arraigned for murder. Audley, in his dual capacity as Lord High Steward, presided. After initially pleading not guilty Thomas changed his plea and threw himself upon the mercy of the King. No mercy was forthcoming and, despite his noble standing, Thomas was hanged at Tyburn rather than executed. His estates were forfeit. By the first *Lord Dacre’s Case* Henry gained Thomas’s wardship. By the second he gained his estate. See *Letters and Papers, Foreign and Domestic, Henry VIII* (HMSO, 1898) v 16, at 449.

<sup>39</sup> L S Sealy “Fiduciary Relationships” (1962) 20(1) CLJ 69 at 69–70.

<sup>40</sup> At 69.

<sup>41</sup> Seipp, above n 36, at 1034.

conferred, but short of express trusteeship. One of the first uses of that word by a judge is found in a decision of 1717 in which a landlord sued a tenant who had dug on the leased land. Cowper LC described the tenant as “a sort of fiduciary to the lord, and it is a breach of the trust which the law purposes in the tenant, for him to take away the property of the lord”.<sup>42</sup> The principle then established by Lord Thurlow in the 1788 decision of *Gartside v Isherwood* was that “if a confidence is reposed, and that confidence is abused a court of equity shall give relief”.<sup>43</sup> Over the past 250 years that general principle has stood the test of time remarkably well. Although the language we use to describe fiduciary relationships has become a little more specific, and certain classes of relationship are now presumptively fiduciary, in substance the principle is little better defined.

[41] Undoubtedly in the first four hundred or so years of the Chancery’s existence, both the individualistic morality of the ecclesiastic Chancellors and their knowledge of Roman law came to bear. The courts of equity would enforce trust and confidence relationships “in personam”, that is as between the parties, despite no *legal* obligation to do so. Indeed, frequently this arose in circumstances where one party *sought* to rely upon their legal rights. Equity served the function of Aristotle’s *epieikeia*. It was a correction of legal justice.

[42] Fiduciary law’s modern form focuses on three indicia, these being the essence of a fiduciary relationship.<sup>44</sup>

- (a) the possession of *powers*, either agreed, assumed or imposed;
- (b) *reliance*, via a relationship of trust and confidence (or vulnerability) and;
- (c) *assumption of responsibility*, actual, inferred or imposed:—

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<sup>42</sup> *Bishop of Winchester v Knight* (1717) 1 P Wms 406 at 407.

<sup>43</sup> *Gartside v Isherwood* (1788) 1 Bro C C 558 at 560 citing *Filmer v Gott* (1770) 4 Bro PC 230.

<sup>44</sup> This formulation is one I eventually reached after lengthy discussion with Professor Matthew Harding, of Melbourne Law School, at a seminar we co-presented to judges in Victoria in May this year.

resulting, then, in these three general requirements which are enforced with varying degrees of stringency in the cases:

- (d) the active promotion of the principal's interests by the fiduciary;
- (e) priority to be given to the beneficiary over the interests of third parties;  
and
- (f) subordination (although not entire elimination) of the fiduciary's self-interests.

These ideas find their origins in *epieikeia*, *aequitas* and English law of equity.

[43] As Tipping J noted in the New Zealand Supreme Court decision in *Chirnside v Fay*, no single formula or test has received universal acceptance in deciding whether a relationship outside of the recognised categories is such that the parties owe each other obligations of fiduciary kind.<sup>45</sup>

[44] Some think that imprecision unsatisfactory. I do not, however. Since Aristotle's day, it has never been equity's remit to be explicit.

## **Conclusion**

[45] I should now reflect on where we have come from and where we have got to.

[46] We began with Aristotle's "*epieikeia*", a normative concept that what is legally just is not the same as what is equitable, and that equity is a correction of defects in the law that arise owing to its universality.<sup>46</sup>

[47] Roman law adopted a portion of Greek law and, more importantly, Hellenistic moral philosophy deeply influenced by Aristotle. The ancient Romans also developed their own conception of *epieikeia*, translated to the word "*aequitas*" meaning, broadly, "fairness".

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<sup>45</sup> *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433, at [75].

<sup>46</sup> See also Windeyer, above n 30, at 251.

[48] Roman law pervaded Europe and what are now the British Isles were no exception. Following the Norman invasion of England, Christianity influenced profoundly the work of the Chancellor's office. Chancellors, almost always ecclesiastic for the first several hundred years of the office of the Chancellor, were trained in both canon law and Roman law, and both came to feature heavily in decision-making. Inevitably, equity was imbued with Roman law and Christian morality. It has maintained that pedigree, although not expressly.

[49] The linkage from Aristotle to modern equity is not simply coincidental. The influence of Rome on ecclesiastic Chancellors was not merely religious but also legal. Those Roman influences were in turn rich with the heritage of a thousand years of Hellenic thought and Aristotelian teachings, particularly prominent following Aquinas' translations of Aristotle's works in the middle ages.

[50] The spirit of Aristotle's *epieikeia* still pervades the operation of modern equity, as does its Roman counterpart, *aequitas*. The need for a system parallel to the usual legal processes capable of correcting injustices is fundamental to a civilised legal system. I talked at the outset about the irrepressible tendency of western legal systems to alleviate the injustice that a strict application of inflexible legal rules can work – and to thwart the opportunistic misuse of powers conferred for the benefit of others.

[51] That is what is at the heart of *epieikeia*, *aequitas* and its modern descendent, fiduciary law. And it is particularised, intuitive justice that is at the heart of this history. Perhaps the equitable maxim that best reflects the rich heritage of this intuitive principle is: "*aequitas factum habet quod fieri oportuit*". Equity regards as done that which ought to be done.