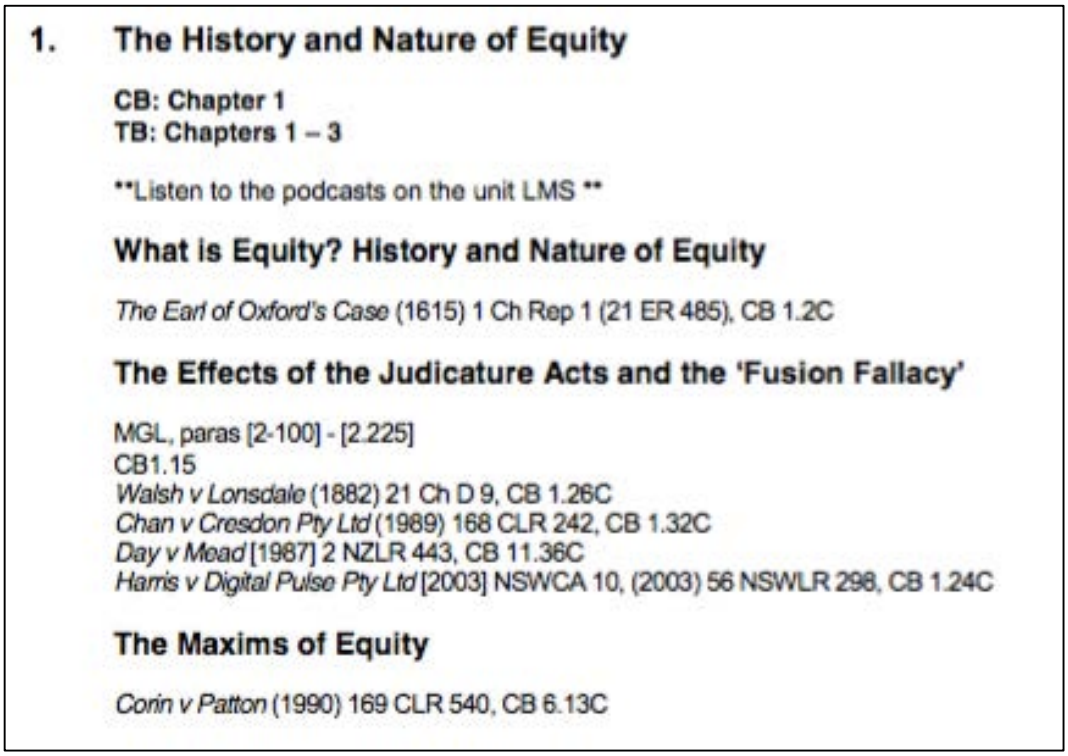
Overview

1. The History + Nature of Equity



1. **The History and Nature of Equity**

CB: Chapter 1
TB: Chapters 1 – 3

**Listen to the podcasts on the unit LMS **

What is Equity? History and Nature of Equity

The Earl of Oxford's Case (1615) 1 Ch Rep 1 (21 ER 485), CB 1.2C

The Effects of the Judicature Acts and the 'Fusion Fallacy'

MGL, paras [2-100] - [2.225]
CB1.15
Walsh v Lonsdale (1882) 21 Ch D 9, CB 1.26C
Chan v Cresdon Pty Ltd (1989) 168 CLR 242, CB 1.32C
Day v Mead [1987] 2 NZLR 443, CB 11.36C
Harris v Digital Pulse Pty Ltd [2003] NSWCA 10, (2003) 56 NSWLR 298, CB 1.24C

The Maxims of Equity

Corin v Patton (1990) 169 CLR 540, CB 6.13C

A. What is Equity?

A. Background

- Equity refers to the body of cases, maxims, doctrines, rules, principles and remedies which derive from the specific jurisdiction established by the English High Court of Chancery.
- Equity is not parallel to the common law. Rather, it supplements or modifies the common law.
    - It does not compete with the common law.

B. Earl of Oxford's Case: Equity trumps Common Law

***The Earl of Oxford's Case* (191615) 1 Ch Rep 1 (21 R 485)**

- **Background:** During the 14th and 15th centuries, the Court of Chancery slowly developed as a distinct curial body that could deal with petitions addressed to the King. Eventually, these petitions were directed to the King's Chancellor. These petitions begged for discretionary relief from various forms of oppression or injustice, including harsh or unjust judgments in the common law courts.
- **Facts:** Oxford wanted to sell its land in London to the Earl, but was prevented from doing so by Statute. Oxford was advised that while they could not sell the land to S, they could surrender the land to the Crown who could then grant the land to the Earl. Later, Oxford realised the land was worth a lot of money and wanted it back from the Earl, so argued that under the Statute they could not surrender the land to the crown.
- **Issue:** Did Oxford or the Earl own the land? Focus on how the Court of Chancery handed down a judgment that placed an injunction on the winner at common law from enforcing the judgment.
- **Common law Court Held:** At common law it was found that the Statute prevents any dealing with the land and so Oxford was always the legal owner of the land. Oxford thus won at law.
- **Chancery Court Held:**
    - The Earl then sought relief to restrain Oxford, arguing that the common law judgement could not be enforced.

        - Court found that equity wins where there is a conflict between the rules of equity and common law.
        - While equity doesn't say that the Earl owns the land, it does prevent Oxford from enforcing his legal right to the land.
    - **King James' Decree**
        - The decision in the *Earl of Oxford's Case* and the challenge it represented to the power of the common law provoked the highest-ranking judge in the common law courts, the Lord Chief Justice Sir Edward Coke, into retaliating.
        - The controversy became so heated that James I was forced to issue a decree of 14 July 1616 to resolve it.
        - The decree of James I **established the supremacy of equity over the common law**. He found that where a party had a case deserving to be relieved in Chancery, that party should not be let 'to perish under the rigour and extremity of our laws'.
        - King James decreed that the Chancellor "shall not hereafter desist to give unto our subjects upon their several complaints now or hereafter to be made, such relief in equity (notwithstanding any proceedings at the common law against them) as shall stand with the merit and justice of their cause, and with the former ancient and continued practice and presidency of our chancery."
    - **Significance**
        - The supremacy of Equity over the Common Law persists to this day.
        - Lord Ellesmere's judgment reveals a moral jurisprudence that was sophisticated, developed and coherent by the year 1615.
        - Case illustrates a pattern of contextual legal and moral reasoning that has persisted in the Anglo-Australian equitable jurisdiction to this day.

C. Pre Judicature Acts

- Historically, the common law and equitable jurisdictions were administered separately.
- In England, equity was administered principally by the Court of Chancery and the common law by the courts of King's Bench, Common Pleas, and Exchequer.
- In Australia there were never two sets of courts. However, within each Supreme Court as established there was distinct common law and equity jurisdictions. There were separate systems of pleading and no juries in courts of equity, and in this sense there was a proper division between law and equity in the Australian colonies that reflected that in England.
- Equity had both 'concurrent' and 'auxiliary' jurisdiction as compared to common law: 'concurrent' referred to suits upon facts which would equally have entitled a party to proceed in a court of common law, whereas in its auxiliary jurisdiction, Chancery granted relief against invasion or breach of legal rights that were not protected by it in the concurrent jurisdiction.

Equity in Common Law Courts

- Hard to formulate how common law courts dealt with equity.
- It is not correct to say that they ignored equitable rights and titles: many examples of where equitable rights and titles were incidentally cognisable in proceedings at law e.g. Queen's Bench acknowledged a trust in *Sims v Marryat* (1851) 17 QB 281.
- Further, courts of law borrowed ideas from equity that subsequently became principles at law e.g. the law of guarantees.
- However, note that the common law courts did not have inherent power to award the remedies of injunction and specific performance and ancillary remedies available from Chancery and also had no power to entertain actions brought to recover damages or other relief for infringement of *purely* equitable titles and claims. E.g. beneficiary could not sue his or her trustee at law for breach of trust; had to go to a Court of Chancery.
- This was clear in case of:

Coroneo v Australian Provincial Assurance Association Ltd (1935) 35 SR (NSW) 391

- Example of a case failing because it was brought as an action at common law rather than a suit in equity.

- APA was a non-bank lender; Mr Coroneo defaulted on his loan from APA; mortgagee (APA) exercised their right to sell the property over which they had the mortgage; Coroneo is angry and says that yes he was in default but the property was sold negligently and recklessly for a value far beneath what it was worth.
- Case became a 'demurrer': where mortgagee admitted the entire factual basis of the claim and admitted they were negligent and reckless, but explained that at law, given old system mortgages = transfer of legal title, it was their's to sell as negligently and recklessly as they wanted.
- Court agreed. Frederick Jordan: "I think that the count is based upon a misconception of the nature of a power of sale in a mortgage." Recall that mortgage is the conveyance of legal title, and mortgagor gets an equity of redemption i.e. a promise that the property will be conveyed back to you once you've paid back the loan.
- Thus, Coroneo could only seek relief or protection in equity because his proprietary interest was an equity of redemption.
- Take away: courts of common law weren't able to give relief to a mortgagor under old system, because transfer of legal title meant law saw you as having nothing.
    - It was the *Judicature Acts* that stood as the answer to the issue encountered in *Coroneo's* case.

B. The Effects of the Judicature Acts + the 'Fusion Fallacy'

A. The Judicature Acts: Historically

- Historically, there were 2 separate systems of law: common law and equity.
    - E.g. in a breach of contract dispute:
        - 1. Is there a contract? (decided in the common law courts)
        - 2. Even if there is no contract, is the party estopped? (decided in the equity courts)
- Proved incredibly inefficient to move between the two different courts
- In the 1970s, Parliament decided to merge the administration via the *Judicature Acts*, which gave one court jurisdiction for questions of common law and equity.
- Outcome of any given case wasn't affected (i.e. the law itself didn't change) but rather it was merely more efficient to decide the issues in the same court.
    - "The waters of equity and common law flow in the same channel, but they do not mingle their waters." Ashburn

B. The Judicature Acts: Today

- Today, the Judicature Acts are reflected in the *Supreme Court 1970* (NSW) and the *Law Reform (Law & Equity) Act 1972* (NSW)

    - *Supreme Court Act 1970* (NSW)
        - S57: Concurrent Administration: The Court shall administer concurrently all rules of law, including rules of equity.

    - *Law Reform (Law & Equity) Act 1972* (NSW)
        - S5 – Rules of equity to prevail: In all matters in which there was immediately before the commencement of this Act or is an 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.

- Issues the fusion overcomes:
    - 1. Problem of being unable to hear a case because suing in the wrong division e.g. *Coroneo's Case*, where remedy couldn't be granted because the plaintiff should have sued in equity and not common law.
    - 2. Remedy issues: common law courts used to be unable to award injunctions or specific performance or orders for discovery, so people were always going back and forth between the courts and filing things separately.

- 3. Common law courts couldn't deal with equitable property: e.g. a beneficiary couldn't sue a trustee for breach of trust at law; fusion of courts doesn't require separate filings.

C. The Fusion Fallacy

"The heart of the fusion fallacy is the proposition that the joint administration of two distinct bodies of law means that the doctrines of one are applicable to the other: Harris v Digital Pulse (2003) per Spigelman CJ

- The Fusion Fallacy is the mistaken belief that the Judicature Acts blended Law and Equity.
- However, it was emphasized as early as 15 years after the Acts by Sir George Jessel that the object of the Judicature Acts was to assimilate common law and equity business in the one court of judicature, not blend their principles ad operation.
    - Leeming says think of the courts as a Bunnings Warehouse; they offer everything, but the products themselves don't change. You can just now go to the one spot to get equity and common law administered.
- While this idea sounds simple, the cases below illustrate the difficulty judges have had with implementing this idea.

***Day v Mead* [1987] 2 NZLR 443**

Principle: The judges reduced equitable compensation on the basis of the legal doctrine of contributory negligence. This case is an example of a poor judgment based on the fusion fallacy. Not good law. Not followed in Australia.

- Facts: D sued his former solicitor M, alleging that on M's advice he had invested money in a company (of which M was a director) that went into receivership shortly thereafter. At trial, the judge found for D, but reduced the sum recovered on the basis that D should have obtained independent and competent advice before making such a substantial investment.
- Issue: Is compensation for breach of fiduciary duty apportionable?
- Held: Yes
- Judgement:
    - **Cooke P:** Following the interaction of law and equity, there is no reason for denying the jurisdiction of a court to assess compensation for breach of fiduciary duty having regard to the plaintiff's share of responsibility.
    - **Somers J:** the assessment will reflect that which the justice of the case requires, according to considerations of conscience, fairness, and hardship – it would be unjust and unfair to impose total liability on M.
    - **Casey J:** the basic ideal of controlling unconscionable conduct justifies an approach aimed at awarding a party no more than the loss fairly attributable to M.
    - **Hillyer J:** Loss if calculated by taking the full loss and reducing it by reason of contributory negligence.
- Criticism:
    - This was about an equitable issue: breach of fiduciary duty.
    - Contributory negligence apportionment is a product of statute-altered common law (remember at pure common law, contributory negligence was a complete defence; it is legislation that has made it apportionable). Moreover, the legislative alterations are meant to *help* the plaintiff at law, not hinder a plaintiff in equity.
        - The statute only makes sense because of the harshness of the common law principle it was mitigating. It isn't meant to be transferred into a equitable claim to hurt a plaintiff in equity.
    - To the extent that Cook relies on the intermingling of law and equity, he's operating under the fusion fallacy: he's using the fact of judicature legislation to change the law substantively.

***Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10**

Principle: A fusion fallacy is where you mistakenly combine principles of law and equity. Here, the judges did not commit a fusion fallacy because they knew that allowing punitive damages (common law remedy) for breach of

fiduciary duty (equitable cause of action) would be changing the law substantively; didn't think the could already do this on the basis of the Judicature Acts.

- Facts: Employee, in breach of his employment contract, worked for the benefit of his own business to compete with his employer. The employer sought exemplary damages for breach of fiduciary duty.
- Issue: Can exemplary damages be awarded for breach of fiduciary duty?
- Held: No.
    - **Spigelman CJ and Heydon J:**
        - There is no power to award exemplary damages for equitable wrongs
        - Equity protects relationships of trust and confidence
            - It does not matter that the breach is of varying degrees of seriousness s-I t has either been breached or not
        - To select a remedy from the common law remedies which a court of equity would not have administered before the introduction of the judicature system is a fusion fallacy i.e. a judge-engineered change in the law.

    - **Dissenting Judges:**
        - Other judges thought you should be able to get exemplary damages for equitable breach of fiduciary duty.

    - **Is there a fusion fallacy?**
        - Leeming says *no.*
        - The fusion fallacy is when you mistakenly believe that the combining of law and equity in the one court combines their principles.
        - Here, all the judges were ***aware*** that it would be a substantive change to the law to allow punitive monetary awards in Equity. (Because, damages is not an equitable remedy; and punitive damages are *certainly* not an equitable remedy. Equity only allows compensation).
        - Cf. *Day v Mead*, where the reasoning process revealed a fusion fallacy.

Walsh v Lonsdale (1882) 21 Ch D 9

Principle: Example of a fusion fallacy, in assuming that by virtue of the Judicature Acts only the legal and equitable lease are now the same thing.

- Facts: Landlord granted a 7-year lease to a tenant. Lease did not satisfy legal formalities, and was thus void at law. Tenant went into possession, and landlord demanded a year's rent in advance, as per the terms of the purported lease. Tenant refused to pay, arguing that a valid lease did not exist. In response, the landlord distrained the tenant's goods, and the tenant sued for damages for wrongful distress.
- Issue: was the distress unlawful? NB the distress was not unlawful if there was a valid lease at law.
- Held: No, the distress was not unlawful.
    - A tenant holding under an agreement for lease of which specific performance would b decreed stands in the same position as to liability as if the lease had been properly executed at law.
        - The tenant held his lease under an agreement enforceable in equity, and every branch of the Court must now recognise those rights. There is only one Court, and equity rules prevail in it.
    - I.e. a lease that could have become a legal lease by an order of a court of equity is equivalent to a legal lease.
    - Why? Jessel said that since the Judicature Acts, where there were formerly two estates (a legal and an equitable), there's now just one.
- Criticism:
    - Leeming (and HCA in *Chan v Cresdon*) say that this finding by Sir Georg Jessel was wrong.
    - It is a substantive change in the law if what was formerly an equitable lease was the same as a legal lease.

- Again, can't just deem that to be true on the basis of the *Judicature Acts*. Need to recognise it as a substantive change in the law.
- Clear example of a fusion fallacy.

***Chan v Cresdon Pty Ltd* (1989) 168 CLR 242 – Authority in Australian Law**

Principle: Australian HCA authority asserting the necessary distinction between legal and equitable principles in the context of leases.

- Facts: Mr and Mrs Chan owned a shop in a shopping centre. Landlord gave them a lease, and secured the lease through a guarantee given by the Chan's to perform their obligations "under this lease". Mr and Mrs Chan sign the lease both as the leasing company but also as independent persons acting as guarantors (i.e. confirming that if the company can't pay the rent they will personally pay the rent themselves). However, lease is never properly registered i.e. made legal. Company then goes under, company can't pay rent, landlord then tries to enforce the guarantee.
- Issue before HCA: Although there was no legal lease, did the unregistered lease amount to an equitable lease of 5 years such that the obligation of the lessee was within the terms of the guarantee?
- Held:
  - As a matter of construction, the guarantee, made "under this lease", should be construed strictly as meaning under this *legal lease*, not under the equitable lease that was formed on the basis of the agreement. This is the easy reason.
  - However, if Jessel's view in *Walsh v Lonsdale* was true, then there was only ever one lease relationship between the company and the landlord → wouldn't matter if we were talking about the legal lease or the equitable lease, because they would be the same and so the Chan's personal guarantee would stand.
  - However, HCA held *Walsh v Lonsdale* was wrong. Express about this.
    - Reviewed a lot of authorities, and found that there is necessarily a difference between the equitable lease that arises from the **landlord's specifically enforceable promise to give a lease**, and the legal lease that arises **when you satisfy the formal legal requirements**.
    - While the parties, the terms, and everything else identified in both leases is identical, the leases are still different; one is recognised at law, the other in equity. The difference is clear when a third party comes along (in terms of priority), or when you look at issues like sub-leasing.

  - Outcome and reasoning in *Chan v Cresdon* is antithetical to *Walsh v Lonsdale*, and is wholly consistent with the idea that it's a fusion fallacy to think there's a conflation between doctrines of law and doctrines of equity.

C. The Maxims of Equity

Equity is founded on a series of maxims originally formulated in the 17th century. While you can't win a case in equity just because you win on one of the various maxims (indeed, often one party will win on the basis of one maxim, and another on the basis of a different maxim), they are important because they underpin a lot of equitable reasoning, and are used to mould the exercise of discretion in equity.

A. Examples

1. **He who seeks equity must do equity**

2. **He who comes to equity must come with clean hands**

   - Under this maxim, equity examines the conduct of the party seeking relief in the transaction or arrangement which is the subject of the suit.
   - Should a petitioner be guilty of some impropriety, in the legal (not moral) sense, in some way that is pertinent to the suit, then equity may refuse the decree sought.

3. **Where the equities are equal, the law prevails.**

    - Governs the law of equitable priorities
    - If the legal owner for example has done nothing to postpone their interest to an equitable interest, legal interest holder will prevail. Think 'arming conduct' vs. no arming conduct.

4. **Where the equities are equal, the first in time prevails**

    - As above; think competing equitable proprietary interests; if equities are equal first in time will prevail but only as a last resort.
    - 'Search' for the better equity; if not, see time.

5. **Delay defeats equity**

    - See *Smith v Clay* (1767) 27 ER 491
    - Found that in seeking equitable relief, a plaintiff must act promptly and diligently. Equity will not allow defendants to remain for too long in a position of not knowing whether equitable relief will be ordered against them because it would be unconscientious to do so, and defeat the purpose of equity.

6. **Equity looks to intention rather than form**

    - See *Parkin v Thorold* (1852) 51 ER 698
    - Found that courts of equity make a distinction in all cases between that which is a matter of substance and that which is a matter of form
    - If it finds that by insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance (e.g. think of equitable interests in real property in the absence of a formal deed etc.)

7. **Equity presumes equality**

    - Equity will presume equality in the sense that in the absence of contrary evidence, it will presume that parties start off from an equal (proportional) share and then move from there with evidence.

8. **Equity regards as done that which ought to be done**

    - *Frederick v Frederick* (1721) 24 ER 582: where one, for valuable consideration, agrees to do a thing, such executory contract is to be taken as done; and…the man who made the agreement shall not be in a better case than if he had fairly and honestly performed what he had agreed to.

9. **Equity will not assist a volunteer [e.g. equity will not perfect an imperfect gift]**

    - Equity will not assist a party that has not provided consideration in a transaction
        - Exception: the assistance provided by equity for beneficiaries of trusts, who are usually volunteers.
    - *Corin v Patton* (1990): equity will not assist a volunteer – emphasized there are no equitable remedies to support a volunteer to perfect an imperfect gift. A voluntary covenant is not enforceable in equity.

10. **Equity acts *in personam***

    - Equitable rights are personal rights, not proprietary rights → equity acts in personam rather than in rem.
    - However really, neither is correct.
    - An equitable interest can be both personal and proprietary. Whether an equitable interest survives a transfer depends on whether the transaction is to a bona fide purchaser for value without notice.

- Bit of a confusing maxim, e.g. think trust beneficiaries who have in personam rights enforceable against the trustee, but also proprietary rights e.g. the right of recoupment if the trustee wrongfully disposes of the trust assets to a third party.

B. Case Law

***Corin v Patton* (1990) 169 CLR 540**

- A maxim is not a specific rule or principle of law. It is a summary statement of a broad theme which underlies equitable concepts and principles.
  - Thus, while it can be said that "this decision is interesting because does not conform with a maxim", it cannot be said that a decision is wrong because it does not conform with a maxim

2. Applications of the Conscience of Equity

(A) Breach Of Confidence

CB: Chapter 22
TB: Chapter 9

Coco v AN Clark (Engineers) Ltd [1969] RPC 41, CB 3.17C
Optus Networks Pty Ltd v Telstra Corporation (2010) 265 ALR 281, CB 22.1, 22.19C
O'Brien v Komesaroff (1982) 150 CLR 310, CB 22.2C
Johns v Australian Securities Commission (1993) 178 CLR 408, CB 22.5C
Bolkiah v KPMG [1999] 2 AC 222, CB 11.39C
Kallinicos v Hunt (2005) 64 NSWLR 561, CB 22.10 n2
ABC v Lenah Game Meats Pty Ltd (2001) 208 CLR 199, CB 22.6 n 5
Commonwealth v John Fairfax & Sons Ltd (1980) 147 CLR 39, CB 22.11C
Giller v Procopets [2008] VSCA 236, (2008) 24 VR 1

(B) Estoppel

CB: Chapter 18
TB: Chapter 14

Moratic Pty Ltd v Gordon [2007] NSWSC 5 at [27]-[37]; (2007) 13 BPR 24,713
Central London Property Trust Ltd v High Trees House Ltd [1947] 1 KB 130
Crabb v Arun District Council [1976] Ch 179
Pascoe v Turner [1979] 1 WLR 431 (CA), CB 18.11C
Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 87, CB 18.5C
Commonwealth v Verwayen (1990) 170 CLR 394, CB 18.7C
Austotel Ltd v Franklins Ltd (1989) 16 NSWLR 582. Note also CB 18.8 note 5
Giumelli v Giumelli (1999) 196 CLR 101
Sidhu v Van Dyke (2014) 251 CLR 505

EXAM MEMORISATION

Applications of the Conscience of Equity

Coco v AN Clark (Engineers) Ltd [1969] RPC 41
Optus Networks Pty Ltd v Telstra Corporation (2010) 265 ALR 281
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Commonwealth v John Fairfax & Sons Ltd (1980) 147 CLR 39
Giller v Procopets [2008] VSCA 236
Gold & Copper Resources Pty Ltd v Newcrest Operations Ltd [2013] NSWSC 281
Wilson v Ferguson [2015] WASC 15
Moratic Pty Ltd v Gordon [2007] NSWSC 5
Central London Property Trust Ltd v High Trees House Ltd [1947] 1 KB 130
Crabb v Arun District Council [1976] Ch 179
Pascoe v Turner [1979] 1 WLR 431
Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 87
Commonwealth v Verwayen (1990) 170 CLR 394
Austotel Ltd v Franklins Ltd (1989) 16 NSWLR 582.
Giumelli v Giumelli (1999) 196 CLR 101
Sidhu v Van Dyke [2014] HCA 19
Yarrabee Chicken Co Pty Ltd v Steggles Ltd [2010] FCA 394

Breach of Confidence

Coco v AN Clark (Engineers) Ltd (1969)**: Early statement of test**
1) Information must have necessary quality of confidence, 2) information must have been imparted in circumstances importing an obligation of confidence (would a reasonable man in the position of the recipient realise the information was being given in confidence?) and 3) unauthorised use of that information to the detriment of the plaintiff.

Optus v Telstra (2010)**: modern statement of test**
Elements for breach of confidence are specificity, quality of confidence, received in circumstances importing an obligation of confidence, and actual or threatened misuse without consent, with no requirement of actual detriment. Further, a pre-existing contract doesn't preclude suing for equitable breach of confidence, as sometimes equitable remedies will be more desired.

O'Brien v Komesaroff (1982)**: element 1 → info identified with sufficient specificity**
Salesman marketed and sold tax minimization devices, which included a unit trust deed that had been drafted by his solicitor. Solicitor could not sue for breach of confidence because the entirety of the unit trust deed was not a sufficiently precise definition of what was the confidential information.

Johns v Australian Securities Commission (1993) **element 2 → 'necessary quality of confidence'**
ASC conducted private interview, with transcript later disclosed to Royal Commissioner and media. Found that once information is already in the public domain that can preclude breach of confidence action as no obligation attaches to common knowledge

Bolkiah v KPMG (1999) **element 2 → 'necessary quality of confidence' [solicitor/client relationship]**
A solicitor holds a duty of confidence to their client in equity even after the retainer has ended. This is a strict duty, and solicitors must not just take reasonable steps to preserve confidentiality but should actually do so.

Kallinicos v Hunt (2005) **element 2 → 'necessary quality of confidence' [solicitor/client relationship]**
Accepted *Bolkiah*, and said the Court has an inherent power to protect the integrity of the judicial process, which is a well-established basis on which to restrain a former solicitor from acting.

ABC v Lenah Game Meats (2001) **element 2 → 'necessary quality of confidence' [general test]**
General test is 'disclosure or observation of information or conduct that would be highly offensive to a reasonable person of ordinary sensibilities.'

Cth v John Fairfax & Sons (1980) **element 2 → 'necessary quality of confidence' [government secrets]**
Cth sought to restrain publication of a book detailing Australia's defence and foreign policy. Court said that government information is a unique area for equity → must weigh up public interest. Unless disclosure is likely to injure the public interest, it will not be protected. Factual consideration/discussion about whether the information merely allows you to criticize past governments, or if it is relevant to current security and relations.

Giller v Procopets (2008): **remedies (equitable compensation)**
P videotaped sex between P and G, and threatened to show G's family. Court found that equitable compensation can be awarded for distress or embarrassment suffered as a result of a breach of the equitable duty of confidence. Note the uncertainty as to 'aggravated' or 'punitive' compensation.

Estoppel

Moratic Pty Ltd v Gordon (2007): **equitable promissory estoppel**
Equity will give a cause of action to a plaintiff who has acted to their detriment on the basis of an assumption induced or acquiesced to by the defendant to the extent that it would be unconscionable for the defendant to deny the assumption.

Central London Property Trust v High Trees (1947)**: equitable promissory estoppel**
C leased block of flats to H and promised H could pay half-rent during war while flats were difficult to sub-let. Example of estoppel being used as a shield in equity → High Trees relied on promissory estoppel to prevent C from claiming full rent from 1940-1945 (i.e. within the war years where it had been represented that only half rent was fine). Principle being that in cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact so acted on, the court will treat the promise as binding to the extent that it will not allow the promisor to act inconsistently with it even though the promise may not be supported by consideration in the strict sense.

Crabb v Arun District Council (1976): **proprietary estoppel re right of way**
C and ADC agreed C could have a right of access to his property via council road, and on this promise C subdivided the land relying on this access point. ADC later fenced off the access point. Example here of estoppel being used as a sword in the case of 'proprietary estoppel'. If there is a representation through conduct or acquiescence that you have an interest in a piece of property and then on reliance of that representation you act to your detriment, you can enforce that as a cause of action and get the court to enforce your expectation.

Pascoe v Turner (1979): **mistress claiming proprietary acquiescence estoppel + minimum equity to do justice**
P told his mistress T "this house and everything in it is yours" so T spent ¼ of her life savings on improvements to P's knowledge. A proprietary estoppel arose by acquiescence because not only did P say the house was hers but then stood by while she made improvements. Minimum equity to do justice was transferring T the fee simple (not simply providing a licence) because she deserved security of tenure and freedom from interference.

Waltons Stores v Maher (1988): **big key case; abolished shield/sword distinction and confirmed equitable estoppel elements**
W leased commercial premises to M with M planning to demolish the premises and construct new one, but no formal agreement signed. M went ahead with demolition after told by W's solicitors "approval will be forthcoming, we'll let you know by tomorrow if not" and then heard nothing. Found it was unconscionable for W, knowing that M had exposed themselves to detriment by acting on the basis of a false assumption, to adopt a course of inaction. Also abolished the shield/sword distinction. Brennan J confirmed equitable estoppel elements.

Commonwealth v Verwayen (1990): **estoppel precludes departure from 'assumed state of affairs'**
V sued Cth for injuries he obtained 20 years ago in navy (outside of limitation period) but Cth repeatedly represented to V it wouldn't contest liability (only quantum of damages). Court considered what remedy would be fair, and noted that estoppel precludes departure from the 'assumed state of affairs' and will only give some substitute remedy if relief framed on presumed state of affairs would be inequitably harsh.

Austotel v Franklins (1989): **no estoppel because involved sophisticated commercial parties who explicitly didn't reach a final agreement → thus not unconscionable**
Franklins bought special equipment and cancelled old lease on basis of early negotiations with property developer to lease new land for one of their stores, but then developers pulled out and franklins sued. No estoppel because no unconscionable conduct → these were sophisticated commercial parties, well-resourced and advised, dealing in a commercial transaction of great value that had yet to reach final agreement.

Giumelli v Giumelli (1999)**: whether imposition of constructive trust/conveyance of land = appropriate remedy**
Appellants estopped from denying respondent's right to a lot of land, and Full Federal Court found it was held on constructive trust and must be conveyed to respondent when subdivided. HCA said court must look at all circumstances of the case to see how equity can be satisfied, with constructive trust + forced conveyance a last resort. Instead said relief should be equitable compensation.

Sidhu v Van Dyke (2014): **focus for estoppel is on whether it's unconscionable for representor to enforce legal rights; also remedy-wise, no constructive trust imposed**
S and VD were cheating on their spouses with each other, got found out, and divorced. VD didn't seek a property settlement from her husband during divorce because S said she could have the cottage on his land but then later refused to convey the cottage. [Estoppel?] Not necessary for defendant's conduct to be sole or predominant inducement acting on plaintiff's mind – question is whether plaintiff's conduct was *so influenced* by the encouragement or representation that it would be unconscionable for the representor thereafter to enforce his strict legal rights. [Remedy?] Court didn't order constructive trust + conveyance → instead got equitable sum equal to value of cottage.

LONG-FORM NOTES

A. Breach of Confidence

To enforce an obligation not to disclose information, you can sue on the basis of a) breach of contract, or b) equitable duty of confidence.

(i) Elements

Statement of Test

Coco was the first broad statement of when equitable duty of confidence claims can arise, with *Optus v Telstra* subsequently providing the specific applicable test.

***Coco v AN Clark (Engineers) Ltd* [1969] RPC 41**

Principle: *Coco* gives us an early statement of a circumstance where breach of confidence arises. However, note that it was not meant to be the definitive test, with the applicable legal test properly stated later in *Optus v Telstra*.

- Facts: Manufacturing specifications were disclosed by one party to another during negotiations for a joint venture.
- Issue: Was there a duty of confidence?
- Held: Yes.
  - 3 elements are required if a case of breach of confidence is to succeed:
    - 1. The information itself must have the necessary quality of confidence about it:
      - Information that is common knowledge, public property, or public knowledge does not satisfy this requirement.
      - However, information constructed from materials available in the public domain may possess the necessary quality of confidentiality – novelty depends on the thing itself, not its constituent parts.
    - 2. The information must have been imparted in circumstances importing an obligation of confidence.
      - Test = would a reasonable man standing in the position of the recipient of the information realise upon reasonable grounds that the information was being given to him in confidence?
      - No obligation of confidence arises if the information is communicated in public.
    - 3. An unauthorised use of that information to the detriment of the party communicating it.

Optus Networks Pty Ltd v Telstra Corporation* (2010) 265 ALR 281 **

Principles: Elements for breach of confidence are specificity, quality of confidence, received in circumstances importing an obligation of confidence, and actual or threatened misuse without consent, with no requirement of actual detriment. Further, a pre-existing contract doesn't preclude suing for equitable breach of confidence, as sometimes equitable remedies will be more desired.

- Facts: Optus and Telstra contracted that they would not eavesdrop on customers' use of services in each other's respective areas. T breached the contract, and O sued T. T accepted they had breached the contract, and did not care, as their profits outstripped likely damages pay outs. However, O wanted to obtain an account of profits (i.e. strip T of their profits), and needed thus to sue in equity for equitable breach of confidence to get account of profits.
- Issue: Did the contract exclude equitable obligations?

- Held: No.
  - Elements for equitable breach of confidence:
    - 1. Information must be identified with specificity (e.g. 'information within this book' is not sufficiently specific)
    - 2. Necessary quality of confidence
    - 3. Received in circumstances importing an obligation of confidence
      - An advantage of being able to show there is also a contract is that this requirement is more easily overcome
    - 4. Actual or threatened misuse without consent
      - NB that detriment is not an element as suggested in *Coco* – that is relevant to remedy, however it seems silly to require the breach of confidence to cause loss before it is actionable e.g. you might want injunctive relief prior to the detriment being caused.

  - Also held that the contract between O and T did not preclude O for suing on equitable duty of confidence:
    - Contractual and equitable duties of confidence can co-exist.
    - Contractual obligations can exclude equitable duties; however, this did not occur here.

Element 1: information identified with sufficient specificity

O'Brien v Komesaroff* (1982) 150 CLR 310 **

Principle: confidential information must be sufficiently precise, such that a court can order what information not be disclosed.

- Facts: An insurance salesman marketed tax minimisation devices, including by using a unit trust deed ('Exhibit B20') which had been drafted by a solicitor. The salesman sold them on his own account, and the solicitor sued for infringement of copyright (which succeeded) and breach of confidence.
- Issue: Was there a breach of confidence?
- Held: No, because he could not identify any information with specificity.
  - 'Exhibit B20' (i.e. entirety of the unit trust deed) was not a sufficiently precise definition of what was the confidential information.
    - The generality of the description does not identify the information and enable the Court to formulate an order as to information not to be disclosed.

Element 2: Necessary Quality of Confidence

- This is an objective test:
  - Stating that information is confidential does not making it confidential.
- Inherently confidential information:
  - Commercially sensitive information
  - TV program ideas
  - Secret folklore of Aboriginal Australians
  - Sexual activities
  - NB: the bare fact of having a second family is not confidential

General test for private information

ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 **

Principle: General test for what amounts to private information

- Test for private information: disclosure or observation of information or conduct that would be highly offensive to a reasonable person of ordinary sensibilities.

- Certain kinds of information about a person may be easy to identify as private, such as information relating to:
  - Health
  - Personal relationships
  - Finances
- Certain kinds of activity, which a reasonable person applying contemporary standards of morals and behaviour, would also be understood to be meant to be unobserved.

Public domain

- Information that is in the public domain can no longer be the subject of confidence: *Douglas v Hello!* (2008)
  - Example: In *BBC v Harper Collins* (2010), HC wanted to publish a book revealing Ben Collins' identity as the racing driver known as 'The Stig' on Top Gear. BBC was denied an injunction as the identity of 'The Stig' was public knowledge – HC did not unmask Collins.
- What constitutes the 'public domain' is contentious – not every form of publication renders information in the public domain.
  - Transitory publications available only to a few people does not undermine confidence: *AFL v The Age* (2006)
  - Publication in a minor, restricted manner does not mean the information is in the public domain (*Prince of Wales v Associates Newspapers*)
- The public nature of the information will be relevant in 2 respects:
  - 1. Whether there is a breach of confidence; and
  - 2. Whether an injunction will be awarded as a remedy (i.e. if it's in public an injunction might be ineffective).

Johns v Australian Securities Commission* (1993) 178 CLR 408 **

Principle: If information is in the public domain, that might preclude breach of confidence action (but did not in this case; but see Gaudron obiter). It might also preclude injunctive relief (did so in this case).

- Facts: ASC conducted a private interview with J. The transcript was then disclosed to a State Royal Commissioner, and copies were later made available to the media.
- Issues:
  - 1. Was there a breach of confidence, and
  - 2. Could J obtain an injunction?
- Held:
  - **Brennan J:**
    - Relief for breach of confidence *can* be granted to restrain a defendant from further publishing confidential information after some limited publication has occurred.
    - However, when the proceedings of a court, tribunal or commission are open to the public and a fair report of the proceedings can lawfully be published, generally such published information is regarded as being within the public domain.
      - Here, the transcripts were tendered in a public hearing.
    - Once in the public domain, that information can be freely used and disseminated.
    - Johns should have been heard before the decision to release the transcripts to the Royal Commission. However, as the transcripts had already been published, an injunction was denied.
      - The information was no longer confidential, even if the defendant had wrongly published it.
      - The most that can now be done is to declare that J was denied an opportunity to be hear din opposition of the release of the transcripts.
  - **Gaudron J (dissent, but relevant obiter)**
    - The concept of 'public domain' has two aspects:
      - 1. Whether any duty of confidence arises:
        - No obligation attaches to trivial tittle-tattle or public property and public knowledge or **common knowledge**

- 2. Whether a duty of confidence has come to an end:
  - Information ceases to be confidential if it has passed into the public domain e.g. by consent

The Solicitor-Client Relationship

Bolkiah v KPMG [1999] 2 AC 222 ***

Principle: A solicitor holds a duty of confidence to their client in equity even after the retainer has ended. This is a strict duty, and solicitors must not just take reasonable steps to preserve confidentiality but should actually do so.

- Facts: KPMG was in possession of confidential information about B's financial affairs. KPMG undertook work potentially adverse to the interests of B (who was now a former client). KPMG claimed that they established effective Chinese walls to minimise any risk of disclosing confidential information.
- Held:
  - The fiduciary relationship between solicitor and client comes to an end with the termination of the retainer. However, a continuing duty to preserve the confidentiality of information imparted during the subsistence of the retainer survives the termination of the client relationship.
  - A solicitor may be restrained from acting to avoid a significant risk of the disclosure or misuse of confidential information belonging to the former client.
    - 2 conditions:
      - 1. Solicitor possessed information that was confidential to the former client;
      - 2. Such information was or might be relevant to the matter on which he was instructed by the new client.
  - The duty to preserve confidentiality is unqualified, whether founded in contract or equity:
    - It is a duty to keep the information confidential, not merely to take all reasonable steps to do so.
    - The defendant must adduce clear and convincing evidence that there was no risk of disclosure – an effective Chinese Walls needs to be an established part of the firm's organisational structure, rather than ad hoc.
  - The Court should intervene unless it is satisfied there is no risk of disclosure.
    - The risk must b a real one, and not merely fanciful or theoretical, but it need not be substantial.

Kallinicos v Hunt (2005) 64 NSWLR 561 ***

- Case accepts *Bolkiah v KPMG*
- There is always an inherent power in the Court to protect the integrity of the judicial process
  - There is well-established basis to restrain a former solicitor from acting, even without it being show that s/he possesses any confidential information of the former client, in order to protect the integrity of the judicial process.

Government Secrets

- Public interest is relevant to the question of whether information is confidential
  - Balancing exercise

Commonwealth v John Fairfax & Sons Ltd (1980) 147 CLR 39 ***

Principle: government information will only be protected if it is in the public interest to do so; information that merely opens the government to criticism doesn't have the necessary quality of confidence.

- Facts: The Cth sought to restrain publication of a book *Documents on Australian Defence and Foreign Policy* on the basis of breach of confidence.
- Issue: was the information confidential?

- Held: No, as there was no evidence that national defence or security would be prejudiced.
    - When equity protects government information it will look at the matter through different spectacles.
        - It is unacceptable in our democratic society that there should be restrain on the publication of information relating to government when the only problem is that is enables the public to discuss, review, and criticise the government.
    - The court will determine the government's claim to confidentiality be reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.
    - For example:
        - Information that merely throws light on the past workings of government may be published so long as it does not prejudice the community in other respects.
            - Serves the public interest in keeping the community informed and promoting discussion of public affairs.
        - Disclosure may be restrained where national security, relations with foreign countries or the ordinary business of government will be prejudiced

Element 3: Received in circumstances importing an obligation of confidence

- For there to be a duty of confidence, the information must be known to be confidential
    - Question is whether the recipient knew or ought to have known that it was confidential
- If a recipient has confidential information, but does not realise it is confidential, and later is told that it is confidential, a duty may arise.
- The basis for this is that an obligation of conscience arises fro circumstances in or through which the information was communicated or obtained i.e. if you receive the information in circumstances where it's clear the information is confidential then your conscience is bound (*Moorgate Tobacco*)

Element 4: actual or threatened misuse without consent

- Note that unlike in *Coco*, the current test doesn't require actual detriment; just a threat of misuse will do.
- Re: consent, if a plaintiff has, in the past, published information then s/he has implicitly consented to the later publication of such information: *Campbell v MGN* (2004)
    - However, note example of *Douglas v Hello*, where just because D allowed 'OK' Magazine to take photos of his wedding doesn't mean that there was consent for *Hello* to take photos of the wedding.

(ii) Defences

- 1. Equitable defence of laches (delay)
- 2. Defence of unclean hands
    - If the plaintiff has acted unconscionably, the Court can refuse relief [see topic 1].
- 3. Defence of forced disclosure
    - If a statute or court compels you to disclose, that is a defence to a claim for breach of confidence
    - *The Royal Women's Hospital v Medical Practitioners Board of VIC* (2006): the hospital was under investigation in a public inquiry into the way they carried out abortions: the inquiry required disclosure of otherwise confidential medical records; the hospital's breach of confidence was excused as they had been compelled to disclose.
- 4. Unclear whether there is a public interest defence in Australia (there is in the UK).
    - Radan and Stewart say there is, albeit more limited than in the UK.

(iii) Remedies

- All equitable remedies are discretionary
- Main remedy for actual or threatened breach = injunction
    - Can get injunctions in aid of legal rights and equitable rights
- In lieu of or in addition to injunction, can get:
    - 1. Account of profits;

- 2. Constructive trust;
- 3. Equitable compensation
- 4. Others (e.g. destruction of documents)

- The remedy for contractual breach of confidence is damages.

Account of Profits

- Focus of this remedy is on how much the wrongdoer gained, not how much the plaintiff lost (think *Optus v Telstra*)
  - Need to show a profit was made from the breach of confidence
- Very raise to claim an account of profits against a magazine, as every magazine nearly always runs at a loss

Constructive Trust

- If B has taken confidential information from A and use it to create Company X, A's remedy may be a constructive trust over the shares and goodwill of the new company
  - I.e. the new enterprise that was built on the breach of confidence is held on trust for the plaintiff
- Rarely awarded, because it is difficult to say that a whole new company is built on the breach of confidence – the breach may be one element, but not the foundation of the whole company.

Equitable Compensation

Giller v Procopets [2008] VSCA 236 ***

Principle: equitable compensation can be awarded for distress or embarrassment suffered as a result of a breach of the equitable duty of confidence. Note the uncertainty as to 'aggravated' or 'punitive' compensation.

- Facts: P videotaped sex between P and G. P showed and threatened to show the tape to G's family. G sued for damages for breach of confidence.
- Issue: Could G claim damages
- Held: Yes
  - Damages for breach of confidence occasioning distress are recoverable on the basis of 2 alternative grounds:
    - 1. Equitable compensation for the embarrassment or distress suffered as a result of a breach of an equitable duty of confidence
      - Inherent jurisdiction to grant relief by way of monetary compensation for breach of an equitable obligation
    - 2. Damages under Lord Cairns Act (s38 *Supreme Court Act 1986*)
      - Awarded in lieu of an injunction or specific performance
      - Here, an injunction is undesirable as he video has already been viewed.
  - Aggravated damages?
    - There is academic support for the view that in a claim for equitable compensation, it is possible to recover for aggravated damage – the question was however left open by the Court
    - Damages awarded under the LCA can include a component for aggravation
    - Here, G was awarded aggravated damages as P breached his duty with the deliberate purpose of humiliating, embarrassing and distressing G.
  - Punitive damages?
    - The ground that is relied upon may be material where punitive damages are sought, as it may be possible to award punitive LCA damages, but not punitive equitable compensation.
    - However, there is no authority supporting a punitive monetary award for breach of confidence under either ground.