

## Introduction: History and Nature of Equity

### **What is equity? History and nature of equity**

- Equity is body or rules administered by courts of justice which, were it not for operation of Judicature Acts, would be administered only by Courts of Equity: Maitland
- Primary connection between all equitable doctrines is historical
  - o All equitable doctrines originated in equity jurisdiction of Lord Chancellor sitting in Court of Chancery
- Rational of Equity = operates to control or restrain CL in circumstances where assertion of CL rights is unconscionable/unconscientious
  - o Equity filling in gaps of CL → it is softening or mollifying extremity of it: Earls of Oxford
  - o It is secondary gloss on CL rights and powers that people have
  - o Operates interstitially – presupposes the existence of CL rights
- These are equitable principles and NOT rules
  - o Equity treats them as guidance
  - o More like a presumption as to what equity will do
  - o Equitable courts will depart from principles/maxims where considered appropriate

### **‘Fusion fallacy’**

- *Judicature Acts 1873* (JA) fusion operation of CL and equity into a single court
  - o They provided a single procedural regime for that court = procedural fusion
    - This was to overcome delay and procedural defects
      - Suitor could previously be defeated if commenced dispute in wrong court – note costs involved in this
      - E.g. if wanted equitable remedy for breach of CL rights...
        - o Had to go to CL court first to establish you had CL rights and then go to equity to get equitable remedy for breach of CL rights
  - o Also provided (s25(11)) that in the event of conflict between CL and equitable rules, equity rules would prevail (giving statutory effect to Earl of Oxford case)
- In Australia, *Supreme Court Act 1970* s57 replicates this section.
  - o s5 *Law Reform (Law and Equity) Act* replicates idea that in event of conflict between two jurisdictions, rules of equity shall prevail
    - i.e. rules of equity will prevail in sense that they will restrain or control exercise of CL rights to mollify its extremity
- Procedural vs. substantive fusion
  - o Main intention of JA was to provide procedural fusion of law and equity
  - o Procedural fusion does not involve change in substance of law, just making law more streamlined and efficient
  - o Question has arisen, does JA have the consequence that there has been substantive fusion?
    - Substantive fusion involves administration of a remedy not previously available at law or in equity, or modification of principles in one branch of the jurisdiction by concepts which are imported from the other and thus are foreign: Meagher, Gummow and Lehane
      - These authors totally against idea and hence the term ‘fusion fallacy’
  - o Instances where occurred:
    - MCCC Proceeds
      - Facts: trustee pledged share certificates in breach of trust to a bona fide purchaser – beneficiary argued conversion
      - Outcome: cannot sue on conversion because that is a CL action and trust rights are equitable
    - Walsh:
      - Outcome: Equity making available a legal remedy

- Chan: argued that this was not the case, because equity could order retrospective SP and if did legal rights could flow
- NZ decisions have recognised substantive fusion but HCA constantly rejects
  - Day: recognised that an award of equitable compensation for breach of fiduciary duty may be reduced by CN
  - Aquaculture: awarded exemplary damages (CL remedy) for an equitable breach
- Conclusion: not the law. To suggest substantive fusion is part of the law is a 'fallacy'
- Fusion by convergence?
  - CL existed since time immemorial (1189 AD)
  - Equity recognised as being created over time
  - If equity develops over time it might develop to point where equity and law converge
  - Consequence of natural development of law and equity

### Maxims of Equity

- Note: these are merely principles not rules and courts of Equity can depart from these
  - Presumptions of what equity will do
- Where two maxims are inconsistent with each other court has to choose which maxim to follow – focus is on the one which best gives effect to conscience
  - Corin
    - Equity will not assist a volunteer vs. equity looks to intention not to form
    - Held in favour of intent maxim as best gave effect to conscience
- Maxims
  - Equity regards as done that which ought to be done
    - Walsh: agreement to grant lease considered as granted as soon as entered into agreement
  - Equity follows the law
    - Equity adds its gloss to CL, it does not just literally do the same as the law
  - He who seeks equity must do equity
    - If go to court and ask for equitable relief, you yourself must be prepared to act properly
    - E.g. if suing on contract and you are seeking SP you must be prepared to perform obligations of contract yourself
  - He who comes to equity must come with clean hands
    - Conduct in past
    - Idea = Cannot get an equitable remedy if you have acted wrongfully or dishonestly (Black Uhlan).
      - Requirements to argue this:
        - Wrongdoing must be serious: Gellch
        - Wrongdoing must relate to the claim
  - Where the equities are equal the first in time prevails
  - Delay defeats equity
  - Equity looks to intention/substance rather than form
    - E.g. if creating trust and do not use word 'trust', can still create trust arrangement because equity looks to substance of what you are doing
  - Equity presumes equality
    - Equity will try to do better, will not just presume equality and walk away
    - If evidence does not show it, then way equity deals with it is to presume equality (fall back position)
  - Equity acts in personam
    - Equity is focused on the individual
    - E.g. Mareva orders → court acts in personam by saying that certain individual cannot touch bank account

- Equity will not assist a volunteer
  - If valuable consideration provided equity will jump in and assist, but if no consideration, equity will refuse its assistance to you

## Topic 2: Breach of confidence and estoppel

### PROCESS

- Breach of confidence
  - o Introduction
    - Scenario
    - Relevance
  - o Assess whether a contract does exist
  - o Determine whether there has been a breach
  - o Assess possible defences
    - Is there a public interest argument/defence
  - o Remedies
    - Injunction
    - Order for delivery up
    - Equitable compensation or account of profits (and CT)
- Estoppel
  - o Introduction
  - o Four types
    - Estoppel by convention
    - Estoppel by representation
    - Promissory estoppel
    - Proprietary estoppel
  - o Remedies

### STRUCTURE

#### 1) Breach of confidence

- Introduction
  - o Scenario = confidentiality obligations separate to contractual obligations due to a contract not existing or a party not being privy to the contract
    - Not a party → comes by information innocently
      - Stance = once learns that it was obtained in circumstances involving breach of confidence may be restrained from making use of it: Johns
  - o Relevance of equitable doctrine
    - If contract already exists - adds remedies to mere contractual damages which may only result in nominal damages (no loss)
      - Remedy = account of profit: Optus
    - If no contract – it provides a claim and remedies
- Assess whether a contract exists
  - o If no:
    - The equitable doctrine provides a cause of action
    - Move on
  - o If yes:
    - The equitable doctrine may provide additional remedies
    - However it must first be determine whether the contract excludes the equitable doctrine
      - This is a matter of construction: Optus
      - Argument you want = rights and remedies contained within contract were not exclusive given construction of terms: Optus
      - Make an assessment
        - o If unclear state that the weight of opinion in NSW suggests that the doctrine would be excluded: Newcrest Operations
- Determine whether there has been a breach
  - o A breach of confidence requires four elements to be established: Optus

- 1. Information in question must be identified with specificity
  - Requirement = must be able to identify what information is confidential: O'Brien
    - **Very bare outline of the confidential idea will not suffice: O'Brien**
    - Facts: solicitor devised tax minimisation scheme – needed to identify specific information in the structure
- 2. Information must have the necessary quality of confidence
  - Idea = no breach of confidence in revealing something to others which is already common knowledge: Coco
  - To determine this a contextual analysis is apposite:
    - Things done in private: Lenah Meats
      - Facts: film of possums being killed
      - Idea = not necessarily confidential
      - Requirement for relevantly private = disclosure or observation of information or conduct that would be highly offensive to a reasonable person of ordinary sensibilities
        - Example: film of man in underwear
    - Things in the public domain
      - Idea = not confidential if in public domain
      - Determine whether in public domain:
        - Clear case law:
          - Lucas Film
            - Facts: props in a film lose their confidentiality
        - Unclear case law: Johns
          - Facts: transcript of private interview given to RC and used in RC proceedings
          - Brennan and Dawson JJ: things in open court are in the public domain and lose quality of confidence
          - Gaudron and McHugh JJ: agreed with comment above but distinguished RC proceedings
      - Determine whether there is an argument for transitory disclosure
        - Idea = information disclosed for a short time is not in the public domain: AFL
        - Need to consider:
          - How long
          - Potential exposure to how many people
  - **Did confider produce obtain information only after expenditure of time and money by way of research or in application of skill/ingenuity? (Medic-Care)**
    - **Likely to have necessary quality of confidence**
  - **Steps taken to preserve secrecy of information and to prevent it becoming public knowledge: Medic-Care**
  - **Intrinsic value of information: Medic-Care**
    - **Value to a competitor or other interested party**
  - **Would reasonable person recognise information to be the 'property' of confider? (Medic-Care)**
  - **Prima facie confidential information (Lenah)**
    - **Information about:**
      - **Health, personal relationships or finances**

- Activities/information which would be highly offensive to reasonable person of ordinary sensibilities
- Information disclosing iniquity
  - Idea = information containing wrongdoing or disclosing wrongdoing does not satisfy test: AG Australia
  -
- Contexts:
  - Information from previous employment
    - Idea = things separate to learning and skill development, and considered property of the employer is confidential: Gray
      - Facts: client information was confidential
  - Lawyers
    - Idea = information from former clients is confidential: Bolkiah
  - Government secrets
    - Idea = information not confidential if it allows for the critique of government unless it injures the public interest: John Fairfax
      - Note: this may be an issue under a possible defence
    - Contexts where public interest may be harmed:
      - National security
      - Foreign affairs
      - Prejudicing the business of government
    - If information classified as 'top secret' it cannot automatically be concluded information contains government secrets as classifications do not change: John Fairfax
- 3. Information must be received by the other party in circumstances importing the obligation of confidence
  - There are two, non-mutually exclusive, tests for determining this element: Australian Medic-Care
    - Reasonable person = if circumstances are such that a reasonable person standing in the shoes of the recipient of an idea would have realised on reasonable grounds that information given was confidential the obligation of confidence may be imposed
    - Purpose test = has the confidential information been imported for what was known, or ought reasonably to have been known, to be only for a particular person
- 4. There must be an actual or threatened misuse of information without consent
  - Requires an assessment of the scope of confidentiality ie
    - Was information only to be used for a particular purpose (purpose test)
      - Actual or threatened misuse = using for extraneous purpose
    - Was information to be used for any reason provided not disclosed to third parties
      - Actual or threatened misuse = disclosing to third parties
- Assess possible defences/public interest argument
  - Introduction:

- While England has established a broad public interest defence, Australia has not: Corss
- State the facts lending itself to an English public interest argument
  - Example: singer in public eye actually a drug user – public has an interest in knowing this
- Alternate argument
  - While a public interest defence does not exist it is likely to be argued by [insert party who breached confidence] that [insert other party] is coming to the court with unclean hands and this not entitled to a remedy
  - Requirements for unclean hands
    - Must relate to the matter in question
- Assess remedies
  - Injunction
    - Examples:
      - To stop products being sold: Peter Pan
      - To stop an expert witness testifying: Australia Leisure
    - Not useful if information already in the public domain
      - Exception = springboard doctrine
        - Idea = stop the party from operating to allow competitors to catch up and alleviate the benefit obtained from the breach: Terrapin
  - Order for delivery up
    - Idea = delivery up property made with information and destroy: Peter Pan
  - Equitable compensation for loss or account of profits
    - Determine which is greater
      - Loss suffered, or
      - Gain made by other party
    - If loss greater
      - Seek equitable compensation if remedy appropriate:
        - If commercial or financial loss remedy is appropriate
        - If mental distress Giller held appropriate but this is controversial
    - If gain is greater
      - Seek an account of profits
        - Note: important in a contractual sense because CL does not allow for an account of profits
        - Note: may be able to assert a CT over profits
          - Consequence = trace into other assets
- Conclude

## 2) Estoppel

- Introduction
  - There are four distinct doctrines of estoppel and, while the expansion of promissory estoppel has caused courts to focus on that and arguments exist as to a unified doctrine (see eg Waltons), the court in Guimelli highlights the distinct doctrines remain
  - Therefore the following analysis is based on these separate doctrines
- Estoppel by convention
  - What looking for in problem question
    - Contract or deed
    - Common understanding
  - Process:
    - This is a CL doctrine and applies in the contexts of deeds and contracts

- Requirements:
    - The underlying requirement is that a common understanding exists between the parties
      - If deed – find in recitals
      - If contract – find by conduct: Moratic
    - It is not required that there be:
      - Detrimental reliance
      - Inducement by one party
  - Consequence
    - Parties are prevented from contradicting, or acting contrary to, the assumption: Moratic
      - Facts: clause in contract was never enforced and was then later used as a basis for a legal argument – estopped from doing so
- Estoppel by representation
  - What looking for in problem question
    - Representation as to past or present fact
  - Process
    - This doctrine exists at CL and in equity
    - Requirements
      - There are three requirements:
        - Representation as to past or present fact
          - Consequence: it cannot relate to the future or intention: Jordan
          - Silence or inaction may satisfy this requirement: Waltons Stores per Gaudron J
        - Reliance by the other party on the representation
        - Detriment if other party resiles from promise
    - Consequence
      - Prevents the representor from denying the fact
      - It is a **evidentiary tool**
      - Limitation:
        - Not a cause of action – it only binds parties to the fact represented
        - Therefore use doctrine when need to establish a fact for a cause of action
          - Example: representation that a contract exists and then representor breaches
          - Need doctrine to establish the contract exists
- Promissory estoppel
  - What looking for in question
    - Representation as to intention ie future conduct
    - May or may not be a pre-existing contract
      - Example: representation that will not enforce contractual provision
      - Example: representation that agreement is established
    - **Basis = enforcing a promise without consideration**
  - Process
    - This is an equitable doctrine
    - Determine whether there is a pre existing contract
      - If yes: (using as a shield – someone suing for breach contract and you defending on basis of representation made about provision in contract)
        - Requirements
          - Representation as to intention
          - Reliance
          - Detriment if other party resiles from promise



- Need to assess at the time the promisor seeks to resile
  - Example of detriment:
    - Required to make lump sum payments as opposed to periodic payments
    - Lost opportunity to:
      - Break a lease and move
      - Assign the lease
  - Cases to use:
    - High Trees: agreement to reduce the payable rent while the war was on was enforceable and prevented the lessor claiming the full amount at a later date
    - Quaglia: agreement to reduce rent for salon
- If no: (using as a sword – creating new rights)
  - Requirements:
    - No definitive statement as to the required elements for promissory estoppel in this context, however the judgments of Mason CJ and Wilson J, and Brennan J, indicate that there must be:
      - Representation
      - Reliance
      - Detriment: Quaglia cf High Tress per Denning
      - Representor inducing the representee to adopt the assumption
      - Knowledge by the representor the other party was exposing itself to detriment by acting on the representation
        - Note: Brennan J indicates in the absence of knowledge, an intention for this to occur may also be satisfactory
    - If representation relates to the existence of an agreement, if more essential terms are not agreed upon the court is less likely to award an estoppel: Austotel
    - What are not essential requirements
      - Pre-existing contract
  - Cases to use
    - Waltons Stores: negotiations between lessor and lessee were such that lessor would demolish and erect building and lessee would take lease – letter sent saying we should accept
    - Yarrabee: chicken farm
  - Academic point
    - There is a fear, in this context, of overtaking the law of contract and the requirement of consideration as promises without consideration are enforced
- Proprietary estoppel
  - Assess whether a CT exists in favour of party arguing estoppel
  - What looking for in question
    - Property right – real or personal property
  - Process
    - This is an equitable doctrine
    - State there are two categories that are distinguished by the knowledge requirement

- By encouragement
  - Idea = A encourages B they will have, or have, a property right and B detrimentally relies on this
  - What is not required = A need not know what B does in reliance on representation
    - Just need encouragement
  - Case = Dilwyn
    - Facts: father allows son to have possession of land and told him it was for the purpose of giving it to him – no formal transfer and son builds
- By acquiescence or standing by
  - Idea = A, without encouragement from B, spending money on B's property thinking it is theirs – B knows A spending money but stands by ie passive acquiescence
  - What is not required = B need not know that A thinks it is their property
    - Just need to know they are spending
  - Cases:
    - Pascoe: D tells P she has house and P spends money
    - Sidhu: D promised to transfer land where the detriment was not seeing another solicitor about the issue
- Assess whether the party with the proprietary right is being estopped or are you using the doctrine to force someone to acquire proprietary rights
  - If person with proprietary rights being estopped → traditional category
    - Move on
  - If person without proprietary rights is being forced to acquire rights
    - This is an unorthodox context
    - It was upheld in Salvation Army however the additional requirement is that the transactions need to be linked
      - Facts: council purported to resume land from Salvation Army – SA then acquire new property – council purports to resile from resumption and not buy SA land - forced to buy
- Remedies
  - Introduction
    - Remedies are limited to avoiding detriment (Verwayen) but may result in reversing detriment or enforcing the representation
    - **May not in every case require making good of assumption**
  - Examples of remedies:
    - Guimelli: did not enforce promise by granting a CT – remedy was a charge
    - Sidhu: only way to avoid the detriment was to enforce the promise and grant a CT but the representor only had half of the legal title
      - Remedy was equitable compensation based on the value of the fulfilment of the promise ie half the house
  - Need to think creatively here