Equity Study Notes
1. The History and Nature of Equity

(A) What is Equity? History and Nature of Equity

- Equity – the body of cases, maxims, doctrines, rules, principles and remedies which derive from the jurisdiction established by the English High Court of Chancery
- It is a key pillar of the Australian legal system
  - HCA observed when referring to the ‘normative complexity of the legal system, with the interaction between the rules of law, principles of equity, requirements of statute and between legal, equitable and statutory remedies’ – Bankstown City Council v Alamdo Holdings Pty Ltd
  - Administration of principles of common law and equity carried out in single court since 1972 in Australian jurisdictions
- Harsh unconscionable results which would flow from application of common law rules alone in certain cases provided the theoretical and moral justification for the existence of Chancery – supplement to the common law which is inadequate to always deal justly
  - When equity’s principles stem from what conscientious behaviour requires the actors in the dispute to do, this means all actors, not just defendants
  - Equity focuses on facts of particular case and moulds remedy to achieve objective of undoing, as far as possible, particular departure from common law rules/equitable principles that have occurred
- Interested in remedies beyond damages:
  - Injunctions
  - Estoppel
  - Specific performance
  - Equitable damages under Lord Cairns Act
- Aristotelian conception of equity as a ‘rectification of law where the law falls short by reason of its universality’ of great significance
  - Injustice flows form generality of the laws rules and inability to mould rules to fit the circumstances of the case
- The notion of conscience is central to equitable jurisdiction
- Common injunctions
  - No longer exist
  - Issued by chancellor – provided that no steps were to be taken further in the common law action until the question of availability of equitable defence had been decided
  - Came to head in Earl of Oxford’s Case whereby King James I decided they could continue with these
- **The Earl of Oxford’s Case in Chancery (1615)**
  - Court of Chancery developed as distinct body to deal with petitions for discretionary relief from oppression or injustice from harsh judgements of common law courts
  - Petitions dealt with through common injunctions – orders preventing opposing party from putting forward claim which equity found obnoxious/executing obnoxious common law judgement
  - Developed as a jurisdiction to escape harsh/oppressive judgements at CL
    - Granted discretionary relief as ‘men’s actions are diverse and infinite’
    - To correct men’s consciences for frauds, breach of trusts, wrongs, oppressions and soften extremity of the law
  - Whilst law and equity are distinct in their courts, judges and rules of justice they both aim at one end – to do right
Principle: first case to find distinction between equity and common law. Equity will prevail and common injunctions will continue to be issued.

(B) The Effects of the Judicature Acts and the ‘Fusion Fallacy’

Law and Equity before the Judicature System

- Law and equitable jurisdictions administered separately
  - England – equity administered by Court of Chancery and common law by King’s Bench, Common Pleas and Exchequer
  - Australia – never two sets of courts but within Supreme Courts as established, there were distinct common law and equity jurisdiction
    - No trial by jury in equity and two systems of pleading
- Concurrent/auxiliary equity jurisdiction: suits upon facts which would equally have entitled a party to proceed in a court of common law
- Exclusive equity jurisdiction: relief against invasion/breach of legal rights which weren’t protected by it in the concurrent jurisdiction
- Intervention of equity justified as necessary to prevent multiplicity of actions at law upon same subject matter or prevent irreparable injury not properly compensated by damages
  - These requirements didn’t apply when case fell into concurrent jurisdiction
- Four important areas of limitation upon equity’s recognition of legal rights:
  - Chancery had no power to decide disputed legal right or title as a step in protecting it against invasion
  - Limited power to transfer a suit to the common law courts; a plaintiff who brought action in the wrong court had to start again
  - Couldn’t award common law remedy of damages for invasion of equitable right existing only in exclusive jurisdiction. Can’t bring common law claim that only requires award of damages.
    - In 1858 Lord Cairns’ Act gave chancery limited power to award damages in addition to or in substitution for injunction or decree of specific performance
    - Provision is re-enacted from time to time and is still in force in England and all Australian states – it isn’t settled, except in Victoria, by legislative amendment (Giller v Procopets) whether the Act gave power to award damages in the exclusive jurisdiction or was limited to suits in respect of legal rights and titles.
  - Differed from Common law courts procedure – relied on affidavit evidence and avoided juries
- Equity in common law courts
  - Certain principles and doctrines, equitable in origin, have been borrowed by common law system and continue to be applied
    - E.g. estoppel by representation
  - Essential to note that (a) the common law courts, even when adjudicating on legal claims in contract or tort, didn’t have inherent power to award, the remedies of injunction and specific performance and ancillary remedies available from Chancery when it dealt with legal claims in its concurrent and auxiliary jurisdictions and (b) the common law courts couldn’t entertain actions brought to recover damages or other relief for infringement of purely equitable titles and claims.
  - Plaintiff couldn’t seek relief at law for claim based in exclusive jurisdiction of equity
Equitable defence can't be plead in common law courts

- **Conflicts between law and equity**
  - Limited class of case in which the same dispute might be the subject of proceedings both at law and in equity, which would be decided differently because of a conflict between law and equity as to the applicable rule of substantive law.

- **Coroneo v Australian Provincial Assurance Association Ltd (1935)**
  - Orders for injunctions and specific performance are actions in court of chancery and can't be maintained at common law

- **Nelson v Nelson 1995**
  - Equity offers discretionary relief attuned to particular facts of a case.

### The Judicature System

- Relationship between common law and equity in England changed with judicature system in 1875
  - *Judicature Act* – provided that in event of conflict, equity shall always prevail at the outset

- Judicature system;
  - System of separate courts of common law and equity abolished
  - Common injunction became obsolete and abolished
  - No intention in the legislation to fuse the principles of common law and equity into one system of law

- Judicature system adopted in all states of Australia

- The scheme of the judicature system appears from its NSW counterpart in the *Law Reform (Law and Equity) Act 1972* and the *Supreme Court Act (1970-73)*
  - S5: in the case of conflict the rules of equity prevail
  - S57: the Court shall administer concurrently all the rules of law, including the rules of equity
  - S61(1): The Court shall not restrain by injunction any proceedings pending in the court – abolishes common injunction
  - S61(2): stipulated that there was a defence to common injunction

### The Fusion Fallacy

- Judicature system has two essential and conceptually distinct effects:
  - Fuses procedures of old common law and equity jurisdictions
  - Embodies in statutory mandate the supremacy of equity over law in cases of conflict between the rules

- Results have been called ‘fusion fallacies’ – they are explicable by application of neither law nor equity and can only be the product of a change in substantive principles in English jurisprudence
  - Maitland – equity came not to destroy the common law but to fulfil it

- **Emmerglick**
  - A judgement in common law creates a right for the plaintiff
  - A decree in equity, operating against the person, imposes duties upon the defendant
    - From this difference as well as from equity’s principles, drawn from morals and applied in opposition to common law rules, conflict results
    - Equity compels the defendant to forego exercise of legal rights where fairness, good faith and conscience dictate that they shouldn’t be enforced
There is no conflict in form, only in substance
  - Law and equity can’t be blended together
    - One strives for predictability and treats cases as belonging to a generalised type
    - The other strives for individual justice and treats cases as being unique
    - Each has a function to perform and requires freedom to act upon the other
  - Windeyer J in *Felton v Mulligan* referred with approval to Ashburner’s metaphor that asserted that “the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters”
  - Lord Diplock argued against the separation and believed the Judicature Act did represent a fusion of the jurisdictions
    - This view has been supported by Courts in New Zealand and Canada where courts asserted that common law and equity are mingled/merged
  - In Australia Lord Diplock’s views have been vigorously contested
    - Meagher, Gummow and Lehane – most notable rejection of Lord Diplock’s views
      - They labelled his view a ‘fusion fallacy’
      - A fusion fallacy arises when the decision reached in a particular case is one which could not have been reached under the separate system of courts that existed before the judicature system reforms were enacted
      - In particular these fusion fallacies have led to the following:
        - Administration of a remedy not previously available at common law or equity e.g. in the words of Heydon JA in *Harris v Digital Pulse* ‘selecting a remedy from the common law range of remedies which a court of equity administering the law relating to equitable wrongs before the introduction of the judicature system would not have administered’
        - The modification of the principles of one branch of the law by the introduction of principles from another by holding that the existence of a duty of care in tort may be tested by asking whether the parties concerned are in a fiduciary relationship
  - Sir Anthony Mason argues that there is no reason why the courts in shaping principles, whether their origins lie in the common law or equity, shouldn’t have regard to both common law and equitable concepts and doctrines, borrowing from either as may be appropriate

*Harris v Digital Pulse Pty Ltd (2003)*

- **Facts:** An employee, in defiance of express term in employment contract, secretly worked for benefit of his own business and competed with employer during course of employment. Employee was fired and employer sought exemplary damages for breach of fiduciary duty. Trial judge ordered exemplary damages in addition to order for equitable compensation/account of profits at plaintiff’s election to punish wrongdoer. The order was reversed on appeal.
- **Issue:** Exemplary damages and relationship between law and equity
- **Held:**
- **Spigelman CJ:**
  - It is unnecessary/undesirable to decide case on basis that punitive monetary award can’t ever be awarded in equity. Remedial flexibility is characteristic of equity’s jurisdiction.
Present proceedings should be decided on basis whether power to make punitive monetary award should be acknowledged with respect to such fiduciary relationship.

While there is interaction between each area of law and line is often blurred, they remain distinct bodies of doctrine.

"Fusion fallacy" is proposition that joint administration of two distinct bodies of law means doctrines of one are applicable to each other. This is untrue – but doesn’t mean bodies don’t influence each other.

Challenge to integrity of equity by adopting a common law remedy developed over time in a different remedial context.

- The fiduciary relationship is much closer to contractual relationship than tortuous and exemplary damages aren’t available for contract in Australia – court shouldn’t develop this for the first time.

**Heydon JA**
- Fusion of the law (by choosing remedies from any area of law) involves deliberate judicially engineered change in law
- No power in NSW law to award exemplary damages for equitable wrongs

**Walsh v Lonsdale (1882) All ER**

- **Facts:** landlord granted 7-year lease of mill to tenant. Lease not under seal therefore void at law. After tenant gained possession, landlord demanded, pursuant to terms of written lease, year’s rent payable in advanced. Tenant refused to pay so landlord distrained tenant’s goods. Tenant sued for damages for wrongful distress and argued he was merely a tenant from year to year, in possession without a lease with rent payable quarterly, not in advance.
- **Issue:** was lease enforceable?
- **Held:** distress was not unlawful.
- **Jessel MR:**
  - There aren’t two estates as there were formerly – one at common law by reason of payment of rent from year to year and one at equity under agreement. There is only one court and equity rules prevail in it.
  - A person who enters into possession of land under a specifically enforceable contract for a lease is regarded, by a court having jurisdiction to enforce the contract, as being in the same position, as between itself and the other party to the contract, as if the lease had actually been granted.
  - Remedy of distress granted.
- The case establishes that, until a formal lease is executed in compliance with a decree of specific performance, there exists an equitable lease only, although the parties to the lease stand in the same position as if a lease has been granted.
  - **Note:** this is a fusion fallacy – held that there was an equitable right (interest in the property) but there was a common law remedy of wrongful distress. This is not the approach in Australia.
  - This decision has been the centre of much debate and controversy

**Chan v Cresdon Pty Ltd (1989) HCA**

- **Facts:** Cresdon agreed in writing to lease land to Sarcourt. Agreement contained terms of lease as an annexure. Lease was duly executed by never registered. Sarcourt defaulted under lease and Cresdon took action against Chan as guarantor of the unregistered lease. Credon’s action against Chan was stated as one being taken on the guarantor ‘under this lease’. Credon’s action unsuccessful – court held that as there
was no registered lease there was no enforceable guarantee. Cresdon’s alternative claim was based upon rule in *Walsh v Lonsdale*.

- **Held:** this claim unsuccessful. Court ruled that, although rule in *Walsh v Lonsdale* meant an agreement to lease gave rise to an equitable lease, it didn’t create a legal interest. A consequence of this is that the equitable lessee will be defeated by a bona fide purchaser of the legal estate who acquires the legal estate for valuable consideration and without notice of the equitable lease.

- Court confirmed that operation of the rule depended on the availability of specific performance of the agreement to lease.

- Two facts raised doubts as to the availability of specific performance:
  - Cresdon had in the meantime mortgaged the property
  - The lease had come to the end before expiration of the term due to Saracourt’s breach.

*Day v Mead* [1987] NZLR

- **Facts:** Mead was Day’s solicitor. He was director and shareholder of Pacific Mills. Acting on Mead’s advice, Day purchased shares in Pacific Mills knowing Mead was a shareholder and that his firm’s nominee company had lent money to Pacific Mills. Day participated in the management of the company. He bought further shares. Company went into receivership and Day lost both investments. Day sued Mead for loss plus interest, claiming breach of fiduciary duty.

- **Issue:** was his contribution to the loss relevant?

- **Held:** (Cook P): whether or not there are reported cases in which compensation for breach of a fiduciary obligation has been assessed on the footing that the plaintiff should accept some share of the responsibility, there appears to be no solid reason for denying jurisdiction to follow that obviously just course, especially now that law and equity have mingled or are interacting. It is an opportunity for equity to show that it has not petrified and to live up to the spirit of maxims.

**(C) The Maxims of Equity**

- Maxims of equity are fixed and formulaic statements of certain broad equitable principles which have emerged during course of the jurisdiction’s long and varied development

- Aren’t rules or laws and can’t supply answers to specific legal problems – however, aren’t without function or value in modern equity

- They perform rhetorical function for judge of demonstrating how the decision is imbued with ancient values of ancient jurisdiction and can represent certain fundamental moral ideas and themes which lie at the heart of equitable jurisdiction

- Significant and central maxims:
  - Equity looks on that as done which ought to be done
    - 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 agreed to
  - Equity follows the law
    - Equity recognises common law rights, estates, interests and titles and doesn’t say that such common law interests aren’t valid
  - He or she who comes into equity must come with clean hands
    - Requires plaintiff in equity not to be guilty of some improper conduct or else relief will be denied
Equity is not solely concerned with preventing unconscientious conduct by a defendant but also requires conscientious behaviour of the plaintiff.

He or she who seeks equity must do equity.

Plaintiffs in equity must fulfil their legal and equitable obligations before seeking a remedy.

*Nelson v Nelson* – merely putting property in name of someone else and buying it yourself gives you an equitable interest in property but, you have defrauded the government to do so – mother had to pay back government as price of getting equitable relief.

Equity doesn’t allow a statute to be made an instrument of fraud.

Equality is equity.

Equity acts in personam.

Equity will not assist a volunteer.

It is the presence of valuable consideration that will attract the intervention of equity.

Equity looks to intent not form.

Courts of Equity make distinction between that which is a matter of substance and that which is a matter of form; and if it find 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 a form and thereby defeat the substance.

Equity will not suffer a wrong to be without a remedy.

It isn’t sufficient that because we may think that the ‘justice’ of the present case requires it, we should invent such a jurisdiction for the first time.

Where equities are equal, the law prevails.

Where the equities are equal the first in time prevails.

Equity aids the diligent not the tardy.

**Corins v Patton (1990) CLR**

**Facts**: Mr and Mrs Patton joint proprietors of land. Mrs Patton didn't want interest to transfer to her husband after her death – transferred her interest 5 days before her death to Corin, her bother. She also executed a deed of trust under which appellant was to hold property on trust for Mrs Patton in accordance with order of court. Order and deed were handed to Mrs Patton’s solicitor. To register transfer, Mrs Patton had to obtain a duplicate copy of certificate of title from bank of NSW. She took no steps to do so before dying.

**Issue**: whether Mrs Patton had effectively disposed of her interest in the land prior to her death, thus severing the joint tenancy and defeating her husband's right of survivorship.

**Held**: (Mason CJ & McHugh J) A joint tenancy can be severed in one of three ways.

Mrs Patton attempts to use the first way, disposing of her interest through gifting it to the appellant. For equity to recognise a gift, the intending donor has to do all that is necessary to transfer legal title, such that the legal transfer could be effected without any further action on his/her part.

There mere fact that Mrs Patton had declared her intention to discontinue the joint tenancy and acted in such a way as to effect a discontinuation of the joint tenancy didn’t suffice to sever the joint tenancy.

“Equity will not assist a volunteer” – *like other maxims of equity, it is not a rule or principle of law. It is a summary statement of a broad theme which*
underlies equitable concepts and principles. Its precise scope is necessarily ill defined and somewhat uncertain.

2. Applications of the Conscience of Equity

(A) Breach of Confidence

Introduction

- Contractual promises of confidence will be enforced in the usual way, and subject to the usual discretionary considerations, in equity's auxiliary jurisdiction, by injunction.
  - If breached, a promise who suffers loss can obtain contractual damages
- Circumstances when confidential information will be protected independently of any contractual or statutory obligation may occur where there is no contract or because the defendant was not a party to any contract.
- **Optus Networks Pty Ltd v Telstra Corp Ltd (2010) ALR:**
  - Finn, Sundberg and Jacobson JJ held that in analysing whether Optus had established an equitable breach of confidence against Telstra that there are four elements:
    - 1. The information in question must be identified with specificity.
    - 2. It must have the necessary quality of confidence;
    - 3. It must have been received by Telstra in circumstances importing an obligation of confidence; and
    - 4. There must be an actual or threatened misuse of the information without Optus' consent.
- **This formulation is orthodox and reflected in other decisions**
- The formulation in **Optus** can be contrasted with the influential formulation by Megarry J in **Coco v A N Clark (Engineers) Ltd:**
  - Three elements are normally required if, apart from contract, a case of breach of confidence is to succeed:
    - 1. The information itself must have the necessary quality of confidence about it
    - 2. That information must have been imparted in circumstances importing an obligation of confidence.
    - 3. There must be an unauthorised use of that information to the detriment of the party communicating it.
  - For *quia timet* relief is readily available for threatened misuse, including in the absence of detriment, and there can be an accounting for profits for unauthorised use by the defendant of information which occasioned no loss to the plaintiff
    - Gummow J: the obligation of conscience is to respect the confidence, not merely to refrain from causing determine to the plaintiff
  - Contrary to the second element in Megarry J’s formulation, an obligation can arise even where there was no imparting of the information i.e. where the information is obtained surreptitiously.
  - Megarry J’s formulation ignores the vital threshold element that equity will only protect what can be specified with precision and made the subject of an order.
- **Optus Networks Pty Ltd v Telstra Corporation (2010)**
  - **Facts:** agreement between companies about fees of use of copper cabling. Telstra knows every call Optus subscribers make. Agreement that Telstra will keep records of Optus calls but information will only be used for billing. Telstra
breached contracts. Optus didn’t want damages, they wanted an account of profits because Telstra had made money out of breach of confidence.

- **Held:** the contract expressly approved equitable remedies.

1. Must be able to specific the confidential information

   - Only if you can identify information so it can be written out in court order can equity protect it – normal remedy is injunction

   - **O’Brien v Komesaroff (1982) CLR**
     - **Facts:** A life insurance salesman marketed tax minimisation devices, including by using a unit trust deed which had been drafted by the respondent, a solicitor. After they fell out, the solicitor subsequently, sued for infringement of copyright (where he succeeded) and for breach of confidence.
     - **Issue:** can there be breach of confidence where information can’t be identified with specificity?
     - **Held:** (Mason J) ‘Ex B20’ not sufficiently precise definition of what information was to be foundation for action of breach of confidence.
     - The information was advice he published regularly to the world at large, albeit for a limited purpose, the nature of such information ill accords with the accepted conception of confidentiality. The information is too general and can’t satisfy that it was imparted in circumstances that gave rise to obligation of confidence.
     - The more general the description of the information which a plaintiff seeks to protect, the more difficult it is for the court to satisfy itself that information so described was imparted in circumstances which give rise to an obligation of confidence.’ – *Independent Management Resources Pty Ltd v Brown*
     - Although equitable protection may be given to ideas as opposed to their expression (contrast copyright), in order to be capable of being treated confidentially, the idea must be sufficiently well developed to be capable of realisation.

2. Necessary quality of confidence

   - Absolute secrecy not required – question of degree
     - **Prince of Whales v Associated Newspapers** – personal letters written by Prince Charles to about 20 of his closest friends found to be sufficiently confident.
     - **Douglass v Hello** – the fact that there were 250 people at the wedding didn’t preclude photos taken at wedding having necessary degree of confidence.
   - This is dependant on fact
   - Three (overlapping) categories are:
     - Information which is commercially sensitive
     - Personal
     - Held by governments
   - There is trade-off between equitable and some species of statutory protection i.e. the price of patent protection is public disclosure
   - Factors to help determine whether commercial information may be considered confidential – *Thomas Marshall (Exports) Ltd v Guinle, Ansell Rubber Co Pty Ltd v Allies Rubber Industries Pty Ltd* and *Wright v Gasweld*
     - Extent to which information is known outside the business
     - Extent to which trade secret was known by employees and others involved in plaintiffs business
     - The extent of measures taken to guard the secrecy of the information
• The general question is, however, “would a person of normal intelligence, in all the circumstances of the case, including, inter alia, the relationship of the parties and the nature of the information and the circumstances of its communication, recognise this information to be [confidential]” – Fullagar J in *Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd*