

TOPIC 1: THE HISTORY AND NATURE OF EQUITY

WHAT IS 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 → CL is self sufficient system
 - **Fiduciary Duty:** Obligation to act in the best interest of another party subordinate to his/her own interests
 - E.g. trustee and beneficiary, agent and principle → Presumed to be fiduciary
 - **Two obligations universally acknowledge:**
 - 1. Obligation not to be in situation where there is a real possibility of conflict between self interest and fiduciary duty
 - 2. Obligation not to make profit from fiduciary position
 - If breach = damages even if no harm has been
- **Fundamental principle according to which equity acts:** a party having a legal right shall not be permitted to exercise it in a way that the exercise amounts to unconscionable conduct.
 - 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
 - **Aristotelian conception** of equity as a '**rectification of law where the law falls short by reason of its universality**' of great significance
 - Injustice flows from 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**
- **Three Main Courts of Law in Westminster** – King's Bench, Common Pleas, Exchequer Chancery
 - In 19th century there were different outcomes of same dispute depending whether heard in King's Bench (criminal CL) and Commons Pleas (civil CL) or Exchequer Chancery/Court of Chancery (equity)
 - 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 and achieve justice
- Interested in **remedies beyond damages:** injunctions, estoppel, specific performance
- **Common Injunctions → No longer exists**
 - 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 – common injunctions could still be issued

The Earl of Oxford's Case in Chancery (1615)

Principle: First case to find distinction between equity and common law. Equity will prevail and common injunctions will continue to be issued.

If there is a conflict between rules of equity and common law, equity wins.

- **Three Equitable Jurisdictions**
 - **Concurrent Equity Jurisdiction:** matters in which both the equity and CL courts have jurisdiction to make orders
 - E.g. enforcement of contract where primary equitable remedy is order for specific performance and CL remedy is an order for damages.
 - **Exclusive Equity Jurisdiction:** relief against invasion/breach of legal rights which are not protected by equity in the concurrent jurisdiction
 - Matters in which equity has an exclusive cognizance because no relief can be obtained at CL
 - 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 did not apply when case fell into concurrent jurisdiction
 - **Auxiliary Equity Jurisdiction:** a person goes to equity merely in order to obtain its assistance in proceedings, which they are taking, or about to take in courts of law.
 - E.g. Seek order of injunction to prevent irreparable injury to property pending decision at law

JUDICATURE ACTS

- Historically law and equitable jurisdiction administered separately.
- **4 Important areas of limitation upon equity's recognition of legal rights:**
 - 1. Chancery had no power to decide disputed legal right or title as a step in protecting it against invasion
 - 2. Limited power to transfer a suit to the common law courts; a plaintiff who brought action in the wrong court had to start again
 - 3. Could not award common law remedy of damages for invasion of equitable right existing only in exclusive jurisdiction. Cannot 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.
 - E.g. if injunction is not issued – but had legitimate loss (equity cannot issue damages) – cannot transfer files, would need to restart in CL courts
 - 4. Differed from Common law courts procedure – relied on affidavit evidence and avoided juries
- **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.
- **Introduction of The Judicature System**
 - The Judicature Acts of 1873 and 1975 (UK) attempts to solve the problems of separate courts state above
 - Common injunction became obsolete and abolished
 - s 25(11): Provided that in event of conflict, equity shall always prevail at the outset
 - s 24: empowered judges to give effect to both common law and equitable principles
 - 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
 - **s 5:** in the case of conflict the rules of equity prevail
 - *Supreme Court Act (1970-73)*
 - **s 57:** the Court shall administer concurrently all the rules of law, including the rules of equity
 - **s 58:** if equitable claim against some legal right and the relief can only be given in equity court – the same court gives you that relief
 - **s 61(1):** The Court shall not restrain by injunction any proceedings pending in the court – abolishes common injunction
 - **s 61(2):** stipulated that there was a defence to common injunction

FUSION FALLACY – RESULT OF JUDICATURE SYSTEM

- 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
- **Fusion Fallacy**
 - 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
 - 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
 - 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 legislation had no intention to fuse the principles of common law and equity into one system of law** → More of administrative reform
- E.g. legislation did not authorize the new court to award CL damages for breach of an equitable obligation.
- 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"
- Although it is quite clear that legislation fusing formerly separate courts into one court did not of itself permit fusion fallacies, there is nothing in legislation to suggest that the law could not develop in such ways in the future.
- NOTE: Lord Diplock argued against the separation and believed the Judicature Act did represent a fusion of the jurisdictions → **REJECTED IN AUSTRALIA**
 - This view has been supported by Courts in New Zealand and Canada where courts asserted that common law and equity are mingled/merged

Harris v Digital Pulse Pty Ltd (2003)

- H, in defiance of express term of employment contract, secretly worked for benefit of his own business and competed with employer during course of employment. DP sued for exemplary damages for breach of fiduciary duty → can exemplary damages (CL remedy) be awarded for equitable obligation
- **Currently NO.** → would be fusion fallacy
 - 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.
 - Sir Anthony Mason: There is no reason why courts in shaping principles, whether their origins lie in CL or equity, should not have regard to both CL and equitable concepts, borrowing them either as may be appropriate.
 - Such a view, if based upon the view that the fusion of courts allow new single court to award common law remedies for breaches of equitable obligations, amounted to a 'crude fusion fallacy'
- The fiduciary relationship is much closer to contractual relationship than tortious and exemplary damages aren't available for contract in Australia – court should not develop this for the first time.

***Walsh v Lonsdale (1882)* → ALL WRONG**

- Lease b/w W and L, not under seal and therefore void at law. L sought 1 years rent, payable in advance. W refused, L distrained W's goods. W sued L for wrongful distress and that in possession without a lease with rent payable quarterly, not in advance.
- Remedy for 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**.
- 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.

***Chan v Cresdon Pty Ltd (1989)* → CORRECT**

- Lease agreement b/w CP and Sarcourt (owned by C), lease not registered (void at law). Sarcourt defaulted, CP took action against C as guarantor of the unregistered lease ('C guarantor under this lease')
- CP unsuccessful → there was no registered lease there was no enforceable guarantee.
- **Two reasons:**
 - 1. This is a guarantee and the law has a **very narrow approach to construing guarantees**
 - Guarantee obligations are "under this lease" (document says this) → No reason for construing it as an equitable lease (promise to give lease) the promise reflected in the bargain is to be a legal lease
 - C would be liable pay all rent Sarcourt owed under legal lease → however only equitable lease
 - Still have obligation to pay in an equitable lease however no guarantee in the equitable lease of paying rent – also must sue in equity
 - 2. Although rule in *Walsh v Lonsdale* meant an agreement to lease gave rise to an equitable lease, it **didn't create a legal interest**.
 - Insists difference between legal lease (CL) and the specifically enforceable promise for a legal lease (equitable lease)
 - Difference evident when 3rd party is introduced: The equitable lessee will be defeated by a bona fide purchaser of the legal estate (3rd party) 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.

Because specific performance is discretionary, a court can 'backdate' it so that a lease that has expired can still be susceptible to a decree of specific performance.

Day v Mead [1987] → NZ CASE, DIFFERENT POSITION TO AUSTRALIA

- M was D's solicitor. On advice of D, M invested (purchased shares) in D's company. D participated in the management of the company, which later went into receivership and lost investments. M had numerous conflicts of interests. → D sued M for loss plus interest, claiming breach of fiduciary duty.
- At trial, **the award for equitable compensation was reduced by half** on the basis that the Plaintiff did not seek to protect his own interests by engaging independent and competent financial advice
 - Imported contributory negligence into equity
- **Regardless of whether there has been previous cases** where compensation for breach of fiduciary 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
- **It is an opportunity for equity to show that it has not petrified and to live up to the spirit of maxims.**

MAXIMS OF EQUITY

- Maxims of equity are **fixed and formulaic statements of certain broad equitable principles**
 - Not rules or laws and can't supply answers to specific legal problems
- 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
- **Maxims**
 1. Equity looks on that as **done which ought to be done**
 - a. 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
 2. Equity **follows the law**
 - a. Equity recognises common law rights, estates, interests and titles and doesn't say that such common law interests aren't valid
 3. He or she who comes into equity must come with **clean hands**
 4. He or she who **seeks equity must do equity**
 - a. Plaintiffs in equity must fulfil their legal and equitable obligations before seeking a remedy.
 - b. *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
 5. Equity **doesn't allow a statute** to be made an **instrument of fraud**
 6. **Equality** is equity
 7. Equity **acts in personam**
 8. Equity **will not assist a volunteer**
 - a. It is the presence of valuable consideration that will attract the intervention of equity
 9. Equity **looks to intent not form**
 - a. 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
 10. Equity will **not suffer a wrong to be without a remedy**
 - a. 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.
 11. Where equities are equal, **the law prevails**
 12. Where the equities are **equal the first in time prevails**
 13. Equity **aids the diligent not the tardy.**

Corins v Patton (1990)

- Mr and Mrs P joint proprietors of land. Mrs P want interest to transfer to her husband after her death – transferred her interest 5 days before her death to C. → Mrs P executed deed of trust in accordance with order of court (given to solicitor). However needed to obtain duplicate copy of certificate of title from bank of NSW → Took no steps to do so before dying

- Joint tenancy was NOT severed. → 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. → Declaration of intention is not sufficient
- “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.**

TOPIC 2: BREACH OF CONFIDENCE

- **Breach of Confidence:** The tort of failing to preserve the secrecy of confidential information despite having undertaken to do so. Equitable remedy available under doctrine of breach of confidence
 - **Contract:** Contractual promises of confidence will be enforced – breach will result in contractual damages and possibly injunction in equity’s **auxiliary jurisdiction**
 - **No Contract:** Can occur where there is no contract or where d was not a party to any contract
- **TEST: *Optus Networks Pty Ltd v Telstra Corp Ltd***
 - **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 did not want damages, they wanted an account of profits because Telstra had made money out of breach of confidence.
 - **To establish an equitable breach of confidence:**
 - 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/imparted D in circumstances importing an obligation of confidence; and
 - 4. There must be an actual or threatened misuse of the information without P’s consent.
- *Coco v A N Clark (Engineers) Ltd*
 - 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 detriment to the plaintiff

1. Must Be Able To Specify 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 → Generally not an issue

O’Brien v Komesaroff (1982)

- O and K partners selling ‘tax minimisation devices’. O was a solicitor who drafted the ‘devices’. After fallout K continued to sell ‘devices’. O sued for infringement of copyright and for breach of confidence.
- ‘Tax devices’ was advice O **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.
- 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 → Dependent on facts
- **Three Categories:**
 - Commercially sensitive information
 - Personal
 - Held by Governments

Commercial

- Factors; *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 value of the information to the plaintiffs and their competitors
 - The amount of effort/money expended by the plaintiffs in developing the information
 - The ease/difficulty with which the information could be properly acquired or duplicated by others

- Whether it was plainly made known to the employee that the material was by the employer as confidential
- The fact that the usages and practices of the industry support the assertions of confidentiality
- The fact that the employee has been permitted to share the information only by reason of his or her seniority/high responsibility
- That the owner believes these things to be true and that belief is reasonable
- The greater the extent to which the 'confidential material' is habitually handled by an employee, the greater the obligation of the confidentiality imposed
- That the information can be readily identified.
- 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*

Public Domain

- Once information gets into the **public domain** it can **no longer be the subject of confidence** – *Douglas v Hello! (No. 3)*
- **What is the 'public domain'?**

Johns v Australian Securities Commission (1993)

- ASC conducted private confidential examination of company. Originally disclosed to State Royal Commissioner on instances privately, on second instance on the basis they could be tendered. When tendered, copies were made available to the media, which published the reports of their contents.
- A defendant who, having received information **in circumstances which impose a duty of confidence**, **makes a limited publication** in breach of that duty, **can be restrained from further breaching the duty** by making a wider publication.
 - Here the transcripts were exhibits tendered before the Royal Commission sitting in public.
 - **When the proceedings of a court, tribunal or commission created by statute or in exercise of the prerogative are open to the public and a fair report of the proceedings can be lawfully published generally, it isn't possible to regard information published in those proceedings as outside of the public domain** – *Home Office v Harman*
- **Gaudron J:** It has been held in Australia that a third person who comes by information innocently may be restrained from making use of it once he/she learns that it was obtained in circumstances involving an breach of confidence
 - **Publication does not destroy right to sue for original breach:** Regardless of 'the consequences of the tender of the transcripts in the proceedings of the Royal Commission... it does not follow that the tender brought the ASC's obligation of confidence to an end.... Publication, no matter how extensive and no matter whether by third parties or by the person who owes the primary obligation, does not necessarily extinguish an obligation of confidence.
- Question of whether there should be a duty on third parties must depend on the extent to which the information in question is generally known or available

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001)

- The Commonwealth, intervening, sought unsuccessfully to dilute the requirement of confidentiality. Gummow and Hayne JJ rejected the submission as follows:
 - 1. A court of equity has jurisdiction to enjoin use of information obtained by **illegal or improper means** which need not have the necessary quality of confidence → protected on the ground that it would be 'unconscionable'
 - 2. **Third party** may be enjoined from using information even if **not implicated** in the illegal or improper initial obtaining of it.

NOTE: Enjoin → prohibit someone from performing (a particular action) by issuing an injunction.

Employment

University of Western Australia v Gray (2009)

- **Employment setting:** Information communicated to/acquired by the employee in the course of his/her employment has the necessary quality of confidentiality → employee has duty of confidence, unauthorised use or disclosure of the information by the employee will be an actionable wrong.
 - Relatively secret, not trivial and it not public property or knowledge
- **Factor Include:**
 - When information has been produced or obtained only after the **expenditure of time or money**, either by way of research or in the application of skill and ingenuity
 - The novelty or originality of the process, technique or product which the information encapsulates is an important indicator that the information itself is not already in the public

domain.

- What is required in the cases of technical, scientific and business information is 'some product of the human brain which is relatively secret' – *Coco*
- **Ex-employee:** An ex-employee **cannot use/disclose confidential information** that can be **fairly regarded** as a separate part of the employee's stock of knowledge which a **man of ordinary honesty and intelligence would recognise to be the property of his old employer**

Government Secrets

Commonwealth v John Fairfax & Sons

- The Commonwealth sought to restrain the publication of a book *Documents on Australian Defence and Foreign Policy* on three bases including breach of confidence
- Equitable principle fashioned to protect personal, private and proprietary interests of the citizens, not to protect the very different interests of the executive government. **When equity protects government information it will look at the matter through different spectacles.**
 - **Rationale:** democratic society → unacceptable to restrain publication of information relating to government just because it enables the public to discuss, review and criticise government action – freedom of interest starts with premise that citizen has right to information.
- The court will determine the government's claim to confidentiality by **reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.**
- Degree of embarrassment to Australia's foreign relations which will flow from disclosure is NOT enough to justify interim protection of confidential information
 - The sales of the book already made to countries it could offend
 - The circulation of about 100 copies of a book may not be enough to disentitle the possessor of confidential information from protection by injunction, but in this case it is likely that what is in the book will become known to an ever-widening group of people here and overseas

Esso Australia Resources Ltd v Plowman

- Confidential arbitration 20 years ago. Explosion at a gas refinery in Victoria causing people to be out of pay – issue of who was going to pay. Confidential arbitration. Issue of disclosure of some of the information.
- The courts have consistently viewed government secrets differently from personal and commercial secrets
- **Reversal of the onus of proof:** the government must prove that the **public interest demands non-disclosure**

ABC v Lenah Game Meats

- Film of possums being processed for pet food → sent to ABC. Injunction against ABC to stop show being broadcasted. Commonwealth tried to intervene.
- Argued that confidential information obtained surreptitiously should be protected → extending to 3rd parties.
- (Gummow and Hayne JJ) reaffirmed Mason J's decision 'different spectacles'. Injunction set aside.
- The court determines the legal/equitable right upon which the plaintiff relies for its equity, considers the adequacy of legal remedies and then comes to discretion and such matters as the imposition of terms and the form of any relief.
 - Look to whether common law remedy is adequate, if not look to equity's auxiliary jurisdiction

3. Imparted in Circumstances Importing an Obligation of Confidence

- Broad principle in equity that he **who has received information in confidence shall not take unfair advantage of it**; *Ammon v Consolidated Minerals Ltd (No. 3)* [2007]
- 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*
- Whether the information was **imparted in circumstances** where a **reasonable person** must have **realised on reasonable grounds** that he/she was **not free to deal with the information** as his/her own or **must have realised** that he/she could deal with the **information within certain limitations**; *Del Casale v Atedomus (Aust) Pty Ltd* by Campbell JA
- Third parties who receive information from a person in breach of duty, knowing of that breach, will themselves become subject to a duty of confidence; *ABC v Lenah Game Meats*
- **Improperly or Surreptitiously Obtained**
 - Equity will intervene to **prevent the activities of eavesdroppers** – information **imparted in confidence** and **information improperly or surreptitiously** obtained are treated as two species of the same genus – *Smith Kline & French*

- The fact that information was surreptitiously obtained can be the **clearest indication** that it was **confidential** and that the defendant considered it to be so; *Ashcoast Pty Ltd v Whillans*
- ***Australian Broadcasting Corporation v Lenah Games Meats Pty Ltd*** supports the claim above, however rejection of improper/surreptitious means as sufficient basis for equitable intervention in the same case.
 - Merely embarrassing information doesn't reach standard of confidential information especially in a commercial context.
- ***Creation Records Ltd v News Group Newspapers***
 - Interlocutory relief was granted → newspaper photographer surreptitiously took pictures of Oasis photo shoot.
 - Photo shoot was public, public allowed to watch whole thing + take pictures before the shoot
 - HOWEVER surreptitious photographing, easy inference that he knew that photography wasn't permitted, allowed to remain on the basis that photographs would not be taken → thus imparted in circumstances importing obligation of confidence

Smith Kline & French Laboratories (Australia) Ltd v Secretary to the Department of Community Services and Health (1991)

- SK provided confidential information to DCSH in support of an application to approve a drug for the treatment of gastro-intestinal ulcers → failed to enjoin competitor using same information in determination of approval for version of same substance
- **Test of reasonable person** does not give guidance as to the scope of an obligation of confidentiality where one exists.
 - **Basis of obligation to respect confidences:** obligation of conscience arising from circumstances in which information is acquired.
 - Obligation could impose no restrictions on use as long as not revealed to 3rd parties OR not entitles to use it except in limited circumstances
 - Courts exercising equitable jurisdiction shouldn't be too ready to import an equitable obligation of confidence in a marginal case. Distinction between use of confidential information in a way of which many people might disapprove on the one hand and illegal use on the other.
- Relationship with the common law:
 - Claims for breach of confidence may overlap with other claims
 - *Commonwealth v John Fairfax & Sons Ltd* – Commonwealth failed to establish case for interlocutory relief protecting confidential information but succeeded in copyright
 - What is the relationship with contractual and equitable confidences?
 - *Optus Networks Pty Ltd v Telstra Corp Ltd* – argued that express contractual terms dealing with the use of parties' confidential information and limiting the damages available for breach stood in the way of a claim in equity for an account of profits

Former Clients

- Where a person owes **a fiduciary duty to another** – there is contention over the **equitable protection over confidential information after the termination** of the fiduciary's retainer
 - The basis of equitable relief depends on confidential information **not some 'duty of loyalty'** surviving from the fiduciary relationships
- The weight of authority currently supports the proposition that the **duty of loyalty DOES NOT survive the termination of the retainer**; *Ismail-Zai v Western Australia*
 - C.f. Victoria – there is a duty of loyalty remaining
- HOWEVER there is **well-established basis to restrain a former solicitor from acting**, even **without** it being shown that he/she possesses any confidential information of the former client
- There is a **duty of confidentiality** → Regarding former client only duty remaining is the continuing duty to preserve confidentiality of information imparted during its existence; *Bolkiah v KPMG*
- **Double employment/simultaneous representation:** A lawyer must obtain fully informed consent from each client before they can act and, subject to the scope of the consent, will need to ensure an effective information barrier is put in place to protect each client's confidential information.
 - The existence of *fully informed consent* is a question of fact in all the circumstances of the matter; *Maguire v Makaronis* (1997)
 - There is no precise formula for determining whether fully informed consent has been given and the sophistication of the clients involved will have an impact upon the level of disclosure required

Bolkiah v KPMG [1999]

- KPMG provided services to a former client and potentially has the power to use confidential information of the former client to work for another, new opposing client.
- Court granted injunction restraining KPMG from acting for new client.

- Burden on KPMG to show that there was no risk of information (from old client) coming into the possession of those within KPMG acting for the new client
 - Evidence KPMG attempting to exact Chinese wall however it was ad hoc and within a single department → another two teams involved with former and current client with large rotating memberships with persons accustomed to working together
- Distinction to be drawn between client and former client.
 - Client: absolute duty to current client.
 - Former Client: **Only duty to former client is a continuing duty to preserve confidentiality of information imparted during its existence.**
 - The duty **extends beyond** that of **refraining from deliberate disclosure**, and includes the **duty not to put the client at risk**: '... a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation.'
 - 'I prefer simply to say that the **court should intervene** unless it is **satisfied that there is no risk of disclosure**. It goes without saying that the **risk must be a real one**, and **not merely fanciful or theoretical. But it need not be substantial.**'
 - There is no rule of law that Chinese walls or other arrangements of a similar kind are insufficient to eliminate the risk.
 - The Australian courts assess the *effectiveness*, rather than reasonableness, of the steps taken to screen the *tainted* individual lawyer(s)
- P seeking to **restrain former solicitor from acting** in a manner for another client **must establish**:
 - 1. That the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented and
 - 2. That the information is or maybe relevant to the new matter in which the interests of the other client is or may be adverse to his own'.

Kallinicos v Hunt (2005) → no real chance lawyer had confidential info → should he be restrained? YES

- Lawyer had acted on behalf of a partnership company in respect of transactions, which were highly contentious in a later litigation between the directors and shareholders of the company. In the litigation, the lawyer acted for one of the parties. → major conflict of interest
- The **court always has inherent jurisdiction to restrain solicitors from acting in a particular case**, as an incident of its inherent jurisdiction over its officers and to control its process in aid of the administration of justice
- The **test to be applied** in this inherent jurisdiction is **whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting**, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice
- The jurisdiction is to be regarded as exceptional and is to be exercised with caution
 - Due weight should be given to the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause
- Brereton J, exercising the court's inherent supervisory jurisdiction over its officers, granted an injunction preventing the lawyer from continuing to act given the following circumstances:
 - the lawyer might well be exposed to a suit (there were serious allegations of wrong doing and the possibility of the solicitor being implicated in improper conduct);
 - the lawyer would (almost certainly) be a material witness; and
 - the lawyer appeared to have a vested interest in how the evidence turned out.

4. Unauthorised or Threatened Misuse

- Generally not an issue

5. Remedies

- **Remedies Available:**
 - An **injunction** is the **usual remedy** in the exclusive jurisdiction (breach of confidence is equitable right) coupled with orders for delivery up and destruction
 - Equitable **pecuniary remedies**, such as equitable compensation or an account of profits, are available

Giller v Procopets [2008]

- De facto boyfriend takes videos of girlfriend, some consensually and some covertly and gives them to family. She sues for money for emotional distress.
- \$40,000 for mental distress including \$10,000 for aggravated damages under *Lord Cairns Act* (or equitable compensation).