

# Equity Scaffolds

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# Introduction

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## Preliminary things to note:

1. Equity is a subsidiary system of law, which was designed to ‘soften the hard edges’ of the common law. It operates if the common law has been unfair; when it does operate, an equitable claim can bind a legal title holder [*Earl of Oxford’s Case*].
2. It is not concerned with righting wrongs or providing remedies for losses; rather, it is concerned with holding people to their duties.
  - a. The account of profits [a common equitable remedy] is an example of this: even when a beneficiary of a trust fund makes a profit, a Court might grant an account of profits against the trustee for acting in a conflicted position [*Boardman v Phipps*].
  - b. A judge cannot award exemplary damages for breach of a fiduciary duty [*Harris v Digital Pulse*] for the same reason – equity is not about punishment.
3. Equity can either:
  - a. Act in aid of common law rights [e.g. injunctions and specific performance are equitable remedies which are used to protect common law rights] – for equity to intervene, the common law remedy **must be inadequate**.
  - b. Create its own obligations [e.g. the law of trusts; equitable duties of confidence].
4. There are no damages in equity; damages are a common law remedy. Financial compensation in equity is called ‘equitable compensation’.

## Fusion Fallacy

1. The advent of the *Judicature Acts* [and its NSW equivalent, *Supreme Court Act 1970* (NSW) s 57] meant that any judge could grant legal and equitable remedies. It did not merge the substantive doctrines of the common law and equity, only the administration of those doctrines.
  - a. The court in *Day v Mead* conflated the doctrines of contributory negligence and breach of fiduciary duty, even though the former presupposes independent and equal actors concerned with their own self-interest, and the latter presupposes an unequal position with one party trusting another.
  - b. Even if someone who holds an equitable lease has certain rights under that lease, it does not follow that they have the same rights they would have under a legal lease [*Walsh v Lonsdale*; *Chan v Cresdon*].
  - c. A judge should not award damages [a common law remedy] for innocent misrepresentation [an equitable cause of action] [*Redgrave v Hurd*].

## Maxims of Equity

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| <ol style="list-style-type: none"><li>1. He who seeks equity must do equity;</li><li>2. He who comes to equity must come with clean hands;</li><li>3. Where the equities are equal the law prevails;</li><li>4. Where the equities are equal the first in time prevails;</li><li>5. Delay defeats equity [<i>laches</i>];</li><li>6. Equity looks to intention rather than form [<i>Corin v Patton</i>];</li><li>7. Equity presumes equality;</li></ol> |
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8. Equity regards as done that which ought to be done [*Attorney-General for Hong Kong v Reid*];
9. Equity will not assist a volunteer;
10. Equity acts *in personam* [i.e. equity will not declare that legal title has changed, but it will order someone to carry out the formalities required to change legal title];
  - a. *Penn v Lord Baltimore*: dispute over ownership of land in American colonies, which took place in London, which was fine because it was not changing legal title but directed at parties.

## Breach of Confidence

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### Contractual vs. equitable duties of confidence

There can be co-existing contractual and equitable duties of confidence. Breach of the former [e.g. non-disclosure agreements, terms in employment contracts, deeds of compromise] leads to a claim for breach of damages, and the remedy is damages (or an injunction for anticipatory breach). Breach of the latter leads to a claim in the court's equitable jurisdiction, and the remedy might be an account of profits, an injunction, or equitable compensation. A claimant can claim breach of both duties, but can only recover in respect of one.

1. Is there a contractual duty of confidence?
  - a. If so, does the contract oust the equitable duty of confidence? This is a matter of construction of the particular contract [*Optus v Telstra*].
2. If there is no contract [or if duties are concurrent], is there a breach of the equitable duty of confidence? This requires the plaintiff to establish, as per *Optus v Telstra*, that:
  - a. The information in question has been identified with specificity;
  - b. It had the necessary quality of confidence;
  - c. It was received in circumstances importing an obligation of confidence;
  - d. There is an actual or threatened misuse of the information without consent.
3. Can the party disclosing the information raise a defence?
4. If there has been a breach, what is the appropriate remedy?
  - a. If equity acting in aid of legal rights: are common law remedies inadequate?
  - b. If equity acting in aid of its own rights: equitable remedies are discretionary, so is the particular remedy sought appropriate?

### **1. Is there a contractual duty of confidence? If so, does the contract oust the equitable duty?**

This is a matter of construction [*Optus v Telstra*]. In that case, a contractual provision which agreed that if either party misused confidential information, the remedy owed would be calculated in a particular way, was not construed to oust the equitable duty. This means that even when the contract appears to envisage the consequences of breach of the contractual duty of confidence, it does not necessarily oust a concurrent equitable duty.

### **2. Has an equitable duty of confidence been breached?**

Contrary to Megarry J's statement in *Coco v AN Clark (Engineers)*, a claimant need not prove that they have suffered or will suffer detriment to be successful.

- a. **The information in question has been identified with specificity**