# EQUITY NOTES

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THE HISTORY AND NATURE OF EQUITY

- Equity today is a body of rules administered by our English courts of justice, which, were it not for the operation of the Judicature Acts, would be administered only by those courts which would be known as Courts of Equity (Maitland)
- Equity in this course is not about equity as a concept of fairness; we are more focused on having ‘equities’ in a mortgage, in shares etc.
- As a matter of history, equity was about mercy, fairness or a final appeal to the King
  - Over time, the petitions to the Kings were redirected to the Lord Chancellor (a priest) who was able to make their decisions on the basis of “god and charity”
  - This ossified over time, as petitions had to be put into a particular form, the Chancellor became a lawyer rather than a priest, and the Chancellor would refuse to intervene unless there was a historical precedent on similar facts
  - This led to the emergence of an actual legal system, in which lawyers could specialise
- By the start of the 17th Century, there was a formal system of equity that operated as a subsidiary system of law; it exists to fill the gaps or mitigate the harshness of the common law
  - If equity was abolished, there would still be a functional system of law, even if it might have harsh outcomes
    - The one thing that would cause trouble would be the loss of the equitable law on trusts
  - If common law was abolished, things would be extremely difficult, even though much is codified.
  - Equity is not a fully independent, fully fledged system of law, and it always operates underneath the common law
- The two systems often come to different outcomes, and so if there is a conflict, equity will usually prevail
  - Equity will win over common law, allowing people to enforce equitable interests and equitable remedies
  - This is embodied in statute in NSW
- This was decided in the Earl of Oxfords Case
  - It is not about whether the judges got it wrong at law; it is just not the end of the story.
  - It is possible to prevent a legal owner from relying on his or her rights if it would be unconscionable to do so.

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<td>▪ Magdalen College (Cambridge) owned land in London, which is now incredibly valuable, but at the time the land was boggy, marshy and not very valuable.</td>
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<td>▪ The College attempted to sell the land to Benedict Spinola, but there was an Act of Parliament that prevented Oxford and Cambridge colleges from selling land.</td>
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The College thought they could surrender the land to the Crown, who would then regrant the land to Spinola. They would pay some sort of fee to the Crown. This transaction then took place.

Spinola took the land, improved it greatly, and the land became much more valuable and the College regretted what it had done. At this time, Spinola had died, and the land was in the hands of the Earl of Oxford.

The College tried to engineer a dispute about the land, and as part of that a judge would say they owned the land.

- They granted a lease to an accomplice over the land, and then rejected him from the land.
- Trying to dispute about wrongful ejectment.
- Trying to engineer a dispute that would have them determined to be landowners

However, the Earl got wind, and sued the College first.

The College argued the land was theirs because the Statute did not only prevent the sale of the land, it also prevented them from surrendering the land to the Crown.

- This was not allowed in the sense it was impossible to surrender. The surrender was ineffective

At common law, the College won because the Chief Justice held they were correct in their interpretation of the Statute.

The Earl brought suit in the Court of Chancery, arguing it was unfair.

The Burser and Master of the College had to answer the claim in the Court, but they refused to appear before the Chancery. They were thrown in jail

They were then granted writ of habeus corpus (show me the body), and thrown into jail again by the Lord Chancellor

The key point of this case then turned on **whether the men were validly imprisoned. They would be valid if it was possible for the Lord Chancellor to make a decision to set aside the decision of the Kings Bench.**

- If common law won, then nothing equity said would change that
- If equity could make a difference, then the Masters had to appear before the Court.

This was not a question that could simply be put before either the common law courts or the Court of Chancery, because each side would say they themselves would win; it was a question for the King, who at the time was King James

**Held:**

- Equity prevailed.
- The King agreed that when a judgment is obtained by oppression, wrong or bad conscience the chancellor will set it aside not for any defect, but for the hard conscience of the party.
- It is not about whether the judges got it wrong; it is just not the end of the story. It is possible to prevent a legal owner from relying on his or her rights if it would be unconscionable to do so.
- ‘By the law of god, he that builds a house ought to dwell in it; and he that plants a vineyard ought to gather the grapes thereof.... and yet here in this case, such is the conscience of the defendant that he would have the houses, gardens and orchards, which he neither built nor planted: but the Chancellors have always corrected such corrupt consciences

- Equity speaks as the law of God speaks.... as a right in law cannot die, no more can equity in chancery die
- Conscience and equity is always ready to render to everyone their due. The Chancery is only removable at the Will of the King and Chancellor
- The reason why there is a chancery is because the people's actions are so diverse that it is impossible to make any general law which may aptly meet with every particular act, and not fail in some circumstances
The Office of the Chancellor is to correct men’s consciences.... and to soften and mollify the extremity of the law.

- While law and equity are distinct, they both aim at one and the same end, which is to do right; as justice and mercy differ in their effects and operations yet both join in the manifestation of gods glory
- After a judgment is handed down in common law, you could go to equity for relief
- Statutes are not so sacred as that the equity of them may not be examined

**FUSION OF COMMON LAW AND EQUITY**

- Now we have fused systems of common law and equity, but immediately after the *Earl of Oxfords Case* there were common law courts and the equity court, the Court of Chancery
  - This created confusion, because if you were suing for breach of contract, you would have to prove the case in common law and then go to equity to get specific performance if that was the remedy you sought
  - Unfused systems had very separate and discrete jurisdictions that made one particular matter with elements in each difficult.
  - It was not an efficient system, and so the systems were fused.
  - This was not a fusion of principles, but a fusion of the administration of the law. One judge can now do both common law and equity
- The fusion was affected in the **Judicature Acts** 1873-1875, which consolidated the old courts into one Supreme Court of England of Wales called the senior courts.
  - There were still specialist judges and divisions within the one Court
  - As a matter of jurisdiction, the fused court took all of the common law and equitable matters
- This was only mirrored in NSW in 1972, under s57 of the **Supreme Court Act 1970** that states
  - The Court shall administer concurrently all rules of law, including rules of equity
  - People refer to this as the NSW Judicature Acts
- In s5 of the **Law Reform (Law and Equity) Act 1972 (NSW)**, it legislates the principle from the *Earl of Oxfoords Case*, and states
  - In all matters in which there was immediately before the commencement of this Act or is any conflict or variance between the rules of equity and the rules of common law relating to the same matter, the rules of equity shall prevail.
- The Supreme Court of NSW was always slightly different from the court system in England
  - The Supreme Court was always less separate than the individual courts in England
  - There was a common law and equitable division in the Supreme Court, but their jurisdictions were spit like the historical English divide.
- Until recently, the most senior legal figures in NSW learned their law before the fusing of law in NSW.
  - This explains why equity is still seen as orthodox and important in NSW compared to other jurisdictions like New Zealand
The outcome of any particular case should be the same now as it was before the fusion, only quicker and more efficient

Walter Ashburner said
- The streams of common law and equity now flow in the same channel, but they do not mingle their waters
- The fact that two things happen in the same place does not mean they merge
- A fusion fallacy can be explained in general and specific terms:
  - Generally, it can be regarded as the mistaken belief that the principles of law and equity have been merged along with their administration
  - It is also specifically where an actual case the outcome of which can only be explained by the mistaken belief that law and equity has merged.
    - It is better to understand the specifics: look at the cases of *Day v Mead, Walsh v Lonsdale*

The clearest example is where a court awards damages for breach of an equitable duty
- Technically, damages should only be awarded for breach of a common law duty
- In equity, it should be equitable compensation
- It is important to note that you cannot award a legal remedy for an equitable wrong, but you can give equitable remedies for legal wrongs
  - It was always a goal of equity to soften the remedies of legal claims
- One example is damages for misrepresentation
  - At common law, you could only get damages for misrepresentation if it was a term of the contract or if it was fraudulent misrepresentation
  - At equity, you could get the contract rescinded for innocent misrepresentation, but **no damages are given in equity.**
  - In *Redgrave v Heard* (1881) the judge found that damages should be available for innocent misrepresentation: this is an example of fusion fallacy
  - This outcome could not have been reached before the fusion of law and equity
- Contributory negligence is the idea that someone that has been harmed but they have a duty to look after themselves
  - Does this analysis apply in equity? For example, in *Day v Mead*
  - This case would not be followed in NSW; contributory negligence cannot exist at the same time as a breach of fiduciary duty
  - This is a category error; you cannot be owed a fiduciary duty if you are capable of looking after your own interests
    - It exists where a person to whom it is owed cannot look after their own interests
    - Doesn’t mean they can’t look after themselves in all respects; in a particular area of their life they are vulnerable which is why you get a professional to do the task for them.
- Equity will not intervene where there are two equal economic actors as this is governed by the law of contract
  - E.g. in the negotiation between a buyer and purchaser for a car
A further example is that equity does not have a punitive element, and so granting exemplary damages might be a fusion fallacy if the judges are unaware that what they are doing crosses the lines of law and equity (Digital Pulse)

Canson Enterprises Ltd v Boughton & Co (1991) (Canada)

**Facts:**
- In this case, a purchaser bought land that was massively overvalued
- A solicitor acted for the purchasers in a transfer of land and in the preparation of a joint venture agreement to develop the land.
- However an intermediate company (whom the solicitor also acted for) purchased the land from the vendors and resold it to the purchasers at a much higher price. The Solicitor did not disclose to the purchasers that the land was not being purchased directly from the vendors
- The purchasers proceeded with the development but suffered substantial loss when the supports of the land began to sink. They sued the engineers for wrongdoing and won, but when the engineers couldn’t pay the full judgment amount they also turned to the solicitor
- The purchasers argued they would not have purchased the property or entered into the joint venture if they knew about the involvement of the intermediate company
- At first instance the judge found the solicitor liable for breach of financial duty, but that the purchasers could only recover direct damages of the secret profit and the consequential damages of expenses incurred on the project prior to the wrongful acts of the engineers
  - They held the shortfall was not recoverable because such damages did not flow from the breach of the fiduciary obligation, but were the unrelated fault of the soils engineers and pile-driving contractor
- The purchasers appealed to the Supreme Court of Canada

**Held:**
- The Court dismissed the appeal of the purchasers, and held no further compensation for the warehouse damage was appropriate
  - The solicitor was not liable for the further costs that happened when the land was developed.
- Equity has an inherent jurisdiction to compensate the purchaser for the breach of a fiduciary duty
  - Equity aims at restoring a person to whom a duty is owed to the position in which he or she would have been had the duty not been breached.... through a variety of remedies including compensation
- But the difference between damages and compensation is not always clear: in the case of a mere breach of duty, the concern of equity is to ascertain the loss resulting from the breach.
  - Both the common law and equity compensate the victim for a breach of confidence; damages equivalent to those for deceit were sufficient in this case
- There is no reason why the same claim, whether framed in terms of common law action or equitable remedy, should give rise to different levels of redress... even the path of equity leads to law
- The essence of a fiduciary relationship is that one party pledges herself to act in the best interest of the other. Equity is concerned not only to compensate the plaintiff but to enforce the trust which is at heart
Because the fiduciary is in control, there is substantial potential for gain through wrongdoing: this justifies more stringent remedies.

- Compensation is an equitable monetary remedy available when the equitable remedies of restitution and account are not appropriate:
  - Losses are only those which were caused by the breach; where there is no link between the breach and the loss, the loss is not recoverable.
  - Where the trustee’s breach permits the wrongful act of third parties, you can establish a direct link between breach and loss, and the damages will be recoverable.
  - In this case, the losses were not a result of the breach of duty — what the purchasers lost was the opportunity to say no to the acquisition of the land.

- Even though if the solicitor had done their job properly the land wouldn’t have been bought; but it was not the fault of the solicitor’s that the developers were negligent.

- There were two main judgments that disagreed on why the solicitor was not liable:
  - Lafaraye J used language of common law, intervening cause etc. It was about causality.
  - McLachlin J was in the minority reasoning, but wrote a passage cited with much approval in Australia:
    - In negligence and contract, the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently, the law seeks a balance between enforcing obligations by awarding compensation and preserving optimum freedom for those involved in the relationship in question. The essence of a fiduciary relationship, by contrast, is that one party pledges herself to act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged.
    - The solicitor was not liable because the scope of the fiduciary obligation did not extend so far as to get help with the later development of the land.
    - To what extent are you owed fiduciary obligations? To what extent are you vulnerable?
    - The approach of Lafaraye J would be considered a fusion fallacy in NSW.

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### Harris v Digital Pulse

**Facts:**
- This case is a classic example of senior employees ripping off companies they worked for to take up an opportunity for themselves when they resign.
- Harris worked for DP and decided to leave DP to exploit a new opportunity in a new company.
- They were particularly dodgy: if clients would come to DP, they would be met by Harris, who would do the work in the name of the new company and invoice in that name.
- They also took confidential information from DP.
- DP claimed for breach of fiduciary duty and sought exemplary damages for this breach.
- At first instance, the court granted the damages, and this was appealed.

**Held:**
- The Court of Appeal held equity does not punish; there is no punitive element to equity.
This is perhaps a fusion fallacy; there was enough of an argument that DP was vulnerable to Harris' actions, so they were owed fiduciary obligation.

The idea that that has an element of punishment, such that there should be exemplary relief is a fusion fallacy

**Awarding exemplary damages is inappropriate with the basis of equity**

However, this was not a case by accident: there was a conscience decision to change the law by advancing it. In this case, they knew they were being asked to make new law

- A fusion fallacy is always by accident

Note there is a difference between aggravated compensation vs exemplary. The aim is still compensatory, not punitive.

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**Walsh v Lonsdale**

**(1882)**

**Facts:**

- Lonsdale granted a lease to Walsh over a mill for a term of seven years, on the basis that Walsh was not to run less than 540 looms. The lease was at a fixed rent made payable in advance, and contained a stipulation that there should at all times be payable in advance on demand one whole year's rent in addition to the amount of rent due and unpaid for the last period before that demand.

- The lease did not fulfil the legal formalities, and was not effective at common law.

- Walsh moved into the mill, and met the terms by running 560 looms in 1991. However in March 1882 Lonsdale demanded the whole years rent and the previous months payment under the contract. The tenant refused.

- **Lonsdale seized the goods.**

- Walsh sued for "illegal distress", on the basis that because the formalities failed, he was only a year by year tenant, and therefore could not be forced to abide by the terms of the agreement to pay a years rent in advance.

*This is similar to the Earl of Oxfords case. Was the distress of goods lawful or not? You can only answer this by working out the relationship between the law of equity and common law relating to the lease.*

**Held:**

- The Court held the distress of goods was not unlawful
  - Meaning the debt was owing, meaning we are looking at this as if the lease is valid even when we know at law it did not.
  - The Court of Equity could have granted specific performance and would order the landlord and tenant to create a valid lease, but this hadn't actually been done yet. A Court of Equity has no power to move legal equities around itself, although they can order them moved.
  - **This is why this case is thought of as a fusion fallacy**

- “A tenant holding under an agreement for a lease of which specific performance would be decreed, stands in the same position as to liability as if the lease had been executed. He is not since the Judicature Act a tenant from year to year, he holds under the agreement, and every branch of the Court must now give him the same rights... There is only one Court and the equity rules prevail in it”

- This is wrong: it is a fusion fallacy.
It is not true that because of the judicature act that we assume a specifically enforceable contract to grant a lease is the same thing as a legal lease.

It does mean that a judge can order the creation of a legal lease through specific performance, but you cannot skip the step of ordering specific performance.

However the outcome in this case can be defended.

Chan v Cresdon Pty Ltd
(1989)

Facts:
- A lease of land was entered into which contained a provision by which a guarantor, who was a party to the lease, guaranteed the performance by the lessee of its obligations “under this lease”
- S43 of the Real Property Act (QLD) stated that until registration, no instrument would pass any interest or estate in land.
- S129(1) of the Act stated that no tenancy from year to year should be implied by payment of rent; if there was a tenancy it is a tenancy determinable at will of either of the parties by one month’s notice
- The lease in question was not registered under the Act. The lessee defaulted on the lease.
- The lessor sought to recover the amount of rent due from the guarantor
- Issue: Given s129, was the obligation to pay rent something that the guarantor guaranteed under the agreement? Whether the moneys owing were an obligation to be performed under the lease?

Held (Mason CJ, Brennan, Deane and McHugh JJ):
- The Court held that the lessee’s obligation to pay rent did not arise “under this lease” and thus the guarantor was not liable. Because the agreement was not registered, the lessee had a common law tenancy
- Because of s129, the lease was terminable on one month’s notice; the obligation to pay rent under the common law tenancy was not an obligation “under this lease” within the terms of the guarantee
  - If the unregistered lease was an equitable lease, the guarantor had not guaranteed the lessee’s obligations under that lease, but instead under the lease as a lease at law
  - the existence of the unregistered lease operated to bring into existence or evidence an equitable lease, and occupation and payment of rent under the unregistered lease created an implied tenancy at common law.
- Two propositions arise out of this case:
  - The court will treat the agreement as a lease in equity, on the footing that equity regards as done what ought to be done and equity looks to the intent rather than the form, rests upon the specific enforceability of the agreement
  - An agreement for a lease will be treated as an equitable lease for the term agreed upon, and as between the parties, as the equivalent of a lease at law, though the lessee does not have a lease at law in the sense of a legal interest in the term
- Specific performance in this sense means not merely specific performance in the primary sense of the enforcing of an executory contract by compelling the execution of an assurance to complete it, but also the protection by injunction or otherwise of rights acquired under a contract which defines the rights of the parties
An equitable right is not equivalent to a legal right; between the contracting parties an agreement for a lease may be as good as a lease … But introduce the third party and then you will see the difference.

Courts of equity don’t usually decree the payment of rent: they decree the execution of the lease, and then leave the parties to their remedies at law consequent upon the relation created by the execution of the document (Cox v Bishop).

This case goes further to explain Walsh v Lonsdale
Is there a jurisdiction in equity to backdate specific performance? Jessop was exercising a backdating jurisdiction, not trying to skip the ordering of specific performance.

**Day v Mead**
**(1987) (NZ)**

**Facts:**
- Mead had been Day’s solicitor for 25 years, and convinced Day to purchase $20,000 worth of shares in a company, Pacific Mills, of which Mead was a director and shareholder.
- After his investment, Day took an interest in Pacific Mills, and regularly visited the premises and attended directors meetings. Six months later, Day made another investment on Mead’s advice of $80,000 worth of shares.
- One year later, the company went into receivership.
- Day sued Mead for his loss plus interest, claiming a breach of fiduciary duty
- At first instance, the trial judge ruled in favour of Day, but found that for the second transaction Day was equally to blame for the loss, and so only awarded him the initial $20k plus half of the second investment $40k, and no interest because Day delayed bringing the case to trial.

**Issue:** Was Day entitled to the full second investment and/or interest?

**Held:**
- The Court held that there was no reason that when assessing compensation for a breach of fiduciary duty a Court could not take into account the plaintiff’s share of responsibility for the loss.
  - In the second investment, Day was ‘partly the author of his own loss’ and a lesser sum than the full amount would fairly compensate him.
  - The Court found that Day was entitled to interest on his compensation.
- The purpose of awarding interest is to enable proper compensation to be given to a plaintiff.
  - So long as they are out of the debt, they cant obtain any advantages which possession of the money to which they are entitled would afford, and yet the defendant gets to enjoy its use.
  - A plaintiff’s delays require to be weighed carefully against other factors – in the end it is a question of what the justice of the case requires.

**MAXIMS OF EQUITY**

- Maxims do not exist at common law, where the main sources of law are common law or statute.
- A maxim is a distillation or phrase or aphorism.
- It is not a specific rule or principle of law, it is a summary statement which underlies equitable concept and principles.