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# 1. LAW AND EQUITY

- 'Equity' = body of cases, maxims, doctrines, rules and remedies which derive ultimately from specific jurisdiction by that court

## 1. HISTORY OF EQUITY

- 2 broad views on the origin of equity in England.
  - o 1<sup>st</sup> → Equity originated in the development of the law of trust
  - o 2<sup>nd</sup> → more orthodox view: equity emerged as a result of various defects in medieval common law.

## ENGLAND

### SCLEROSIS OF THE COMMON LAW

- **Summary:** A sclerosis of the common law had set in, as a result of which it failed to adapt to new developments in society and economy, and the Chancery provided remedies for these problems.
- By the reign of Edward 1, the administration of justice began to be distributed between three common law courts that developed out of the King's Council.
  - o Common law and equity originated together as one undifferentiated system
  - o During that time, the courts had the capacity to innovate and maintain flexibility to meet changed circumstances because the legal system in England was at its infancy and appropriate responses took time to settle.
  - o Common law courts retained discretionary powers to grant remedies, and relief was granted on the basis of principles of abstract justice, rather than following earlier decisions.
  - o Common law was at the heart of equity, i.e. idea that law should be administered fairly.
  - o However, as time passed, the interest of precision in the legal system began to outweigh concern for universal redress of wrongs. By the end of 14<sup>th</sup> century, common law had become static and ceased to respond to changed social conditions. Courts were bogged down by the need to adhere to precedent and procedural technicalities
- There arose a need for new system that could respond to changing demands in society. This need was met by the emergence of the Court of Chancery which administered the principles of equity
  - o People were bringing petitions to the king. Hence, the king started delegating his authority to deal with them to the Lord Chancellor. By the late Middle Ages, the Chancery court had become a responsive, quick, inexpensive and desirable avenue for recourse for those who felt they have been wronged in ways that no other jurisdiction could remedy.
  - o Chancery always presupposed existence of CL principles and rights, and are usually only concerned with the manner by which parties exercised their CL rights
  - o One of the major remedies → common injunction: order a plaintiff at CL to discontinue proceedings, or to prevent verdict at CL from being enforced. Disobedience resulted in imprisonment
  - o Conflict arose between common law courts and court of chancery. In *Glanville v Couetney (1614)* → Chief Justice Coke from common law court ordered the release of a person that was imprisoned by the Court of Chancery for refusing to follow its direction.
- However, the setbacks suffered by Chancery were reversed in the decision of *The Earl of Oxford's Case in Chancery (1615)*.

## The Earl of Oxford's Case (1615) 1 Ch Rep 1 (21 ER 485)

- Facts: College owned some land in London that it wanted to sell to Benedict. But a statute said that the colleges could not convey land. Legal advice=college can't sell the land, but it can surrender the land to the Crown and the Crown can grant the land to B. That happened and the college got the money. Land eventually through B and others landed to the Earl of Oxford's. 30 years later, the college realized that the land is worth a lot of money. The master of college wanted to get the land back. Argument → cannot convey=cannot surrender to the crown. College went down to the land and told an accomplice that the land was leased to him, after which the college told him he was ejected. College wanted the accomplice to sue for wrongful ejection. As part of that claim, he had to prove that the college was the landlord. All this would happen without Earl's knowledge
- Result: The college won at law in a common law court. Statute properly construed prevented any dealing with land.
- Earl sued the college in the Lord Chancellor's court. College was subpoenaed but the college ignored it. They were imprisoned in the debtor's jail. But the common law court issued a writ of habeas corpus to get them out. However, they were once again imprisoned by the court of equity.
- Question: Can the equity court restrain the enforcement of a legal judgment?
- Answer: 'Office of Chancellor is to correct Men's consciences for Frauds, Breach of Trusts, Wrongs and oppressions, and to soften and mollify the extremity of law. When a judgment is obtained by oppression, wrong and hard conscience, the Chancellor will frustrate and set it aside, not for any error or defect in judgment, but for the hard conscience of the Party' (Lord Ellesmere)
- The king agreed with Lord Ellesmere, and decided that the Chancellor's court won. **If there is a conflict between rules of equity and common law, equity wins.**

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## THE EFFECTS OF THE JUDICATURE ACTS

- While equitable principles were being systematized by Lord Nottingham and his successors (Chancellors), great procedural deficiencies continued to impact negatively on the Court of Chancery.
  - o Lack of judges and staff, and proper procedures → excessive delays
- Similar concerns with CL courts led to calls for a major overhaul of the English system. There was a growing call for elimination of the separate courts of common law and equity and their fusion into a single court.
- Attempts to redress:
  - o Common Law Procedure Act (1854) enabled CL court to grant injunctions and specific performance and hear/consider some equitable pleas.
  - o Chancery Amendment Act 1858 (aka Lord Cairns' Act) enabled Chancery to order damages in favour of plaintiff in lieu of decree of specific performance or an injunction (previously, if P was denied equitable relief he would have to commence fresh proceeding in CL courts for award of damages)
- Still did not solve problem of separate courts. Finally...Judicature Acts of 1873 and 1875
  - o Abolished historic courts of common law and equity and replaced them with one court (HC of Judicature).
  - o s 24: empowered judges to give effect to both common law and equitable principles
  - o Fusion of courts did not similarly fuse the principles of equity and common law. The two streams of jurisdiction run side by side and do not mingle their waters.
  - o s 25 (11) if there were any substantive differences between rules of common law and equity that were not dealt with, the equitable rule would prevail (Earl of Oxford's Case)
- Although s 25 (11) gave supremacy to principles of equity over CL, that was not the case in reality. Dominance of common law over equity post-Judicature Act was probably attributable to the impact that CL lawyers had in administering the principles of equity, there being more of them than equity judges in new unified court.

- E.g. Milroy v Lord decision undermined the equitable principle relating to declaration of trust. Prior to this decision, if X intended to give property to Y, but the transfer had not been carried out because of non-compliance with relevant formalities, equity could give effect to intended transfer by finding that X had declared himself to be a trustee of property for Y. But the case decided that transfer of property could not be saved by treating an intended ineffectual transfer of property as declaration of trust. There needs to be intention on part of X to declare trust of property for Y.

## AUSTRALIA

- With English settlement in NSW in late 18<sup>th</sup> century, English rules of CL and equity became foundation of colonial legal system.
- **History:**
  - Started with the Court of Civil Jurisdiction. However, the exponential increase in court's work led to calls for reformed legal system
  - Court of CJ was abolished and replaced with Supreme Court. Second Charter recognized SC as having full power to administer justice in summary manner according to as near as may be to the Rules of HC of Chancery in Great Britain
- **Recognizing equity in operation:**
  - Acts of 1823 (aka NSW Acts) created a new SC and Legislative Council for each colony. New SC was granted power to do things necessary for the execution of Equitable jurisdiction like the Lord High Chancellor of Great Britain. → affirmed had been created that Australian SC had equitable jurisdiction
  - Common law and equity were dealt with by same judges and no separate equity court. Equity was suffering because there was little occasion for resorting to equity. But as colony grew, there was increasing pressure on equitable jurisdiction.
- **Separation of equity and CL:**
  - Specialist equity practitioner Justice Willis was appointed from Chancery to a justice in SC. He developed many standing rules for equitable matters. However, he had a very critical attitude and open disrespect for CJ's skills in equity matters. His attitude eventually led CJ to agree to him sitting alone on equity matters.
  - Finally, Willis J's demands for separation were partially met by Administration of Justice Act → have statutory recognition to separate operation of law and equity within SC, but no separate tribunal. Other colonies also adopted the formal separation of law and equity
- **Judicature Act Reforms**
  - In 1876, Queensland was the first colony to adopt judicature system, with the other colonies following. NSW only adopted it in 1970.
  - All Australian jurisdiction have in force provisions to the effect that in the event of conflict between rules of equity and CL, the rules of equity shall prevail.
- **In NSW....**
  - Supreme Court Act 1970 (NSW) → **NSW Judicature Legislature**
    - s 57: The court shall administer concurrently all rules of law, including rules of equity
  - Law Reform (Law & Equity) Act 1972 (NSW)
    - s 5: 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
    - Reinstating the Earl of Oxford's case

## 2. NATURE OF EQUITY

### INTRODUCTION



- Equity is no part of the law, but a moral virtue, which qualifies, moderates and reforms the rigor, hardness and edge of the law. It also assist the law where it is defective and weak in the constitution and defends the law from crafty evasions and delusions. Equity therefore does not destroy the law, nor create it, but assist it. (Dudley v Dudley)
- We ought not to think of CL and equity as 2 rival systems. Equity was not a self sufficient system, it has to presuppose the existence of the CL. CL was a self-sufficient system
- **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.
- HC of Australia has stated later that term 'unconscientious' is more accurate term than 'unconscionable'/'
- Parkinson has suggested that equitable principles and doctrines fall within one or more of five not entirely distinct categories of unconscientious conduct:
  - o Exploitation of vulnerability or weakness
  - o Abuse of positions of trust or confidence
  - o Insistence upon rights in circumstances which make such instance harsh or oppressive
  - o Inequitable denial of obligations and
  - o Unjust retention of property

## EQUITABLE JURISDICTIONS

- Application of equitable principles often said to fall within 1 of 3 separate equitable jurisdictions, i.e. exclusive, concurrent and auxiliary
- **Exclusive jurisdiction** → matters in which equity has an exclusive cognizance because no relief can be obtained at CL.
  - o e.g. obligations arising under trusts
- **Concurrent jurisdiction** → matters in which both the equity and CL courts have jurisdiction to make orders
  - o e.g. enforcement of k where primary equitable remedy is order for specific performance and CL remedy is order for damages.
- **Auxiliary 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.
  - o E.g. by means of injunction prevent irreparable injury to property pending decision at law

## MAXIMS OF EQUITY

- Maxims of equity: basic principles upon which rules of equity have been established. They reflect and represent fundamental moral ideas or themes that lie in the heart of equitable jurisdictions.
- The function of maxim is to provide general principles as points of departure and not to answer to specific questions.
  - o Thus in *Corin v Patton* (1990), in relation to the maxim 'equity will not assist a volunteer', Mason CJ and McHugh J said: like other maxims, it is not a specific rule of principle of law. It is a summary of a broad theme which underlies equitable concepts and principles.

### **Maxim 1: Equity will not suffer a wrong to be without a remedy**

- Equitable remedies evolved to meet the deficiencies in the CL. E.g.
  - o specific performance for k
  - o Injunctions granted to restrain torts
- Novel cases? Common approach of judges:
  - o If the claim in equity exists, it must be shown to have an ancestry founded in history and in practice and precedents of courts administering equity jurisdiction. It is not sufficient that because we may think that the justice is of the present case requires it, we should invent such a jurisdiction for the first time (In re Diplock's Estate)

- Does not mean that equity has passed its childbearing, simply that its progeny (descendants) must be legitimate → by precedent out of principle. Otherwise every quarrel would lead to a law suit (Cowcher v Cowcher)
- Nevertheless, equity principles have not remained static and in fact have been developing.
  - Equity is a living force and it responds to new situations. If it were to fail to respond it would a trophy (ABC v Lenah Game Meats)
- Role of judges in adapting and developing equitable principles
  - Trial judges and intermediate appellate courts should not depart from decisions of intermediate appellate courts in other Australian jurisdictions, nor radically change existing law unless they are plainly wrong. Such changes to the law were properly within the domain of the HC only (Farah Constructions Pty Ltd v Say-Dee Pty Ltd)

### **Maxim 2: Equity follows the law**

- Equity recognizes that CL rights, estates, interests and titles and does not say that such common law interests are not valid.
- However, equity does not slavishly follow the law. It will not permit owner of CL rights and interests to act unconscientiously in enforcing such interests.
- **Examples:**
- **Institution of trust:** where trustee is owner in fee simple, he has at law all the rights of absolute owner in fee simple, but he is not free to use those rights for his own benefit in the way he could if no trust existed. He has to use it for the benefit of the beneficiary
- **Time Stipulations:** At CL, time stipulations in k are of the essence and failure to perform in timely manner entitles innocent party to terminate the k. In equity, time stipulation is not essential. It only recognizes the essentiality of time if time is expressly or impliedly essence of the k. Otherwise, equity regards it as unconscientious to exercise C right to terminate for breach of time stipulation.
  - s 25(7) of the Judicature Act 1873 (UK) resolved the conflict between the common law and equity approaches to the effect of a contractual time stipulation by giving statutory effect to the equitable rules, effectively transforming a time stipulation from an essential term of a contract to an intermediate term of a contract: **Zaccardi v Caunt [2008] NSWCA 202 at [92]**.
- **Consideration:** At CL, consideration need not be adequate, it need only be sufficient, i.e. nominal consideration/ Equity follows common law here, however adequacy of consideration can be a factor in refusing equitable relief (e.g. specific performance). However, such instances are rare.

### **Maxim 3 and 4: Where the equities are equal, the first in time shall prevail, and where there is equal equity, the law shall prevail**

- Maxim 3: 2 equitable interests competing. Equities being equal (no postponing conduct by 1<sup>st</sup> holder), 1<sup>st</sup> holder will win because his interest was created first
- Maxim 4: Earlier equitable v later legal: holder of legal interest will have priority if his or her interest was acquired bona fide for value and without notice

### **Maxim 5 and 6: One who seeks equity must do equity. One who comes to equity must come with clean hands**

- Maxim 5: Plaintiffs in equity must fulfill their legal and equitable obligations before seeking a remedy.
- Maxim 6: Requires plaintiff in equity not to be guilty of some improper conduct, or else relief will be denied.
- This is because Court of Chancery originated as a 'court of conscience'. Confirms that equity is not solely concerned with preventing unconscientious conduct by a defendant but also requires conscientious behaviour by a plaintiff.

- E.g. a plaintiff seeking specific performance must be ready, willing and able to perform the k if the remedy is to be granted

#### **Maxim 7: Delay defeats equity**

- A plaintiff must act promptly and diligently in seeking equity (Smith v Clay).
- Equity will not allow defendants to remain for too long in a position of not knowing whether equitable relief will be ordered against them. It would be unconscientious to do so.
- Laches
- Acquiescence

#### **Maxim 8: Equality is equity**

- Equity's aim is to distribute profits and losses in proportion to the claims and liabilities of the parties concerned
- Equity favors finding of a tenancy in common over a joint tenancy because the latter unduly favors the person of longevity.

#### **Maxim 9: Equity will not assist a volunteer**

- Plaintiff seeking equitable relief has to have a valuable or at least meritorious consideration (Colman v Sarrel).
- Rationale: it would not be unconscientious for equity to decline equitable assistance to a volunteer, whereas it would be so if the plaintiff had provided valuable consideration (Redman v PT Co of NSW Ltd)
- 2 important matters:
  - o **Valuable consideration**
    - Valuable consideration means consideration that has a real and substantial value and not one which is merely nominal or trivial or colourable (In re Abbott)
    - However, does not mean that the consideration needs to be adequate in the sense of it being reasonably equivalent to the value of what was promised or given by the defendant. As long as in arm's length (Bell Group Ltd v Westpac)
  - o **Where the maxim does not apply**
    - While equity does not assist volunteer, neither will it frustrate one or strive to defeat a gift (Milroy v Lord)
    - Exceptions:
    - Beneficiary of a trust who can bring an action against trustee to enforce trust even though beneficiary gave no consideration for beneficial interest provided (Corin v Patton)
    - Volunteers can enforce a donatio mortis causa (property transfers when gift made in contemplation of death, and the property is delivered to the donee)
    - If donor has attempted to make an immediate inter vivos gift of property to donee, or a release of debt, but the gift fails for a failure to comply with legal formalities, then if donee subsequently becomes executor of donor's estate, gift is considered to have been perfected by vesting of legal title in the donee (Strong v Bird)

#### **Maxim 10: Equity looks to the intent rather than form**

- If by insisting on the form, the substance will be defeated, equity will hold it to be inequitable to allow a person to insist on such form (Parkin v Thorold)
- Examples:
  - o Pursuant to this maxim and that equity follows the law, failure to complete a k on date stipulated, time not being essence by express or implied provision, will not result in breach justifying termination.
  - o Equitable mortgagee is treated in equity as if a legal mortgage had been granted, and equitable mortgagee can pursue same remedies as are available to legal mortgagee (Carter v Wake)

- Equity treats as done that which in good conscience ought to be done.

### **Maxim 11: Equity looks on that as done which ought to be done**

- Examples:
  - o Where one for valuable consideration agrees to do a thing, such executory k is to be taken as done
  - o Persons who enter into possession of land under specifically enforceable k for a lease are regarded as being in the same position as if the leases had actually been granted (Walsh v Lonsdale)
  - o Under a specifically enforceable k for the sale of land, purchaser is treated in equity as the owner of the property whether or not an order for specific [performance has been made.

### **Equity 12: Equity acts in personam**

- At CL, judgment of damages was enforced against property of defendant. In equity, remedies attached to the person of the defendant.
  - o If a defendant to equity proceedings failed to comply with equitable order, the property of defendant was not at risk. Rather, defendant was held to be in contempt of court and subjected to coercive measures or constrains until he obeys.
- This maxim could imply that equity does not recognize interests of a proprietary nature and that all equitable interests are no more than personal chose in action. But this is not so!
  - o Many equitable interests and rights are proprietary. E.g. interest of beneficiary under trust is proprietary and not limited to personal action against a trustee

## **3. THE RELATIONSHIP OF LAW AND EQUITY**

### **FUSION FALLACY**

- Since the introduction of the judicature system, the separate courts were fused into one court which recognized and applied principles of common law and equity. However, this was more of administrative reform, and legislature had no intention to fuse, in some way, the principles of common law and equity into one system of law. E.g. legislation did not authorize the new court to award CL damages for breach of an equitable obligation.
- The two streams of jurisdictions, though they run in the same channel, run side by side and do not mingle their waters (Felton v Mulligan)
- However, in England there is a suggestion that CL and equity had merged (statement by Lord Diplock in United Scientific Holdings Ltd v Burnley Borough Council)
  - o Australia (especially NSW) vigorously contested Lord D's view → calls it a **FUSION FALLACY**
- **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.
- Fusion fallacies have led to the following:
  - o The administration for a remedy not previously available at CL or equity
    - E.g. Heydon JA in Harris v Digital Pulse Pty Ltd (2003) → selecting a remedy from CL 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.
  - o Modification of the principles of one branch of the law by the introduction of principles from another.
    - E.g. 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.
- 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.

Harris v Digital Pulse

- Issue: Whether exemplary damages could be awarded for breach of equitable obligations (fiduciary)
- Argument (Mason P): Yes. Rationale for exemplary damages in tort law could be applied by analogy to equitable wrongs (i.e. fusion by analogy)
- Court of Appeal: Disagreed. If 'fusion by analogy' was to be used, then the appropriate analogy was with k law, where exemplary damages are not available.
  - o 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'
  - o Only the HC could change the law that way
- Nevertheless, Mason P (in dissent) was undoubtedly correct when he observed:
  - o 'Fusion fallacy' seems to condemn law and equity to eternal separation, ignoring the history of the 2 systems both before and after the passing of Judicature Act 1873 (UK). IT treats the permission of statute to fuse administration as if it were an enacted prohibition against judge exercising fuse administration from applying doctrines and remedies found historically in one system in a case whose rights maybe found in the other system.
- Similarly, Sir Anthony Mason wrote:
  - o 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.

## LAW AND EQUITY UNDER JUDICATURE SYSTEM

### I) MORTGAGEE'S POWER OF SALE

- Complaint by mortgagor in relation to the exercise of power of sale by mortgagee has traditionally been a matter decided upon in accordance with equitable principles (before statute)→ mortgagor's equity of redemption which requires mortgagee to act in good faith
- However, in Cuckmere Brick Co Ltd v Mutual Finance Ltd, Court of Appeal in England treated mortgagee's obligations to the mortgagor when exercising its power of sale in terms of the tort of negligence, with the mortgagor's remedy being a claim for common law damages.
  - o Tort: imposes a duty upon mortgagee to obtain best possible price for property when sold
  - o Equity: imposes a less demanding duty on mortgagee and does not require him or her to sell at the best possible price
- In Australia, SA said that Cuckmere's equating the mortgagee's duty with that of negligence at CL is a flawed reasoning (Citicorp Australia Ltd v McLoughney (1984)). High court left it open. Full court of Federal Court also rejected it (Upton v Tasmanian Perpetual Trustees Limited)
- However, it can be noted that in NSW, Victoria and Queensland legislation regulates nature of duties of mortgagee
  - o NSW and Queensland: mortgagee must exercise reasonable care
  - o Victoria: mortgagee must have regard to the interests of the mortgagor

### II) DAMAGES IN EQUITY

- In Seager v Copydex (No 1), the English Court of Appeal awarded damages for the breach of equitable obligation pertaining to confidential information.
- However, understanding of the case is dependent upon interpretation of Lord Cairns' Act that permits damages to be awarded in lieu of an injunction sought in aid of equitable rights and obligations.

### III) THE DOCTRINE OF WALSH AND LONSDALE

Walsh v Lonsdale (1882) (Eng CA) Facts: A landlord granted a 7 year lease to a tenant. The lease did not satisfy legal formalities. It was here for void at law. i.e. lease was ineffective at law. Tenant went into possession. Landlord demanded a year's rent in advance as the 'lease' required. Tenant refused because there is no proper lease. The landlord levied for distress at common law (permits landlord to seize tenant's chattels until rent is paid). Tenant sought an injunction against distress and damages for illegal distress.

- Issue: Whether the landlord's common law remedy of distress was permitted despite the absence of a lease at common law? Before judicature, this result could only have occurred if there was in existence a valid CL lease.
- Court of Appeal: Distress was not unlawful. Argument that this is a fusion fallacy.
  - o Contract for lease is not as good as a lease. 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 had been granted.
  - o In truth, because of the administrative reform by Judicature Act, the Court of Appeal in that case was able to simplify procedures to achieve what would have been reached before passing of the Acts in a less onerous and expensive way.
    - Don't have to go through the step of landlord losing at common law court and going to equity court to fix it. It is already assumed as fixed.
- Manchester Brewery case states limited applicability of Walsh case
  - o Applies only to cases where there is k to transfer legal title and the two affirmative answers for the following questions:
    - Is there a k of which specific performance can be obtained?
      - Cannot if one of the terms of the k has been breached.
    - If Yes, will the title acquired by such specific performance justify at law the act complained of?
  - o It is to be treated as though before Judicature Acts there had been, first, a suit in equity for specific performance, and then an action at law between same parties.

Chan v Cresdon Pty Ltd (1989) 168 VLR 242 → Affirmed Walsh but establishes that parties' rights cannot amount to legal interest

- Facts: By a guarantee included in an unregistered lease of shop premises for 5 years, a surety guaranteed the performance by the lessee of its obligation 'under this lease'. At law entry into possession of unregistered lease and payment of rent gave rise only to a tenancy at will terminable on one month's notice. Upon default by lessee, the lessor sought to enforce the guarantee..
- Argument: Rule in Walsh v Lonsdale
  - o Court: No! Although the rule in Walsh meant that an agreement to lease gave rise to an equitable lease, it did not create a legal interest. Hence, equitable lease will be defeated by a bona fide purchaser of legal estate to who acquires legal estate for valuable consideration and without notice of the equitable lease.
- Court confirmed that operation of Walsh rule depended upon on availability of specific performance of the agreement to lease. 2 facts raised doubts as to the availability of specific performance:
  - o Cresdon had in the mean time mortgaged the property
  - o The lease had come to an end before the expiration of the term due to S'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.**
- Argument: Cresdon argued that Chan is a guarantee 'under the lease'.

- Even if specific performance had been available, still will fail! Because under Walsh, all the agreement to lease amounted to was an equitable lease. The guarantee that Cresdon sought to enforce was of 'obligations under the lease' and the court ruled that this meant obligations contained in a legal lease. No such lease existed hence no enforceable guarantee!

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## FUSION FALLACY EXAMPLE CASES

Redgrave v Hurd → Innocent Misrepresentation.

- Traditionally at common law, damages can be claimed if the misrepresentation is fraudulent or if it is a term of k. No remedy of innocent misrepresentation.
- In equity you can get rescission, even in an innocent misrepresentation.
- Fusion fallacy: Common law damages now available for innocent misrepresentation As rescission available, you can get common law damages for innocent misrepresentation too.

Day v Mead [1987] 2 NZLR → Compensation for breach of fiduciary obligation

- P sued his former solicitor on whose advice he invested money in a company where D was director. Company went into receivership.
- 3 actions possible:
  - Contract
  - Negligence
  - Equity for breach of fiduciary duty
- NZ Ct of A blurred all actions and found measure for recovery of damages in equity same as for tort law. CL concept of contributory negligence could apply to reduce claims for compensation for breach of fiduciary duty
- Not the case in Australia!

Canson Enterprises v Boughton (1991) → dissenting judge's view is Australian position!

- Facts: Solicitors acted in a dodgy land development where secret profits were made but others. Later the land development went sour due to negligence in the pile drying during construction. Negligence action was successful but the judgment was partly unsatisfied. Could you sue the defaulting solicitor for the shortfall? Trial judge found liability and assessed damages by the same causation rules as deceit.
- La Forrest J (majority):
  - There might be room for concern if one were indiscriminately attempting to meld the whole of the 2 systems. Equitable concepts like trusts, equitable estates, and consequent equitable remedies must continue to exist apart, if not in isolation, from CL rules. But when one moves to fiduciary relationships and the law regarding misstatements, we have a situation where now the courts of common law and now the courts of equity moved forward to provide remedies where a person failed to meet the trust or confidence reposed in that person. there was throughout considerable overlap. In time the CL outstripped equity and remedy of compensation became somewhat atrophied. Under these circumstances, why should it not borrow from the experience of the common law? Whether the courts refine the equitable tools such as the remedy of compensation or follow the CL on its own terms seems not particularly important where the same policy objective is sought
- McLachlin J (dissent):

- “The basis of the fiduciary obligation and the rationale for equitable compensation are distinct from the tort of negligence and contract. 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, communal or otherwise. The essence of a fiduciary relationship, by contrast, is that one party pledges itself 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 ... In short, equity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart.”

Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 (2003) 56 NSWLR 298 → breach of fiduciary duty exemplary damages?

- Facts: This case concerned an action by Digital Pulse against 2 former employees who had diverted work to their own company. This was in clear breach of the clause in their k of employment not to compete with DP for business. At 1<sup>st</sup> instance, Palmer J also found that the defendants had been in breach of the fiduciary duty which they owed their employer. So flagrant was the defendants’ behaviour that, in addition to other forms of relief, his Honor awarded 10000 exemplary damages against each.
- Court of Appeal: Palmer J had erred in awarding exemplary damages.
  - What the court contemplated in the Aquaculture Corporation case was a form of fusion. It was fusion in the sense of selecting a remedy from common law range of remedies which a court of equity administering the law relating to equitable wrongs before the introduction of a judicature system would not have administered. What is contemplated is that the unified court administering the two systems may select a remedy historically granted by the courts of common law in relation to a wrong recognized only in the courts of equity. But whatever one calls the process, it must be recognized as a process involving a deliberate judicially-engineered change in the law
- Dissent (Mason P):
  - Both equity and common law had adequate powers to adopt and adapt concepts from each other’s system well before the passing of the Judicature Act, and nothing in that legislation limits such powers. They are of the very essence of judicial method which was and is part of the armory of every judge in every common law jurisdiction
- Summary: In a breach of fiduciary duty, can court award exemplary damages?
  - Fiduciary obligations are normally about keeping the fiduciary from doing something e.g. not allowed to make profit. Usually tells someone what they may **NOT** do.
  - A compensatory award is probably not the best remedy. Putting back something where it should have been should be the remedy, e.g. rescission. Duty was not to prevent loss so how can remedy be compensatory?
  - However, there are enough cases today that says that compensation can be a remedy.
  - Damages (common law) v equitable compensation (equity).

Giller v Procopets [2008] VSCA 236

- Facts: Lady sued for breach of confidence (equitable claim). The court allowed recovery on two grounds, equitable compensation AND aggravated damages
- Court: Such damages are compensatory, not punitive. In the appropriate case, it was proper for a court to include a component for aggravation in an award of equitable compensation. In determining whether or not an order for compensation for aggravation should be made, a court will assess the defendant’s conduct on criteria that are very similar to the assessment of whether an award of exemplary damages would be made against the defendant.

Summary areas of conflict



- Mortgagee's power of sale
- Damages in equity (especially in breach of confidence and breach of fiduciary duty)
- Causation in breach of fiduciary duty

## ADDITIONAL READING (OTHER RECENT CASES)

Friend v Brooker [2009] HCA 21

- Facts:
  - In July 1977 Mr Brooker and Mr Friend incorporated a company to carry on an engineering and construction business. Each of the men were directors of the company and controlled the shareholding equally;
  - To finance the operations of the company, each of Mr Friend and Mr Brooker obtained personal loans from time to time which were then on-lent to the company and reflected in the loan accounts of the directors as unsecured loans;
  - In November 1986 Mr Brooker obtained a personal loan of \$350,000 (the SMK loan) from a company called SMK Investments Pty Limited (SMK). \$330,000 of the loan was used to discharge company debts;
  - The company ceased trading in 1990 and was deregistered in 1996. Mr Brooker and Mr Friend disputed who was responsible for the repayment of various loans, including the SMK loan
- Trial: Determined that the Mr. Brooker should fail, having found no evidence to support the respondent's assertion that a partnership or joint venture existed. His Honour also found that the loan in question was a borrowing of the respondent, not of the company nor jointly with the appellant.
- COA: By majority of Mason P and McColl JA the New South Wales Court of Appeal allowed Mr Brooker's appeal based on the doctrine of equitable contribution
- High Court: Disagreed with COA
  - Rejecting Mason P's conception of the equitable doctrine of contribution the joint judgement (with which Heydon J agreed) held that the **equity in the doctrine of contribution was to ensure that an equality of burden undertaken by the debtors should not be defeated by the whim of the creditor or by accident**. The equity does not arise merely because two parties derived a common benefit from the burden undertaken by one of them.
  - Thus, because the trial judge found that there was no common obligation to pay the creditor, there could be no application of the doctrine of contribution.
  - In expressly rejecting Mason P's widening of the incidence of the equitable doctrine of contribution, their Honours stated:

- That view of the jurisdiction provides a framework of analysis at too high a level of abstraction, and risks a result discordant with accepted principle and the general coherence of the law. In a case such as the present, to proceed in this way may too easily produce an outcome in a given case which is no more than an idiosyncratic exercise of discretion.

Andrews v Australia and NZ Banking Group Ltd [2012] HCA 30

- The doctrine of contractual penalties initially arose from equity to provide relief against penal bonds in property contracts. Penal bonds operated at CL similarly to security bonds do today, but in essence equity granted relief in respect of payments activated by a variety of events occurring- not limited to breach of k.
- In the early days, equity would grant relief against a penal bond where it was possible to compensate the obligee for the loss suffered as a result of the default (by k damages). Question to ask in deciding whether or not particular k provision constituted penalty did not turn upon conduct of the parties, but on whether or not the sum required to be paid constitutes, in itself and in substance, a penalty.
- As the doctrine evolved, penalties were called upon in k generally. Eventually the doctrine became reasonably settled and understood to be activated by a breach of k
- Now, after the Andrews case, penalty doctrine has been expanded and a new test propounded where a breach of k is no longer a necessary ingredient for its activation.
- Court:
  - The rule against penalties is a rule of equity as well as a rule of law. Hence, penalty doctrine might be triggered by events other than a breach of k

## 2A. BREACH OF CONFIDENCE

### INTRODUCTION

- Basic proposition: If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied, of the plaintiff, he will be guilty of an infringement of the plaintiff's rights
- **What is confidential information?**
  - Confidential information: covers information that is subject to an obligation of confidentiality
  - They arise in 3 sorts of relationships:
    - private confidences
    - confidences relating to government secrets
    - commercial confidences

### ORIGINS OF THE ACTION FOR BREACH OF CONFIDENCE

#### 1. Property origins

- Many trade secrets or processes will be protected by the obligation of confidence even though they may lack the essential elements of novelty or inventiveness necessary for registration as patent or IP (Krueger Transport Equipment)