The University of Sydney

Equity

LAWS2016
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1: The History & Nature of Equity

WHAT IS EQUITY?

Equity is considered to supplement the CL, rectifying harsh/unconscionable results that would result form the application of a general law designed to apply to all to the specifics of the case. Strong religious influence in terms of mediaeval concept of 'conscience' as an objective standard, brought in via the early Chancellors training as clerics of the Church.

Lord Chancellor was 'the King's natural prime minister', head of the King's Council, keeper of the King's conscience, and delegate of the King's prerogative to dispense justice throughout the realm.

Invested with administrative powers: guardianship of wards of State, administration of estate of 'idiots and lunatics', receivership, cy-pres administration.

***The Earl of Oxford's Case* (1615) 1 Ch Rep 1 Facts**

- Land in London sold by Magdalane College, Cambridge to the Crown and then to Spinola. It was done in this manner in an effort to avoid the operation of an Act prohibiting the sale of College land.
- The Earl of Oxford then bought the land and constructed many houses on it.
- Later, the Master of the College decided selling the land was a mistake and wished to get it back. He therefore purported to lease some of the land to a 3. party and argued that the original sale to the Crown/Spinola was void under the Act.
- The CL Court accepted this argument, finding the sale void under the Act.
- However, the Chancery Court issued an injunction preventing the enforcement of the CL judgement as "when a [CL] judgement is obtained by Oppression, Wrong and a hard Conscience, the Chancellor will frustrate and set it aside, not for any error or Defect in the Judgement, but for the hard Conscience of the Party".
  Decision
- As the courts were locked in a stalemate over whose judgement took precedence, the matter was referred to King James I.
- James issued a declaration stating that that equity takes prevails over the common law. This was consistent with his conception of the royal prerogative and Chancery being *his* court, that operated to mitigate the harshness of *his* CL courts (Crown as fount of justice).
  Pre-Judicature Acts, CL and Equity two entirely separate systems – led to the kind of conflict exemplified by *The Earl of Oxford's Case* and major procedural inefficiency as litigants forced to bounce between the two in search of a remedy.

EQUITY'S CONSCIENCE

"… breaches of trust and abuses of fiduciary position manifest unconscientious conduct; but whether a particular case amounts to a **breach of trust or abuse of fiduciary duty is determined by reference to well developed principles, both specific and flexible in character**. It is to **those principles that the court has first regard rather than entering into the case at that higher level of abstraction** involved in notions of unconscientious conduct in some loose sense where all principles are at large" – Tanwar Enterprises Pty Ltd v Cauchi (2003) 217 CLR 315, [20]

'there were the heads of **fraud, accident, mistake or surprise** [as] ground[s] for equity's intervention" – Shiloh Spinners Ltd v Harding [1973] 2 WLR 28, 37 (Lord Wilberforce, eq. god).

Fraud

- Estoppel: Legione v Hateley (1983) 152 CLR 406
  - Contract, breach the whole time. Then termination for breach
- Part performance: Pipikos v Trayans (2018) 265 CLR 522, [49]
  - Unequivocally referable

- Fraud on a statute: Theodore v Mistford Pty Ltd (2005) 221 CLR 612, [31]
    - SoF gave rise to fraud – eq. recognised
- Fraud on a power: Lady Wellesley v Earl of Mornington (1855) 69 ER 728; Howard Smith Ltd v Ampol [1974] AC 821, 834
    - Knowledge that when child dies, property would vest in adult
    - Looks beyond form of power – to substnace
- Uncancelled bonds
    - Court: Every uncancelled bond = hasn't paid. Eq. no – even though there is a CL judgment -

Mistake

- Rectification in equity: "an equitable remedy which is concerned with a mistake as to an aspect of what an instrument records and with the conscience of the parties. The common law, on the other hand, deals with the interpretation of the words chosen by the parties to reflect their agreement and it does so pragmatically, by reference to considerations such as business efficacy": Simic v New South Wales Land and Housing Corporation (2016) 260 CLR 85, [43].
- Rescission for innocent misrepresentation.

Accident

- Equitable assignments (regarding that as done which ought to be done): Corin v Patton (1990) 169 CLR 540, 557-558
    - Must have done all that they must have done + beyond recall
- Marshalling, subrogation and contribution between co-sureties

Surprise

- Proprietary estoppel by acquiescence: Kramer v Stone [2023] NSWCA 270
    - Mr Stone had established an entitlement to equitable relief, on the basis of a proprietary estoppel arising from the Representation made by Dame Leonie to Mr Stone;
    - Mr Stone had acted to his detriment in continuing the farming operation on the property for about 23 years in the belief that he would one day inherit the property;
    - Dame Leonie "ought to have known" that part of Mr Stone's motivation in continuing the farming operation was the expectation that he would inherit the property; and
    - it was unconscionable for Dame Leonie not to have left the farming property to Mr Stone in her will.

MAXIMS OF EQUITY

CL is concerned with rules
Eq is concerned with pricniples
Animating ideals – self organising rpinciples – ideas that shape doctrine – top down then bottom up
Laches - prejudicial

Equitable maxims, imbued as they are with particularly moral bent of the ancient Chancery jurisdiction, are not rules or positive laws and cannot supply answers to specific legal problems. However, function to justify and/or confirm decisions made on the basis of more precise equitable principles (which themselves developed in reflection of the maxims).

Core examples:

- Equity looks on as done that which ought to be done;
- Equity follows the law;
- He or she who comes into equity must come with clean hands;
- He or she who seeks equity must do equity;

- Equity does not allow a statute to be made an instrument of fraud;
- Equality is equity;
- Equity acts in personam;
- Equity will not assist a volunteer;
- Equity looks to intent, not form;
- Equity will not suffer a wrong to be without a remedy;
- Where the equalities are equal, the law prevails; and
- Equity aids the diligent not the tardy.

Nature of maxims

"summary statement of a broad theme which underlies equitable concepts and principles": *Corin v Patton* (1990) 169 CLR 540 557 (Mason CJ and McHugh J)

Equity regards that as done which ought to be done:

- Walsh v Lonsdale (1882) 21 Ch D 9
- Wasn't legal lease but was specifically performable – util you get it done – until you get it into a legal lease, it will intervene and regards that as done

Equity follows the law:

- "Equity follows the law, but not slavishly nor always": Graf v Hope Building Corp, 254 NY 1, 9 (1930) (Cardozo J).
- Equity does not set out to destroy but rather to supply (auxiliary) to the law

He who seeks equity must do equity:

- Nelson v Nelson (1998) 184 CLR 538
- Discretionary nature of equitable relief
- Fraudulently transferred it to the son, on the faith that the son would beneficially hold it for the mother – made it look like she was asset poor under the act to quality for a pension (resulting trust)
    - Presumption of gift in certain relationships
    - Tried to prove it was a resulting trust instead – on terms that she give back the money to the Cth
- CL: illegality – get out
- Eq relief is discretionary

He who comes to equity must come with clean hands:

- Gartside v Outram (1856) LJ Ch 114
- Employer was ripping off, employee knew. This was confidence
- Eq would not award relief because no cliean hands

Delay defeats equity

- Macquarie Units Pty Ltd v Sunchen Pty Ltd [2023] NSWCA 116
- Laches

Equity looks to substance over form

- Ciaglia v Ciaglia [2010] NSWSC 341
- CL: looks like transfer
- Eq: equity of redemption
- Byrnes v Kendle (2011) 243 CLR 253

Equity is equality

- Lake v Craddock (1732) 24 ER 1011

Equity acts in personam – in respect of the body

- Penn v Lord Baltimore (1750) 27 ER 1132
- Goes into the crux – acts upon conscience – acts upon each person
- Cl view: Nemo dat. In rem
- Trust relationship: if T holdling blackacre on trust for B. If T transfers to 3P
- Look at that persons's conscience
- If they are GFP – then can't get back
- Else, their conscience is burdened
- You don't have an estate, you just have a bundle of rights to restrain someone exercising it against

Equity will not assist a volunteer

- Anning v Anning (1907) 4 CLR 1049
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- NB: gifts, if beyond recall – eq will not perfect an imperfect, done which ought to be done - Corin v Patton
- NBL thye are summary statements of borad things

Corrin v Patton (1990) 169 CLR 540

- 'Like other maxims of equity, [the maxim that equity will not assist a volunteer] is not a specific 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'

JUDICATURE ACTS

Judiciature act

Judicature Act 1873 s 25(11) provided that in the event of conflict, equity prevails. Also affected major changes to procedure as between the courts by combining the court of chancery and the old CL courts into one High Court. However, did not actually change the substantive law as previously applied by CL and Chancery – should have achieved the same results (just better procedure).

The Judicature Act (1873) sought to ensure that a single tribunal in a single proceeding would administer both the common law and equitable jurisdictions.

- s24(1) – the court has the power to administer equitable remedies.
- s24(2) – the court has the power to determine equitable defences.
- s24(4) – the court must recognise all equitable estates, titles, rights, duties and liabilities.
- s24(7) – all matters in dispute between the parties must be completely and finally determined…
- s24(7) – the duplication of legal proceedings concerning such matters should be avoided.
- s25(11) – where there is a conflict between the common law and equity… the latter shall prevail

NSW

Adopted in NSW in 1972 with Law Reform (Law & Equity) Act 1972. NSWSC has jurisdiction to grant all remedies whether equitable or legal the party would previously have been entitled to before each of the previously separate jurisdictions (s 63); equity prevails in any conflict (s 5).

- Supreme Court Act 1970 (NSW)
    - s57: The Court shall administer concurrently all rules of law, including rules of equity.
- Law Reform (Law & Equity) Act 1972 (NSW)

- s5: 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.

EQUITY & CL

Equity presupposes the CL. Equity is concerned not with legal rights, but with the unconscientious exercise of legal rights. Equity acts in personam by binding the D's conscience to resort to their legal rights.

Auxiliary, concurrent and exclusive jurisdictions: Story's trifurcation

Aux: aids legal right

- Eg. specific perf., Compelling discovery (Actually equitable)
- Where legal remedy would be inadequate

Exclusive: only eq. recognise

- Eg. Trust, Fiduciary oblig, Equity of confidence, Redemption

Concurrent: both

- Recission
- CL only can do if it is possible
- Eq: substantial restitution
- UC

Interesting

- (1) Equity takes precedence over law
- (2) Yet equity follows the law; it presupposes the law, but encumbers a person's recourse to it
- ~~(3) Common injunctions~~

"The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, 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 Mens Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions, of what Nature soever they be, and to soften and mollify the Extremity of the Law" – Earl of Oxford's Case (1615) 1 Ch Rep 1, 6-7

Tree root metaphor:

- **Common law: slabs**
- **Tree root - human nature, finds a way to force through the concrete**
  - **Contorts the law into a way that is unacceptable and dangerous to passers by**
- **Equity - grout, poured**
  - **No means perfect, pretty or even consistent**
- **Far better than the alternative - to combine law and equity into one body would be to replace the entire pavement with one slab - same issue**

For the sake of uniformity, losing flexibility that is necessary for any legal system.

FUSION FALLACY

However, in effect, this held to **fusion fallacies** whereby a result different to that which would have previously been obtained is obtained. In truth there has been no "fusion" of law and equity – rather, they remain two separate systems that are simply administered by the same

body: *Salt v Cooper*. Procedural matters have, however, been truly fused.

For example, cases have granted damages for breach of duties arising only in equity (more accurately, should grant equitable compensation). In other instances, rules of CL or equity gave been altered/developed by inaccurate analogies with one another.

Note though the argument that fusion is inevitable and beneficial as it leads to the development of a more consistent and uniform system.

As MGL states:

The fusion fallacy involves
(a) the administration of remedies which are not available either at common law or equity.
(b) the modification of principles in one branch by concepts which are imported from the other.
• The fusion fallacy assumes that both the principles and procedures of the two jurisdictions have merged.
• The Judicature Act (1873) has created a new system of law which contains elements of the common law and equity, but is in character quite different from its components.

o The judicature system has two essential and conceptually different effects:
⊙ It 'fuses' the procedures of the old common law and equity jurisdictions
⊙ It embodies in statutory mandate the supremacy of equity over law in cases of conflict betwen rules.

o The same result will obtain but now issue directly and w/o risk of passage from one court to another to bring the dispute b/w the parties to conclusion. The results have been called 'fusion fallacies', meaning that they are explicable by application of neither law nor equity and can only be the product of a fallacious belief that the substance of law and equity has merged.

o Law and equity now 'flow in the same channel' (in the same court system) but they do not mingle their waters — the outcome of a case pre/post fusion should be exactly the same, it should just be more efficiently.

Eg. JD Heydon, MJ Leeming & PG Turner
Those who commit the fusion fallacy announce or assume the creation by the Judicature system of a new body of law containing elements of law and equity but in character quite different from its components. The fallacy is committed explicitly, covertly, and on occasion with apparent inadvertence. But the state of mind of the culprit cannot lessen the evil of the offence.

Fallacy 1: Law + Equity were fused as a result of the judicature act

- Have now fused
  - waters of the confluent streams of law and equity have surely mingled now."
    - United Scientific Holdings v Burnley Borough Council [1978] AC 904, 924 (Lord Diplock)

- Drafted by the Judicature Commission to reduce inefficiencies
- 2R speech by AG clearly says: "The bill was not one for the fusion of law and equity"
  - Court of Law, but then equitable remedy arose, would have to go to a different court and "begin afresh" - EoOxford
  - No need to hear a case in CL, then cross the street to get an equitable remedy injunction from one side to other
- True effect: Combine the Physical places, and judges that heard the different types of law, combined: Probate, Admiralty, Chancery etc
  - See s 24(1) – the court has the power to administer equitable remedies.
  - s25(11) – where there is a conflict between the common law and equity… the latter shall prevail
    - Suggests a difference -
- Eg. walsh
  - Walsh v Lonsdale (1882) 21 Ch D 9 – illustrates UK fusion fallacy

- Treats a person in possession under an agreement for a lease which was ineffective at law (due to lack of compliance with requisite formalities) as in possession of an equitable lease as 'equity regards as done that which ought to be done'.
- Particularly, erroneously, states that 'Now since the Judicature Act the possession is held *under the agreement'*. I.e., treats an agreement for a lease as effective *legally* as a lease in respect of which CL remedies were available (in this case the remedy of distress, unknown to equity).

Fallacy 2: Regardless of the judicature act, they should be fused as a matter of policy

- Redgrave v Hurd (1881) 20 Ch D 1 - wrong
- Canson Enterprises v Boughton (1991) (SCC) - right
- Use when appropriate - grout
- Combine grout + slab

No: equity -> trust

Normative criticisms

- Burrows, "We Do This At Common Law But That In Equity" (2002) 22 OJLS 1
- "To subsume equity into a larger scheme of private law obligations and property rights would risk losing an explicit ethical element that has stimulated the development of doctrines in the past and that can usefully continue to do so in the future." – McGhee (ed), Snell's Equity (34th ed, 2020) at [1-033]
- Recall equity's interstitial role; 'at every point equity presupposed the existence of the common law'
- institution of the trust, 'equity without common law would have been a castle in the air, an impossibility': Maitland
-

BAD CASE EXAMPLES

Contributory negligence?

1. E.g., in *Day v Meed* the NZHC applied the CL concept of contributory negligence to reduce the equitable comp awarded to a plaintiff for a solicitor's breach of fiduciary duty [giving bad/conflicted investment advice] ➔ this made no sense as (1) fiduciary duties owed to vulnerable persons who by definition can't protect own interest (and therefore can't be negligent in not) and (2) contrib neg introduced by statute *to benefit* Ps by removing absolute CL defence; why should it now operate in equity to reduce award?
    - Nb. HCA has rejected a similar fallacy by SASC re "contributing fault" in *Pilmer*

Doctrine in Walsh v Lonsdale?

2. E.g., in *Walsh v Lonsdale* the HoL's held that as 'equity treats as done that which ought to be done' a specifically enforceable agreement for a lease was as good as a lease at law, stating **'now, since the Judicature Act, the possession is held *under the agreement*' ➔ this is false; the Judicature Act cannot have changed the outcome; the P cannot have held *under the agreement*; a specifically enforceable** agreement is not directly an agreement at law.
    - Cf *Chan v Cresdon*, where the HCA rejected this fusion fallacy reasoning, noting that while a specifically enforceable agreement for a lease may give rise to an equitable lease that ≠ a legal lease; can be defeated by a BFPFVWN.

Mortgagor's DoC?

3. e.g., in *Cuckmere* it was suggested that a mortgagor owes a mortgagee a duty of care to a mortgagee ➔ does not make sense; other authority suggests good faith in exercise of power of sale sufficient. Resolved by s 111A *CA* in 2011 with imposition of statutory DoC.

"Damages" for breach of equitable duties?

4. E.g., in *Seager v Copydex* the UKCA erroneously spoke of "damages" for breach of EDC ➔ should have been termed equitable comp. Or e.g., in *Redgrave v Hurd*, HoL awarded damages for innocent misrepresentation ➔ impossible as (1) while CL allowed damages for fraudulent misrep/misrep in breach of contract, it afforded no remedy for innocent misrep, (2) equity would allow rescission for innocent misrep, but no compensation.
    - Bad
        - **Why bad?**
        - **If reducing force of preventative nature of eq**
        - **All I have to do is pay the price**
        - **Eq way – primary and secondary obligation**
        - **CL: all you have to do is pay up – overlooks look into the rationale of the eq. obligations**

5. Note also, (albeit due to quirk of procedure) in *Walton Stores v Maher* the HCA left the damages award of lower Ct in place for equitable estoppel.

Exemplary/aggravated damages?

6. In *Aquaculture* the NZHC awarded "exemplary equitable damages" by analogy with CL, stating that for breach of EDC 'a full range of remedies should be available as appropriate, no matter whether they originated in common law, equity or statute'.
    - In contrast, in *Harris v Digital Pulse* NSWSC did not fall into same trap ➔ expressly said they were developing the law of equity to allow exemplary equitable comp, rather than making false analogies with CL.

LCA damages in aid of equitable rights:

7. *Prima facie* impossible as LCA damages designed to allow equity to award damages where equitable remedy in aid of legal right sought and denied.
8. However, given by VSC (aggravated) in *Giller v Procopets* for breach of EDC [sex tapes].
9. Explicable as *Vic SCA 1986* s 38 provides broad power to award damages simply where SP/injunction/etc sought; in contrast, original JA and NSW *SCA 1970* s 68 limit LCA damages to where SP/injunction/etc sought *re the breach of contracts etc or continuance of wrongful acts* (i.e., torts) – i.e., in aid of legal rights.

GOOD CASE EXAMPLES

Inaptness of Ashburner's fluvial metaphor: Windeyer J in *Felton v Mulligan* (1971) 124 CLR 367, 392

- "An interrelation is one thing, fusing into an amalgam another": Gummow, "Equity: too successful?"

Penalties and 'lex sequitur equitatem': Andrews v ANZ Banking Group Ltd (2012) 247 CLR 205, [53]ff

Gummow wrote it – law following equity

Eg. The writs system: moneys had in receipt – must pay money wrongly paid back

Monies had and received: Roxborough v Rothmans of Pall Mall (2001) 208 CLR 516, 548 [83]

- "Lord Mansfield spoke of the action for money had and received as one which "lies in numberless instances", as 'founded in the equity of the plaintiff's case', and as a 'kind of equitable action, to recover back money, which ought not in justice to be kept', the question being whether 'the defendant may retain it with a safe conscience'"

Mortgagee's duty of care when exercising power of sale: Cuckmere Brick Co Ltd v Mutual Finance Co Ltd [1971] Ch 949.

- What if bank didn't take reasonable steps to get market value for a foreclosed property – but you also have debt to repay – is there a duty to use reasonable care – court held yes
- Borrow a particular doctrine where appropriate

Exemplary damages in equity? Harris v Digital Pulse Pty Ltd **(2003) 56 NSWLR 298**

- **"the historical development of the law of tort…was closely connected with the development of criminal law": [33]**
- **Could but – long judgment explainting why – overtured 2 1**
    - **Spigelman, Heydon, D Mason**
- **Breach of confidence of eq of exlcusive jurisdiction**
    - **Employer/employee of an IT company – stole a lot of IP,**
    - **Contemlious discregard – borrowing from**
- **But CA disagreed**
    - **No need for penal penalties – no change of circs**
    - **Equity and penalty are strangers – Heydon**
        - **Equity never set out to punish people**
        - **Cf – tort developed from crime – burdensome from state to prosecute so it developed private wrongs à punitive elemnt**
        - **Contract did not develop from crime**

This is why values are still important - provide guidance for equitable doctrines, which allows for 'fusion' by analogy

Damages for breach of equitable obligations

Redgrave v Hurd (1881) 20 Ch D 1

- Fusion Fallacy — damages for innocent misrepresentation: Sir George Jessel Mr suggested that the difference between equity and the common law had disappeared with the passing of the Judicature Acts and that damages might thus be obtainable for innocent misrepresentation.
- Before the Judicature Acts, innocent misrepresentation was not recognized as a cause of action at common law. It was recognised in equity, but only as a ground for rescission, subject to the proviso that restitutio ab initio was possible (i.e. the parties could be restored to their original positions.)
    - • At common law, you can get damages for misrepresentation. But, that misrepresentation either has to be included as a term in the contract (i.e. breach of the term) or the misrepresentation has to be fraudulent.
    - • Common law: there is no common law cause of action for innocent misrepresentation.
    - • Equity: You could rescind a contract for innocent misrepresentation.

Canson Enterprises v Boughton (1991) (SCC)

- "My first concern with proceeding by analogy with tort is that it overlooks the unique foundation and goals of equity...

- 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 (McLachlin J)**

Walsh v Lonsdale (1882) 21 Ch D 9 – illustrates UK fusion fallacy

- Treats a person in possession under an agreement for a lease which was ineffective at law (due to lack of compliance with requisite formalities) as in possession of an equitable lease as 'equity regards as done that which ought to be done'.
- Particularly, erroneously, states that 'Now since the Judicature Act the possession is held *under the agreement'*. I.e., treats an agreement for a lease as effective *legally* as a lease in respect of which CL remedies were available (in this case the remedy of distress, unknown to equity).
- This is a fallacy; possession is not held *under* the legal lease agreement, but rather due to the effect of equity on the lessor's conscience – same result, but different reasoning.

Chan v Cresdon Pty Ltd (1989) 168 CLR 242 – rejects UK fusion fallacy

- Makes the correct distinction between a legal lease and an equitable lease coming into force as 'equity regards as done that which ought to be done'. Majority discusses *Walsh* and highlights the fusion fallacy it represents.
- Particularly, held that a 3rd party guarantor's 'guarantee of obligations *under this lease*', i.e., the ineffective unregistered legal lease, did not extend to create a guarantee of obligations under the equitable lease the lessee held.
- Additionally, makes clear the applicability of the rule in *Walsh v Lonsdale* rests on the availability of SP of the ineffective legal lease/agreement.

Day v Mead [1987] 2 NZLR 443 – demonstrates loose/fused NZ position

- The P sued his former solicitor in relation to dodgy investment advice, claiming breach of fiduciary duty. The TJ found for the P, but had reduced the sum awarded due to the P's "contributory negligence". I.e., applied the tortious/CL concept to the equitable claim.
- On appeal, NZCA held that 'there appears to be no solid reason for denying jurisdiction to follow that obviously just course [adopted in tort of taking into account the P's contributory negligence], especially now that law and equity have mingeled'.
- Totally incorrect! Fusion fallacy.
- Note also that the very terminology ('damages') is an inaccurate fusion – equity awards equitable compensation (which is not limited by the same foreseeability and remoteness requirements as are damages).

Harris v Digital Pulse Pty Ltd (2003) 56 NSWLR 298 – reaffirms stricter NSW position

- Deals with the question of whether exemplary damages (a CL remedy) can be awarded for breach of fiduciary duty (an equitable duty) – in this case a duty owed by an employee to his employer.
- Key point was that the fiduciary relationship was created *by* an employment contract. TJ used this to justify the awarding of exemplary damages.
- On appeal Spiegelman CJ noted that NSW has retained a stronger separation of CL and equity than NZ, Canada and the UK. Spoke of the fusion fallacy and noted that it was inappropriate to apply CL concepts by direct analogy to equity –
    - 'the integrity of equity as a body of law is not well served by adopting a CL remedy developed over time in a different remedial context on a different conceptual foundation. The fact that exemplary damages are awarded in torts is not a basis for asking "why not?" in equity'.
    - I.e., it is not appropriate to analogise directly at a high level with tort, contract, or other areas of the CL.
- Heydon P noted that to award exemplary damages would be to change the law. This is of course permissible, but not justified in the present case. Should not pretend that to do so is not to affect a change however.

- Note though the HCA's new notion of 'coherence':

- The overriding principle of 'coherence' or (viewed from the other side) 'stultification' recently and repeatedly emphasised by the High Court (see, eg, Miller v Miller [2011] HCA 9; Equuscorp Pty Ltd v Haxton [2012] HCA 7; Legal Services Board v

Gillespie-Jones [2013] HCA
35). This principle dictates that a plaintiff must be permitted or denied recovery where to do otherwise would undermine or stultify some overriding principle or policy of the law. The principle aims to avoid incoherence or incongruity in the law. It is a general principle applicable throughout the law rather than a particular aspect of the law of trusts.

- The High Court's promotion of the principle of coherence arguably provides fresh impetus to those scholars who seek principled 'fusion' or convergence between the judge-made rules of common law and equity. Any principle of coherence should surely support rationalisation of doctrines differentiated by historical origin alone.
  The differing requirements of common law and equitable rescission, approaches to tracing at common law and in equity, and separate evolution and indicia of common law and equitable wrongs triggered by common factual patterns are only some of the areas that reflect an arguably unwarranted inconsistency in approach, and that would arguably benefit from rigorous application of the coherence principle.

2A: Breach of Confidence (Application of the Conscience of Equity)

GENERALLY

- Jurisdiction
  - Common law: Contractual duty of confidence (auxiliary jurisdiction).
  - Equity: Equitable duty of confidence (equitable jurisdiction).
- Standing
  - The person to which the duty is owed.

CONTRACTUAL DUTY OF CONFIDENCE

- This can co-exist with an equitable duty of confidence.
  - **Application**: Contractual duty attached to the carpet fastener idea actually pitched by the plaintiff to the defendant, but an equitable duty attached to the alternative fastening method mentioned by the plaintiff to the defendant in passing; *Seager Ltd v Copydex Ltd* [1967] 2 All ER 415.
  - Context:
    - Company went to speak to a manufacturer about manufacturing a type of carpet grip
    - Mentioned another type in the process; Negotiations broke down; They made a second type of carpet grip;
    - They sued for breach of confidence and won
- Can be ousted by contract: *Optus Networks Pty Ltd v Telstra Corporation* (2010) 265 ALR 281
  - An appropriately drafted contract may oust the equitable obligation.
  - Would likely need to be express; exhaustive definition ('confidential information "means" …')
  - Insufficient in Optus v Telstra as treated as simply codifying the contractually protected information.
- Remedies: Common law damages.
  - If damages inadequate, equity may grant an injunction in its auxiliary jurisdiction (see below).
  - If injunction unavailable, equity may grant Lord Cairns' Act damages.

EQUITABLE DUTY OF CONFIDENCE

(0) Detriment not required

(1) The information in question must be identified with specificity (Optus v Telstra);

- Importance: consequences of contempt → imprisonment
- Principle: Must identify the confidential information with sufficient specificity so the Court can frame an injunction the defendant can comply with: *O'Brien v Komesaroff* (1982) 150 CLR 310
  - **Application**: The plaintiff could not point to any specific part of his trust unit deed precedent that was confidential; merely tendering the whole document is insufficient: *O'Brien v Komesaroff*.
  - *BBC v Harper Collins:* P could not claim the entirety of Top Gear's White Stig's bookwas confidential; needed to say which bits of it were.
  - Problems
    - Information described is so general that it would be impossible to evaluate the other elements of the claim
    - Information described is so general that it would be impossible to formulate an appropriate order
- Reason is two-fold
  - (1) formulation of order: Lawrence David Ltd v Ashton [1991] 1 All ER 385, 393
  - (2) to allow further elements to be analysed: Independent Management v Brown at 609 per Marks J

- ~~Degree of specificity required depends on the circumstances: *Sent v Fairfax*.~~
    - ~~Increased where the remedy sought is against the third party: *Retractable Technologies*.~~
    - ~~Decreased where the specificity would destroy the very confidence sought to be protected: *Sent v Fairfax*.~~

(2) It must have the necessary quality of confidence (Optus v Telstra);

(NB this is not what the parties thought subjectively)

1 Intrinsically confidential (Gaudron J, Johns v ASC); and

- Fairly low level required: *Coco v AN Clark*.
- **Test: Whether disclosure would be highly offensive to a reasonable person of ordinary sensibilities: *ABC v Lenah Game Meats Pty Ltd (2001) 208 CLR 199, per Gleeson CJ***
    - Apply contemporary standards of morals and behaviour.

1.1 Personal/things done in private

- **Test:** Personal information carries a quality of confidence when it relates to an activity, which a personable person, applying contemporary standards of morals and behaviour would understand as meant to be unobserved: *ABC v Lenah*.
- **NB: Do not conflate something being done in private giving it a quality of confidence**
    - A butchery killing possums is not done in public, but lacks quality of confidence
    - "An activity is not private simply because it is not done in public, The problem for the respondent is that the activities secretly observed and filmed were not relevantly private.": *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [42]-[43]; [25]
- Examples:
    - Information relating to health, personal relationships, or finances, may be easy to identify as private: Gleeson CJ, *ABC v Lenah*.
        - Film of a man in his underpants: *ABC v Lenah*.
    - A butchery killing possums is not done in public, but lacks quality of confidence: *ABC v Lenah*.
    - Medical information, especially where it is likely to cause embarrassment: *X v Y*.
    - Personal relationships – the mere fact of sexual conduct likely insufficient; there must be a consideration of the depth of the relationship and the type of information.
        - Sport star's affair was not confidential: *A v B*.
        - Private and personal information shared between intimates (eg in a marriage) may be imbued with an equitable obligation of confidence: *Duchess of Argyll v Duke of Argyll (1967)*
        - Revenge porn/Sex tapes/sexts are sufficient: *Giller v Procopets*; *Wilson v Ferguson*
        - Personal journals are generally sufficient: *Prince of Wales' Case*.

1.2 Commercial

- Consider whether (*Coco v AN Clark*):
    - (i) It is not public property and public knowledge; or
    - (ii) if it is constructed solely from materials in the public domain to which the skill and ingenuity of the human brain has been applied.
- Knowledge, skill and experience (know-how) can be used by ex-employees: *University of Western Australia v Gray*.
- ~~If information is able to be acquired by a particular course of investigation/experimenting, the method itself is confidential: Campbell JA, *Artedomus*.~~
- Factors (*Australian Medic-Care Co Ltd v Hamilton Pharmaceutical Pty Ltd* [2009] FCA 1220 at [633], (2009) 261 ALR 501)