

# MLP405 Equity and Trusts

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A Comprehensive Exam Study Guide

**MLP405**

2026 Edition

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# The Origin and Nature of Equity and its Relationship with the Common Law

## 1. Overview

Equity represents a sophisticated body of law evolved to provide flexible, conscience-based justice where the rigidity of common law produces manifestly unfair outcomes. The equitable jurisdiction operates through distinct exclusive, concurrent, and auxiliary jurisdictions, applying discretionary remedies calibrated to individual circumstances. The Judicature Acts fused the administration of law and equity while preserving their conceptual distinctness; the rules of equity prevail where conflict arises. Modern equity encompasses established doctrines including trusts, fiduciary relationships, and unconscionable conduct—all governed by structured maxims that reflect fundamental standards of good faith, honesty, and generosity. Understanding the methodology of equity—particularly its discretionary character and textual flexibility—is essential to comprehending how equitable principles function within the broader legal system.

**Reading Guide: First pass** — §§1–4, 6, 10 (framework, key cases, procedural steps, quick reference). **Deep revision** — §§5, 7, 8, 9 (substantive analysis, exam technique, tips, cross-references). **Critical thinking** — §5.1 Critical Perspectives (policy arguments for essay-style questions).

## 2. Key Definitions

TERM	DEFINITION	AUTHORITY
Equity	A body of law derived from the jurisdiction of the Lord Chancellor, operating to provide flexible justice based on conscience where common law produces inadequate outcomes	Historical development
Equitable fraud	Breach of an obligation enforced by a Court of conscience; extends beyond moral fraud to encompass conduct that is unfair or unjust even where no moral culpability exists	<i>Nocton v Lord Ashburton</i> [1914] AC 932
Exclusive jurisdiction	Equitable jurisdiction applying to principles and remedies exclusively developed by equity (e.g., trusts, fiduciary relationships), enforceable only by equitable remedy	TB [3.1]
Concurrent jurisdiction	Jurisdiction where both equity and common law recognise unfairness and apply relief; equity supplements common law deficiencies	TB [3.2]
Auxiliary jurisdiction	Ancillary equitable jurisdiction providing assistance for enforcement of legal rights, including injunctive relief	TB [3.3]
Fusion fallacy	The incorrect assumption that the Judicature Act effected substantive alteration to rules previously existing under common law and equity	TB [3.7]
Unconscionability	A modern derivation of equitable fraud; conduct that is unfair or against conscience	<i>Australian Competition &amp; Consumer Commission v CG Berbatis Holdings Pty Ltd</i> (2003) 214 CLR 51

### 3. Legislative Framework

#### Primary Legislation

ACT/RULES	KEY PROVISIONS	PURPOSE
<i>Trustee Act 1958</i> (Vic)	Various provisions governing trust administration and fiduciary obligations	Regulate trustee duties and breach of trust
<i>Property Law Act 1958</i> (Vic)	Governing proprietary interests and equitable transactions	Regulate property dealings and equitable interests
<i>Charities Act 2013</i> (Cth)	Governing charitable trusts and institutions	Define and regulate charitable purposes
<i>Judiciary Act 1903</i> (Cth)	ss 31, 32	High Court exercises legal and equitable jurisdiction together
<i>Federal Court of Australia Act 1976</i> (Cth)	s 32	Federal Court may grant all remedies to which party is entitled regarding equitable claim

#### Relevant Provisions in Full

**St German's Doctor and Student (1974) 97:** In some cases it is necessary to leave the words of the law, and to follow that which reason and justice requireth, and to that intent equity is ordained, that is to say, to temper and mitigate the rigour of the law.

**Aristotle, *Nicomachean Ethics* Book V, ch 10:** When the law speaks universally, and a case arises on it which is not covered by the universal statement, then it is right to correct the omission. Hence the equitable is just, and better than one kind of justice—not better than absolute justice, but better than the error that arises from the absoluteness of the statement.

## 4. Key Cases

CASE	CITATION	PRINCIPLE	APPLICATION
<i>Nocton v Lord Ashburton</i>	[1914] AC 932	Equitable fraud extends beyond moral fraud to breach of obligations enforced by Courts of conscience	Foundation for constructive fraud doctrine
<i>Walsh v Lonsdale</i>	(1882) 21 Ch D 9	Agreement for lease treated as equivalent to executed lease for liability purposes	Example of fusion fallacy if taken literally
<i>Australian Competition &amp; Consumer Commission v CG Berbatis Holdings Pty Ltd</i>	(2003) 214 CLR 51	Unconscionability requires more than merely taking advantage of superior bargaining position	Limits statutory unconscionability under ACL
<i>Harris v Digital Pulse Pty Ltd</i>	(2003) 56 NSWLR 298	Legal remedies not available for breach of equitable action; fusion fallacy rejected	Spigelman CJ: 'The heart of the fusion fallacy is the proposition that the joint administration of two distinct bodies of law means that the doctrines of one are applicable to the other'
<i>Youyang Pty Ltd v Minter Ellison Morris Fletcher</i>	(2003) 212 CLR 484	Equitable compensation governed by unique foundation and goals of equity	High Court rejects assimilation with common law damages measure
<i>Giller v Procopets (No 2)</i>	(2008) 24 VR 1	Aggravated damages (compensatory) available for breach of confidence	Distinguishes punitive from compensatory equitable relief
<i>The Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)</i>	(2008) 39 WAR 1	'Fraud is abhorrent to the good conscience on which the principles of equity are based'	Owen J at [4845]
<i>Attorney-General v Blake</i>	[2001] 1 AC 268	Account of profit awarded for breach of contract (not followed in Australia)	House of Lords expanded remedial boundaries

### Case Summaries

#### *Harris v Digital Pulse Pty Ltd (2003) 56 NSWLR 298*<sup>[1]</sup>

**Facts:** Directors of a company breached fiduciary duties. The trial judge awarded exemplary damages. The company appealed the refusal of exemplary damages.

**Held:** The Court of Appeal (Spigelman CJ, with whom Mason CJ agreed) rejected the award of exemplary damages for breach of fiduciary duty. The fusion fallacy lies in assuming that the joint administration of law and equity means the doctrines of one are applicable to the other. Equitable remedies remain conceptually distinct from common law tort remedies. Any change to this position was a matter for the High Court.

**Exam Application:** Use this case to argue that fusion arguments in equity questions are fallacious. Equity retains its distinct remedial framework.

### | *Giller v Procopets (No 2) (2008) 24 VR 1<sup>[1]</sup>*

**Facts:** Breach of confidence involving publication of confidential images. The plaintiff claimed aggravated damages for mental distress.

**Held:** The Victorian Court of Appeal concluded that *Harris v Digital Pulse* does not stand in the way of an award of aggravated damages for breach of confidence because such damages are compensatory rather than punitive. The plaintiff was entitled to damages for mental distress caused through the publication.

**Exam Application:** Distinguish between punitive and compensatory equitable relief. Compensatory remedies may be available where punitive measures (like exemplary damages) are not.

## 5. Substantive Content

### 5.1 The Nature of Equity and Justice

Equity represents a superior form of legal justice because it is not absolute in nature: unlike the law, equity is not generalised and therefore is able to correct the law by considering particular applications. The position has been well summarised by Aristotle's analysis in *Nicomachean Ethics* Book V, where he concludes that equity and justice are effectively the same thing because they are both concerned with balance and proportionality and with what is right and good.

Equity now represents a structured body of law: a source of legal obligation rather than a notion of justice. The primary difference between common law and equity today lies in the method of implementation. Equitable principles are administered according to processes that have evolved in the courts of equity: equitable discretions, maxims and remedies are only relevant to the administration and application of equitable principles.

Most equitable principles are concerned with prescribing standards of conduct; these standards are based upon the basic precepts of good faith, honesty and generosity. One of the most fundamental themes of equitable intervention is the concept of unconscionability. As Owen J stated in *The Bell Group Ltd (in liq) v Westpac Banking Corp (No 9) (2008) 39 WAR 1, 631 at [4845]:*

'Fraud is abhorrent to the good conscience on which the principles of equity are based.'

The concept and application of equitable fraud has gradually expanded. Equitable fraud has traditionally applied a notion of preventive rather than remedial justice. In this sense it adopts a constructive approach so that it protects not only moral fraud in the ordinary sense, but also acts which have an unfair or unjust result. As Viscount Haldane LC stated in *Nocton v Lord Ashburton* [1914] AC 932 at 954:

'A man may misconceive the extent of the obligation which a Court of Equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent, even in such a case as a technical fraud on a power.'

## 5.2 Equitable Maxims

With the evolution of equity as a body of law, a set of structured maxims that assists in the interpretation of the discretionary jurisdiction has emerged. These maxims represent fundamental principles that guide equitable intervention.

**Equity assists only those with clean hands:** This maxim refers to the quality of the plaintiff's conduct. When a plaintiff whose conduct has been improper in a transaction seeks relief in equity, such relief is generally refused at the discretion of the court. Courts look to whether the plaintiff has acted inequitably in relation to the matter in issue.

**Equity follows the law:** Equity never overrules or invalidates the common law and always, where possible, attempts to follow it. If the common law is defective, equity may provide an alternative cause of action but cannot actually overrule or invalidate a legal principle. Equity may prevent a legal right being asserted where the holder has acted unconscionably or the assertion itself would be unconscionable.

**Equity is equality:** Equity will try to act with a balanced and equal perspective. This maxim is particularly relevant to the administration of trust property and the distribution of assets among beneficiaries.

**Equity looks to intent, rather than form:** Equity will only look at substantial fairness and not consider itself bound by form. Equity interprets agreements according to the spirit and intent rather than strict verbal formulation.

**Equity deems that to be done which ought to be done:** Equity will attempt, where fair and possible, to enforce all transactions that were agreed upon. For example, equity may enforce an agreement pursuant to an order for specific performance. As outlined by Young CJ in *Takemura v National Australia Bank Ltd* [2003] NSWSC 339 at [17]:

'The equity to grant specific performance comes from the maxim that equity looks on that as done which ought to be done.'

**Equity acts in personam:** Equity acts against the individual: it does not impose generalised relief and its aim is to prevent individual injustice from continuing. This reflects equity's discretionary,

circumstance-specific nature.

**No relief if damages are adequate:** If damages are adequate relief, equity will not overwhelm the common law by imposing an equitable form of relief. This is a well-entrenched principle ensuring that equitable remedies are reserved for situations where common law remedies are insufficient.

**Equity does not assist a volunteer:** The equitable jurisdiction only intervenes and applies relief if there is some valid reason to bind a promisor's conscience. Under common law, a voluntary promise does not constitute a contractual relationship; equity does not regard a voluntary promise as binding on the conscience of a promisor.

### 5.3 The Origins of Equity

**The medieval period (13th–15th centuries):** During the 13th to the 15th centuries, equity was in an embryonic period. The Chancellor was receiving power from the great Council of the King to administer 'additional' justice over and above that being administered under existing common-law courts. Equity was very much a creature of the Chancellor's whim. One thing was clearly established during this period: the Chancellors did not consider themselves bound by precedent.

**The formative period (16th–17th centuries):** In the following period, equity became a more formalised body of law. The 16th and 17th centuries were periods of great development and the equity jurisdiction established clear ground in the famous *Earl of Oxford's Case* (1615). This case confirmed that equity prevailed over law where conflict existed.

**The period of systemisation (17th–19th centuries):** The third historical period of evolution for the equity jurisdiction extended from the 17th century until the inception of the Judicature Act 1873 (UK). Systemisation truly changed equity from a concept into a tangible body of law and important equitable principles emerged including the trust.

### 5.4 The Judicature System

The English Judicature Act 1873 was introduced with the express aim of merging the administration of the common law and equitable jurisdiction. The Act introduced a single court with both legal and equitable jurisdiction, a single consistent method of procedure, and concurrent jurisdiction over law and equity in all divisions. Section 25(11) sets out that where there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity will prevail. The Act abolished the common injunction and replaced it with a new jurisdiction giving the court power to grant an injunction in all cases where the court feels it to be 'just or convenient'.

Australian equivalents include: *Supreme Court Act 1986* (Vic) s 29; *Supreme Court Act 1970* (NSW) ss 57–64; *Law Reform (Law and Equity) Act 1972* (NSW) ss 5–7.

## 5.X Critical Perspectives

PERSPECTIVE	PROPONENT / SOURCE	ARGUMENT	COUNTER-ARGUMENT
Discretion as certainty	Traditional view; J Story, <i>Commentaries on Equity Jurisprudence</i> (1920)	Equity's discretionary nature allows flexibility to achieve just outcomes in individual circumstances	Discretion produces unpredictability; 'depends upon the length of the Chancellor's foot'
Fusion of law and equity	<i>Walsh v Lonsdale</i> (1882) 21 Ch D 9 (per Jessel MR)	Judicature Act resulted in complete merger of legal and equitable estates; 'there is only one Court and the equity rules prevail'	Expressly disapproved in <i>Manchester Brewery v Coombs</i> [1901] 2 Ch 608; constitutes the 'fusion fallacy'
Legitimate fusion development	<i>Giller v Procopets (No 2)</i> (2008) 24 VR 1	Compensatory remedies may legitimately flow from equitable actions where they serve equity's own goals	Distinction between compensatory and punitive remedies is difficult to maintain consistently
Policy: Institutional efficiency	Modern procedural reformers	Merged administration reduces cost and delay; procedural efficiency justifies unified system	Loss of conceptual clarity; equity's distinct remedial philosophy may be undermined
Unconscionability as panacea	Commentary on <i>CG Berbatis Holdings</i>	Unconscionability provides flexible protection against new forms of unfairness as they emerge	Risk of 'roving commission enabling imperial judiciary to redistribute benefits and burdens between transacting individuals by decree' (per Edelman J in <i>Anderson v McPherson</i> (2012) 8 ASTLR 321)

## 6. Procedural Steps / Decision Trees

### Identifying the Applicable Equitable Jurisdiction:

#### 1. Is the matter exclusively equitable? (e.g., trust, fiduciary relationship, constructive trust)

- Yes → Exclusive jurisdiction applies; only equitable remedies available
- No → Proceed to step 2

#### 2. Does common law also provide relief? (e.g., contract, specific performance)

- Yes → Concurrent jurisdiction; equity supplements common law where inadequate
- No → Proceed to step 3

### 3. Is ancillary relief required? (e.g., injunction to support legal right, discovery)

- Yes → Auxiliary jurisdiction applies

#### Equitable Discretion Exercise:

- Is the plaintiff deserving of equitable intervention?
- Has the plaintiff come with clean hands?
- Would equitable relief produce a just outcome in all circumstances?

## 7. Common Exam Questions

### Common Fact Patterns

FACT PATTERN	GROUND / ISSUE TRIGGERED	KEY AUTHORITY
Contract for sale of land; vendor refuses to settle despite buyer being ready	Specific performance (concurrent jurisdiction)	Equity provides specific performance where damages inadequate
Trustee dealing with trust property for personal benefit	Breach of fiduciary duty; constructive trust	<i>Keech v Sandford</i> (1726) Sel Cas King 61
Elderly couple signs mortgage guarantee without understanding consequences	Unconscionable dealing; set aside transaction	<i>Commercial Bank of Australia v Amadio</i> (1983) 151 CLR 447
Party seeks to rely on legal right despite unconscionable conduct in acquiring it	Equitable fraud; defence of unclean hands	Equity acts in personam; follows equity maxims
Claim that Judicature Act has merged law and equity completely	Fusion fallacy	<i>Harris v Digital Pulse</i> (2003) 56 NSWLR 298

### Question Type 1: Explain the difference between the exclusive, concurrent, and auxiliary jurisdictions of equity

#### Approach:

- Define each jurisdiction with precision
- Provide examples of each
- Explain the remedial consequences of each classification

#### Key Points to Include:

- Exclusive jurisdiction applies to equitable principles exclusively developed by equity (trusts, constructive trusts, fiduciary relationships) and only equitable remedies are available
- Concurrent jurisdiction applies where both law and equity recognise the unfairness; equity supplements common law only where common law relief is inadequate

- Auxiliary jurisdiction provides ancillary assistance for enforcement of legal rights (injunctions, discovery)

### Question Type 2: Discuss whether the Judicature Act has effected a fusion of law and equity

#### Approach:

- Define the fusion fallacy clearly
- Explain the correct position regarding the Judicature Act
- Provide case law support for both fallacious and legitimate fusion arguments

#### Key Points to Include:

- The fusion fallacy assumes the Judicature Act made substantive changes to equitable doctrines
- The correct position is that administration was merged but doctrines remain distinct
- *Harris v Digital Pulse* confirms equity and common law remain conceptually distinct
- Some legitimate development occurs through the merged system but this is not substantive fusion

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#### Footnotes

[^1]: Case summary for exam preparation purposes.



## Sample Preview

This is a preview of the complete study guide.  
The full edition contains all **11 topics** across **~220 pages**.

### TOPICS INCLUDED IN THE FULL EDITION:

1. The Origin and Nature of Equity and its Relationship with the Common Law
2. Undue Influence and Unconscientious Dealing
3. Fiduciary Relationships
4. Constructive Trust and Tracing
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