LAWS5015: EQUITY
FINAL EXAM
SUMMARY NOTES

TOPIC 1: HISTORY AND NATURE OF EQUITY

(1) Equity / Relationships between Law and Equity

- 'Equity' – referred to in the specific jurisprudential notion of equity that entered legal institutional history through the original English High Court of Chancery
- *Earl of Oxford's Case* (1615): 'where a judgment 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 judgment, but for the hard conscience of the party'
- *ABC v Lenah Game Meats* [2001]: '…if equity will intervene ... the ultimate ground upon which it will act will be that, in all the circumstances, it would be unconscientious of the appellant to publish.'
- Equity knew the rules of the common law – 'equity followed the law' in the sense that its concurrent and auxiliary jurisdiction had legal rights as their subject matter

The Earl of Oxford's Case (1615)	
Facts	○ College cannot sell land directly to purchaser; granted land to Queen and Queen granted it to purchaser, then purchaser pays ○ Purchaser fixes and sells to E; E dies and his son inherits land ○ College wanted land back, so they argue the grant was not legitimate in the first (so it was still theirs) ○ College grants tenancy over land and then purports to eject tenant – tenant goes to common law court claiming they have been wrongfully evicted
Decision/ Reasoning	HELD: under common law analysis, college is correct (they had no power to grant land to Queen and sell it that way), however, Court of Chancery held it would be unconscionable in the circumstances to enforce the common law judgment.

(2) Effects of the Judicature Acts and the 'Fusion Fallacy'

- ISSUES PRIOR TO JUDICATURE ACTS:
  - (1) Cannot get a remedy if initiating in the wrong court
    - *Doe d Reade v Reade* (1799): if action not initiated in correct court, risk losing and paying the other side's costs
    - *Pardoe v Price* (1847): Pl loses as no common law debt in a trust relationship (action initiated in wrong court)
  - (2) May need to go to both Courts in order to get full remedy sought
  - (3) Massive delay in Court of Chancery as only 2 judges
- *Judicature Acts 1873-1875* (UK) passed to deal with procedural issues – essentially fused the common law courts and the court of chancery + wanting to avoid double litigation issue (being in the wrong court and needing to go to both courts for remedy)
- Procedural fusion inevitably occurred but was not intended to change case outcomes

Substantive Fusion – 'Fusion Fallacy'

- 'The fusion fallacy involves the administration of a remedy, for example common law damages for breach of fiduciary duty, not previously available at law or in equity, or the modification of principles in one branch of the jurisdiction by concepts which are imported from the other and thus are foreign ... 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.' (Heydon et al.)
- Fusion not from the Acts, but from development/changes of common law and equity principles over time
- Realistically, there likely will be fusion by convergence over time
- Example of fusion fallacy:

Harris v Digital Pulse Pty Ltd (2003)	
Facts	o H secretly worked for benefit of own business and competed with his employer (D) during employment (against his empl contract) o H was dismissed and D sought exemplary damages from H for breach of fiduciary duty o Trial judge awarded the damages in addition to order for equitable compensation/account of profits – appealed
Decision/ Reasoning	HELD (CoA): you <u>cannot get exemplary damages for breach of fiduciary duties</u> – this is a fusion fallacy, as you cannot get common law damages for an equitable cause of action. <u>Heydon JA</u>: 'There is <u>no power in the law of New South Wales to award exemplary damages for equitable wrongs of the type involved in the circumstances of this case</u>. No English or Australian authority supports it.'

- <u>Not</u> examples of fusion fallacy:

Walsh v Lonsdale (1882)	
Facts	o Agreement to lease shed for 7 years recorded in writing but not in deed, meaning no legal lease, but, tenant allowed to go into possession of shed and was paying rent in arrears (not in advance) o Landlord gave notice they wanted rent paid in advance, pursuant to terms of agreement – tenant insists they do not need to pay in advance and continued to pay in arrears – landlord sought to 'distrain from rent' (common law right to take tenant's chattels)
Decision/ Reasoning	HELD: under common law analysis the rent was not payable in advance yet; in equity there was a separate equitable lease, but historically equity did not order payment of rent under a lease and equity had no remedy of distraint – thus <u>landlord loses</u>.

Chan v Cresdon Pty Ltd (1989)	
Facts	○ By a guarantee included in unreg lease of shop for 5 years; guaranteed performance by lessee of obligations 'under this lease' ○ At law, entry into possession of unreg lease and paying rent gave rise to tenancy at will (terminable on 1 months' notice) ○ Lessee defaults, lessor sought to enforce guarantee + contended that unreg lease amounted to equitable 5 year lease, and that obligation of lessee under agreement was within terms of guarantee (based on rule in *Walsh v Lonsdale*)
Decision/ Reasoning	HELD: obligation of lessee under tenancy was not an obligation under the unreg lease and thus <u>did not</u> attract the guarantee. Confirmed *Walsh v Lonsdale* is <u>not</u> an example of fusion fallacy – the rule meant that an agreement to lease gave rise to an equitable lease, it did not create a legal interest (thus, equitable lessee will be defeated by bona fide purchaser of legal estate who acquires estate for valuable consideration and without notice of equitable lease). <u>Mason CJ, Brennan, Deane and McHugh JJ</u>: 'For present purposes these authorities establish two propositions. First, the court's willingness to treat the agreement as a lease in equity, on the footing that equity regards as done what ought to be done and equity looks to the intent rather than the form, rests upon the specific enforceability of the agreement. Second, an agreement for a lease will be treated by a court administering equity as an equitable lease for the term agreed upon and, as between the parties, as the equivalent of a lease at law, though the lessee does not have a lease at law in the sense of having a legal interest in the term.'

(3) Maxims of Equity

<u>Maxims of Equity</u>

- (1) Equity regards as done that which ought to be done
  - *Walsh v Lonsdale*: agreement to lease was supported by valuable consideration and specific performance – equity regards lease as existing already
- (2) Equity follows the law
  - Equity assumes the common law to exist, and merely operates in the 'gaps'
- (3) Equity acts in personam
  - Focus on the conscience of the def
  - E.g. Mareva order – even if overseas property, if def is subject to jurisdiction of Supreme Court of NSW, equity may make order against the property
- (4) He who seeks equity must do equity
  - Equity looks to conscience of def <u>and</u> pl – if pl not acting properly/will not act properly in future, may not be able to get orders in equity
- (5) He who comes to equity must come with clean hands
  - Focus on <u>past</u> conduct of pl – must involve serious wrongdoing to be considered unclean hands (*Geltch v MacDonald* [2007])

    - *Black Uhlans Inc v NSW Crime Commission* [2002]: B is motorcycle to club; members used money to buy clubhouse together but bought in name of one man alone (not club), man later convicted of drug dealing and all property forfeited to state – HELD: misdemeanours of other members of the club do not affect their clean hands in relation to ownership of this property; there was a resulting trust due to all of them putting in money and thus property not forfeited – if there had been connection between criminal activity and money used to purchase clubhouse, result may have been different
- (6) Where the equities are equal, the first in time prevails
- (7) Delay defeats equity
    - Equitable doctrine of 'laches' – if wrong is done to you and you do nothing about it, it becomes unconscionable for you to complain about it way later
    - Delay may be a reason for refusing relief
- (8) Equity looks to intention/substance, rather than form
    - Similar to trusts – don't need word 'trust' to create one, more about intention
- (9) Equity presumes equality
    - If true position is unclear, then equity will presume equality – 'fall-back position' (*Waikato Regional Airport v A-G of NZ* [2003])
- (10) Equity will not assist a volunteer
    - If no consideration, more difficult for equity to assist
    - *Anning v Anning* (1907): equity will not perfect an imperfect gift
    - But, test in *Corin v Patton* (1990): if transferor has done everything that can do <u>and</u> it is beyond their control, the transaction is complete in equity

Corin v Patton (1990)	
Facts	o P tries to transfer land by way of gift to C; executed memorandum of transfer; gave CoT to solicitor and told him to register transfer o Not transferred, so no legal title passed – was a gift so there was no consideration, has title passed in equity?
Decision/ Reasoning	HELD: gift was <u>not</u> complete in equity, but instead of looking to maxim 'equity will not assist a volunteer' the Court looked to 'equity looks to intention/substance rather than form'. Here, P had done all she could do, <u>but</u> was not beyond her recall as the documents were still with her solicitor, meaning they remained in her control. '… it would be a mistake to <u>set too much store by the maxim</u>. Like other maxims of equity, it is <u>not a specific rule</u> or principle of law. It is a summary statement of a <u>broad theme which underlies equitable concepts</u> and principles.'

TOPIC 2: APPLICATIONS AND THE CONSCIENCE OF EQUITY

(1) Breach of Confidence

- *Moorgate Tobacco Co Ltd v Phillip Morris Ltd* (No 2) (1984): 'its rational basis does not lie in proprietary right. It lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained.' (Deane J)
- Contracts protect both regular and confidential information, but equity will only protect confidential information (*Agha v Devine Real Estate Concord* [2021])
    - *Optus v Telstra* [2010] – est that if the contract envisages equitable claims being possible, then equity may be used as another cause of action alongside contract – if contract terms oust the equitable jurisdiction then no claim in equity, but if contract says nothing (doesn't include but doesn't oust), Court would likely rule there is an equitable claim

<table>
<tr><th colspan="2">Coco v AN Clark (Engineers) Ltd [1969]</th></tr>
<tr><td>Facts</td><td>

Pl designed moped engine; requested def help to manufacture
Def drafts contracts re confidential info but never signs as def says they do not like design and do not think it will work
Def makes engine passing off as their own; pl sues asserting confidence in the information in equity (cannot use contract as no contract signed)

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<tr><td>Decision/ Reasoning</td><td>
HELD: no contract needed to protect confidential information in equity, merely need to show the information is confidential.

'…three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself ... must 'have the necessary quality of confidence about it.' Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.'

*Issues with this:
<ol type="i">
Detriment is not key/ necessary part of claim for breach of confidence – will become important when determining remedies
Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health (1990): 'The obligation of confidence is to respect the confidence, not merely to refrain from causing detriment to the plaintiff'
There are many ways confidential information may come to you other than imparting (e.g. eavesdropping on conversation)
Smith Kline & French Laboratories v Secretary, Department of Community Services and Health (1990): 'confidential information improperly or surreptitiously obtained, on the one hand, and information imparted in confidence, on the other, are treated as two species of the same genus'

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Optus Networks Pty Ltd v Telstra Corporation (2010)	
Facts	○ O sought an account of profits for money T took from O's use of their network ○ O argued they could take the money due to T's misuse of confidential info derived from the benefit of having that info ○ Contract explicitly said that rights/powers/remedies independent of the contract were not excluded, and specifically referred to the remedy of recovering profits
Decision/ Reasoning	HELD: there <u>was</u> an equitable breach of confidence by T against O, and contract explicitly envisaged there may be a claim in equity alongside contract. ***4 elements to establishing an equitable breach of confidence [is the Aus authority (not *Coco*) and should use to structure answer]:** ▪ (a) the information in question must be identified with specificity; ▪ (b) it must have the necessary quality of confidence) ▪ (c) it must have been received by the def in circumstances importing an obligation of confidence; and ▪ (d) there must be an actual or threatened misuse of the information without the plaintiff's consent

(a) Identification with specificity

- (i) Need to identify information claimed to be confidential so Court can work out if it actually is confidential <u>and</u> (ii) if court decides it is confidential, it may make orders about what def can do
  - Must be <u>specific about what def can do</u> – need to be clear what information can and cannot be used

O'Brien v Komesaroff (1982)	
Facts	○ Life insurance salesman marketed tax minimisation devices, including by using a unit trust deed drafted by K (solicitor) ○ After falling out, K sued for infringement of copyright and breach of confidence ○ K described confidential info as being: (1) unit trust deeds, (2) a draft memorandum and articles of association for Pty company, (3) oral communications by K to O re operation of unit trust scheme devised by K, (4) oral communications by K to O re establishing unit trust in overseas trust in tax haven country, and (5) oral communications by K to O re legal and practical defects and legal inadequacies of discretionary trust
Decision/ Reasoning	HELD: for breach of confidence action, Court <u>could not identify any information with specificity</u> – K lost. As all the documents had was bare outline of scheme, this was not specific enough for Court to frame an order as to what def could/could not do with the information.

(b) Necessary quality of confidence

- Information must be <u>of the sort that can be protected</u> in equity as confidential
- *Coco*: 'However confidential the circumstances of communication, there can be no breach of confidence in revealing to others something which is <u>already common knowledge</u>' – e.g. 'Albo is the PM' is common knowledge, thus not confidential
- There are common scenarios where confidential information comes up – the Court will respond to them similarly

(i) Things done in private

ABC v Lenah Game Meats Pty Ltd (2001)	
Facts	○ Animal activists break into L's meat processing plant – at time, L was processing possums to be killed (had license, done legally) ○ Activists broke in and filmed; ABC gets film and wants to broadcast; L sought injunction to prevent publication ○ L argued info was confidential as it was done behind closed doors and in private
Decision/ Reasoning	HELD: injunction <u>refused</u> as 'plaintiff had no cause of action against ABC'; ABC did not break into facility and had no connection to activists. Court accepted that if something is done in private this <u>may</u> make it confidential, **but** the mere fact that it is done privately is not enough. '... Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. … The <u>problem</u> for the respondent is that the <u>activities secretly observed and filmed were not relevantly private</u>.' <u>Gleeson CJ</u>: Example of information that would be private: 'A film of a man in his underpants in his bedroom would ordinarily have the necessary quality of privacy to warrant the application of the law of breach of confidence.'

(ii) Public Domain

- ○ *Lucasfilm Ltd v Ainsworth* [2008]: prop designer in star wars movies designed stormtrooper helmet; started making copies and selling; L sued (one argument was confidence); HELD: <u>rejected</u> as once movie was in public domain, helmets were no longer protected (colour, stile, etc. were already in public domain) – even if designs confidential <u>before</u> movie is released, they lose their confidentiality after release
- ○ *Coco*: may have come up with something using information in public domain, <u>but</u> the way it was put together will be confidential if someone comes up with <u>something new</u> that is not obvious and not in the public domain (for inventions)

Johns v Australian Securities Commission (1993)	
Facts	o J was MD of companies which collapsed; RC inquiry set up and A was investigating to determine whether breach of director duties o A had statutory power to interrogate as part of investigation; interrogated J and took transcript; A released transcripts to RC on condition they would not be used in open hearings – condition later withdrawn, so RC used them in open hearings, made transcripts available to public, and media then published them o J wanted to stop further publication of transcripts o Statute allowing A to interrogate J had controls on what to do with transcripts, <u>but</u> RC not subject to these controls
Decision/ Reasoning	HELD: A had acted in breach of natural justice when withdrawing condition on transcripts without J's consent, <u>but</u> once transcripts had been used in open hearings, they were in public domain and <u>lost any quality of confidence they previously had</u> – thus, newspapers could publish.

(iii) Transitory Disclosure

- Short, brief disclosure to other people <u>does not necessarily destroy confidence</u>
- *Australian Football League v The Age Co Ltd* [2006]: 3 players test positive to drugs; names published in a forum and newspaper; both had limited number of subscribers and was only up for 5 hours; HELD: was limited disclosure and <u>not enough to destroy confidentiality</u>, thus they could get an injunction

(iv) Iniquity

- Information disclosing iniquity is <u>not</u> confidential – e.g. overhearing someone planning criminal activity and telling the police, criminals cannot say you have an obligation of confidence due to serious nature of the wrongdoing
- *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987): 'information will lack the necessary quality of confidence if the subject-matter is the existence or real likelihood of the existence of an iniquity in the sense of a crime, civil wrong or serious misdeed of public importance…'

(v) Employment

- When people leave employment, how job is done may be taken elsewhere (otherwise would need to move sectors all the time) <u>but</u> cannot take info that is truly confidential
- *University of Western Australia v Gray* [2009]: 'an <u>ex-employee</u> is <u>entitled</u> to make <u>full use of the general knowledge, skill and experience</u> – the '**know-how'** – which as a <u>result of the previous employment</u> has <u>become his or her own</u> ... what the employee cannot do is to use or disclose confidential information that can fairly be regarded as a <u>separate part of the employee's stock of knowledge</u> which a man of <u>ordinary honesty and intelligence</u> would <u>recognise</u> to be the <u>property of his old employer</u>, and not his own to do as he likes with.'

(vi) Lawyers

- There is no fiduciary relationship between lawyer and client when retainer ends, but this will not stop information from being confidential
- *Bolkiah v KPMG* [1999] UK case widely applied in Aus – basis of equitable relief depends on confidential info, not a 'duty of loyalty' surviving from fiduciary relationship

(vii) Government Secrets

Commonwealth v John Fairfax & Sons Ltd (1980)	
Facts	○ Book written; to be extract in newspapers and sold as standalone book; extracts from top secret govt docs included in book ○ Cth got ex-parte injunction to stop publication
Decision/ Reasoning	HELD: there was not a good enough reason in confidence to continue the injunction up until trial. '… This is not to say that equity will not protect information in the hands of the government, but it is to say that when equity protects government information it will look at the matter through different spectacles. ... Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.'

(c) Circumstances importing an obligation of confidence

- Circumstances in which info is perceived must import an obligation of confidence
- Info may come into hands innocently, but if a reasonable person would realise in the circumstances that info was confidential, they owe an obligation of confidence
  - E.g. outside of folder says 'top secret'
- Two tests – *Australian Medic-Care Co v Hamilton Pharmaceutical* [2009]:
  - (1) the reasonable person test: 'if the circumstances are such that any reasonable person standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given in confidence, this should suffice to impose on that person the equitable obligation of confidence'
  - (2) the purpose test: 'has confidential information been imparted for what was known, or ought reasonably to have been known, to be only for a particular purpose? If it has, its use must be limited to that purpose'

(d) Actual or threatened misuse of information without consent

- Once established there is information that is confidential, and it was received in circumstances importing an obligation of confidence, then can answer whether there has been misuse of information without consent

- *Smith Kline & French Laboratories (Australia) Ltd v Secretary to the Department of Community Services and Health* (1991): 'sometimes the obligation imposes no restriction on use of the information, as long as the confidee does not reveal it to third parties. In other circumstances, the confidee may not be entitled to use it except for some limited purpose.'

(e) Public Interest – *additional point, not from *Optus*

- May be defence to confidence claim if revealing info that is confidential will be in the public interest to do so
- *In Aus, no broad public interest defence for breach of confidence (unlike in UK) – confirmed in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987)

REMEDIES

- (i) Injunctions (including springboard injunctions)
- (ii) Order for delivery up and destruction – i.e. hand over goods/information so that it may be destroyed
- (iii) Equitable compensation – available if breach has caused loss to plaintiff (thus, detriment necessary here); often used where commercial secrets leaked
- (iv) Accounts of Profits – strip def of gain [*not remedy for breach of contract in Aus]
- (v) **Perhaps* constructive trusts over an asset if it was created in breach of confidence [little authority for this]

Peter Pan Manufacturing Corp v Corsets Silhouette Ltd [1964] – injunction, order for delivery up, account of profits	
Facts	○ C got access to P's designs for new type of bra (confidential) ○ C used info to develop own line of bras; began making/selling ○ P claim info was confidential, and C's new line was only possible due to their use of the info
Decision/ Reasoning	HELD: (i) injunction granted to prevent making of new bras and selling of any bras already made; (ii) granted orders for delivery up and destruction of goods; and (iii) ordered account of profits for any profit made on selling the bras up to that point.

Terrapin Ltd v Builders' Supply Co (Hayes) Ltd [1967] – springboard injunctions	
Decision/ Reasoning	Once info has entered public domain, can no longer stop its use. If person has confidential info before product hits market, once it is on the market and competitors can work out how it is made the info is no longer confidential. But, before it is worked out, anybody else who has access to confidential info cannot use it until others work it out. REMEDY: **springboard injunction** – limited in time; injunction that info cannot be used until a point in time where court assesses that info has lost its confidence; holds def back until other competitors have a chance to catch up + protect pl's interest up to that point.

Giller v Procopets (2008) – equitable compensation (not commercial secrets)	
Facts	- In intimate relo; 1 made video tape of them having sex - Split up and def attempted to show people tape (incl pl's family, friends and work colleagues)
Decision/ Reasoning	HELD: information <u>was private</u> (activity done in private and released without consent), thus it is subject to confidence. Granted pl equitable compensation for mental distress caused by release of video. Criticised as generally equity/law does not care about mental distress and hurt feelings – Court justified its necessity on two bases: (1) Is an equitable doctrine, thus could award equitable compensation [*controversial as this was never done before]; and (2) Under *Lord Cairns Act* [*also controversial]

Wilson v Ferguson [2015] – equitable compensation (not commercial secrets)	
Facts	- In intimate relo; photos and videos of sexual activity - After pl left def, he put them up on Facebook
Decision/ Reasoning	HELD: info clearly private and confidential – said that 'very reason' this sort of information is confidential is to protect pl's humiliation/ embarrassment. Upheld *Giller v Procopets* – only where the <u>reason for existence of confidence is to avoid mental/emotional distress</u>, then pl could potentially be awarded equitable compensation.

(2) Estoppel

Commonwealth v Verwayen (Brennan J): 'equitable estoppel yields a remedy in order to <u>prevent unconscionable conduct</u> on the part of the party who, having made a promise to another <u>who acts on it to his detriment</u>, seeks to resile from the promise'

(a) Estoppel by convention / by deed / by grant – <u>common law (not equitable estoppel)</u>

- E.g. parties enter into a deed/contract, focus will be on <u>recitals</u> of deed
  - If recitals true, then parties not allowed to deny truth of those assumptions <u>if</u> this would now cause detriment to one party or another
  - Cannot contradict the common assumption if it would cause detriment
- All that is needed is that parties have common assumption, it is <u>irrelevant if one party was induced into believing an assumption</u> – merely needs to be agreeance in writing that they are operating on same assumption

(b) Estoppel by representation / by conduct / in pais / evidentiary estoppel

- Exists in common law and equity