

LAWS2385 EXAM NOTES

GENERAL OVERVIEW

1. What is "Equity"?	1.1. "Equity" = body of law that derives from the specific jurisdiction established and exercised by the English High Court of Chancery. - Supplements general law – focuses on flexibility and good conscience as opposed to CL's rigid enforcement of strict legal rights. <i>Earl of Oxford's Case</i> (1615) 21 ER 485: where the rules of the common law and chancery (equity) conflict, equity shall prevail. 1.2. <i>Judicature Acts of 1873-6</i> – creation of the High Court of Justice with both common law and Chancery divisions. - Adoption of the <i>Judicature Acts</i> in NSW: <i>Supreme Court Act 1970</i> (NSW) ss 57-63; and <i>Law Reform (Law and Equity) Act 1972</i> (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." 1.3. Fusion fallacy – judicature legislation merged the administration of CL and equity, but NOT the substantive principles/content. <i>Day v Mead</i> [1987] 2 NZLR 443 – concerned breach of fiduciary duty but Court purported to apply CL principle of contributory negligence – fusion fallacy. <table border="1" data-bbox="342 762 2179 1236"> <tr> <td colspan="2" style="text-align: center;"><i>Harris v Digital Pulse</i> (2003) 56 NSWLR 298</td></tr> <tr> <td style="vertical-align: top;">Facts</td><td> - Concerned breach of fiduciary duty (employee used position to earn unauthorized profits), employer sought exemplary damages (punitive in nature). - Although punitive damages are permitted in the CL for certain causes of action, they have historically never been awarded in equitable cases. - Trial judge awarded exemplary damages, later reversed on appeal. </td></tr> <tr> <td style="vertical-align: top;">Ratio</td><td> Spigelman CJ: 'The heart of the 'fusion fallacy' – as it has come to be called in Australia – is the proposition that the joint administration of two distinct bodies of law means that the doctrines of one are applicable to the other. That is no more true of equity and common law than it was and is true of tort and contract within the common law context. That is not so say that one body of law does not influence the other. It is only to say that they remain conceptually distinct.' The fusion of CL and EL is inappropriate – they remain distinct bodies of law. </td></tr> </table>	<i>Harris v Digital Pulse</i> (2003) 56 NSWLR 298		Facts	- Concerned breach of fiduciary duty (employee used position to earn unauthorized profits), employer sought exemplary damages (punitive in nature). - Although punitive damages are permitted in the CL for certain causes of action, they have historically never been awarded in equitable cases. - Trial judge awarded exemplary damages, later reversed on appeal.	Ratio	Spigelman CJ: 'The heart of the 'fusion fallacy' – as it has come to be called in Australia – is the proposition that the joint administration of two distinct bodies of law means that the doctrines of one are applicable to the other. That is no more true of equity and common law than it was and is true of tort and contract within the common law context. That is not so say that one body of law does not influence the other. It is only to say that they remain conceptually distinct.' The fusion of CL and EL is inappropriate – they remain distinct bodies of law.
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2. Equitable Maxims	2.1. Often recited in judgements but NOT the same as binding precedent, merely an expression of an underlying principle: - Equity will not suffer a wrong without a remedy. - Equity follows the law. - He who seeks equity must do equity.						

- He who comes to equity must come with clean hands.
- Equity aids the vigilant and not the tardy.
- Equality is equity.
- Equity will not assist a volunteer.
- Equity looks to the intent rather than to the form.
- Equity looks on that as done which ought to be done.
- Equity acts in personam (personal rights): cf *X Twitter Inc [2017] NSWSC 1300*.

Corin v Patton (1990) 169 CLR 540

Obiter	Mason and McHugh J: • 'It would be a mistake to set too much store by the maxim 'equity will not assist a volunteer'. Like other maxims of equity, it is not a specific rule or principle of law. It is a summary statement of a broad theme which underlies equitable concerns and principles. Its precise scope is necessarily ill-defined and somewhat uncertain...the maxim does not enunciate an inflexible or universal rule.' NB: Application of the maxim, 'equity looks to intention rather than form' may have the effect of transferring the tenancy to Mrs. Patton's brother.
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X v Twitter Inc [2017] NSWSC 1300

Facts	• The Plaintiff wanted anonymous tweets removed from Twitter. • The tweets contained information obtained in breach of confidence. • There were two defendants: ○ Twitter Inc – incorporated in the US. ○ Twitter International Company – incorporated in Ireland.
Issue	Could injunctions be issued in NSW against companies incorporated in foreign jurisdictions?
Outcome	Injunctions were granted.
Held	Pembroke J: • 'First, as the aphorism goes, 'Equity acts in personam'. The plaintiff's right derives from the unconscionability, in the circumstances, of the exercise by the defendants of their legal rights. The proposed orders are a personal direction to perform or abstain from performing particular acts. They do not affect the proprietary rights of the defendants; they are not declaratory by nature; and they do not affect any question of title ... there is a long history of courts of equity making in personam orders that are intended to operate extra-territorially.' NB: Whilst there are clear constitutional issues with a NSW court attempting to apply a ruling beyond its jurisdiction; no such restriction in granting a personal order under EL.

3. Overview of

3.1. Features:

Equitable Remedies

- Discretionary.
- Considers the position of both parties, and third parties.
- Wider range than at common law.
- Remedies may be:
 - Personal – directed to the behaviour of the person.
 - Proprietary – directed to the person's property.

3.2. Jurisdictions:

- Exclusive Jurisdiction – where relief is unavailable at CL e.g., breach of fiduciary obligations.
- Concurrent Jurisdiction – where relief is available at both CL and in equity e.g., breach of contract.
- Auxiliary Jurisdictions – where equity acts in support of CL rights e.g., equitable relief is sought to assist in proceedings at common law such as injunction to prevent damage pending judgment.

3.3. Personal remedies (*in personam*):

- Account of profits.
- Equitable compensation.
- Injunction.
- Specific performance.

3.4. Proprietary remedies (*in rem*):

- Constructive trust.
- Equitable lien.

NB: Personal remedy will leave a plaintiff as an unsecured creditor in the event of the defendant's bankruptcy or insolvency, difficult to ascertain a person's wealth. BUT property subject to an order may depreciate in value or be outside of the Court's jurisdiction.

McKenzie v McDonald [1927] VLR 134

Facts	• Mrs McKenzie's real estate agent (Mr McDonald) encouraged her to sell her property for less than its value. It was worth £2,445 but he valued it at £2,300. The real estate agent owned a shop which was worth £1,550, but which he over-valued at £2,000. • He suggested that she exchange her farm for his shop in addition to paying him £300. She accepted the deal. This conduct amounted to a breach in fiduciary duty. • The real estate agent subsequently sold the farm to a bona fide purchaser for its actual value of £2,445.
Issue	What remedy is available to Mrs. McKenzie?
Outcome	• The defendant was ordered to pay £595 equitable compensation. • Within 21 days, if the defendant notifies the plaintiff or her solicitor of his election to do so, the defendant was permitted to take over

		the shop at the price of £2,000 of which £450 (i.e., the over valuation) shall be considered satisfied by the payment. • It has never been clear if the remedy awarded was equitable compensation or a money form of rescission.
	Held	Dixon AJ: • 'The plaintiff was entitled to have the agreement of exchange of the 25th September set aside. ...[his Honour discussed rescission] ...' • 'But ... the position of third parties concerned ... make it peculiarly difficult to adopt that remedy. [by his own dealings he had made difficult to restore farm to P – on 7 May 2026 he had resold the farm to a third party at an increased price]' • 'Doubtless it is not necessary to restore the parties precisely to their former position, if by the exercise of the powers of the Court, a substantial restitution can be achieved ... [his Honour points to <i>Nocton v Ashburton</i> as authority for equitable compensation being available to remedy breach of fiduciary duty.]' • 'I therefore treat the defendant as having obtained on the farm 5 shillings per acre more than the value assigned to the farm in the agreement of exchange, and as by his own dealings he has rendered it difficult to restore the farm to the plaintiff, he must recoup this difference to her.' • On the other hand, there is no difficulty in restoring to him the shop for which he obtained an allowance of £450 more ... than its value. ... [I]f the defendant decides to take the shop in specie there is no reason why he should not be permitted to do so.' • 'I therefore propose to decree him to pay £595 to the plaintiff by way of compensation, but to order further that if within 21 days he notifies the plaintiff of his election so to do he shall take over the shop at a value of £2,000, of which £450 is contained in the sum stated for compensation.'
	Ratio	Equitable relief may be qualified, if necessary, to avoid injustice to third parties. Remedy fashioned in a way that is fair to both parties. D given the option of taking control of the shop because P did not want it.
	<i>Nelson v Nelson</i> (1995) 184 CLR 538	
	Facts	• Mrs Nelson wanted to obtain a <i>Defence Services Homes Act</i> Loan which was a loan with a lower interest rate than that available on the open market. She would be ineligible for this program if she were already a homeowner. • To avoid this, Mrs Nelson purchased a home (the first house, Bent St), but registered the title of the property in the names of her children: Elizabeth and Peter. • Mrs Nelson subsequently applied for the <i>DSHA</i> loan to purchase a second house (Kidman Ln), and falsely declared that she had no financial interest in any real property. The first house was then sold, and Mrs Nelson wanted to claim the proceeds from the sale. • Elizabeth sought a declaration that her mother held the proceeds on resulting trust for her. • On the facts, Mrs Nelson intended that she herself should benefit from the purchase of the first home, despite putting the title into the names of her children. Mrs Nelson's provision of the purchase money therefore supported a presumption of resulting trust in favour of Mrs Nelson. • Mrs Nelson was not debarred by her own conduct (in seeking to circumvent the <i>DSHA</i> Loan statute) from claiming the proceeds of the sale of the first house.
	Issue	Whether the presumption of advancement applied, and Elizabeth was therefore entitled to the proceeds of the sale.
	Outcome	The presumption of advancement did not apply, meaning, Mrs Nelson was entitled to the proceeds of sale. She was required to repay

	the loan to the Commonwealth. Relief on terms.
Held	Deane and Gummow JJ: • 'In our view, as the price of obtaining the relief she seeks for the recognition and enforcement of a resulting trust in respect of the whole of the balance of the proceeds of sale of the Bent Street property, Mrs Nelson must be prepared to do equity according to the requirements of good conscience. That may involve consideration of more than the interests of the parties to the litigation. Here, good conscience calls for the taking by Mrs Nelson of steps sufficient to satisfy the demands of the underlying policy of the Act.' • 'There should be a declaration ... if on or before 9 January ... Mrs Nelson has paid to the Commonwealth an amount equal to the benefit sum received in respect of the purchase of ... [Kidman Ln], [the children] hold the whole of the balance of the proceeds of sale of [Bent St], together with any interest earned ... on trust for [her].' NB: Dawson and Toohey JJ would have ordered a resulting trust in Mrs Nelson's favour and left it up to the Commonwealth to recover the benefit amount from her, if it so wished.
Ratio	The court will mould a remedy to the circumstances of the case so that the interests of a third party can be considered. Court needed to assess how unconscientious Mrs. Nelson's conduct was so that they could ascertain the appropriate remedy.
<i>Giumelli v Giumelli (1999) 196 CLR 101</i>	
Facts	• Robert Giumelli worked on his family's orchard in Dwellingup, WA. • His parents made a number of representations regarding the property: ○ When Robert was 18, they promised that they would give him part of the property to compensate him for working without wages and recognise his improvements to the orchard. ○ When he was 25, he announced his intention to marry. His parents promised he could build a home on the Dwellingup property, which would be his. His parents helped him select a site on the property and encouraged him to build a home on that site. In reliance on this promise Robert spent approximately \$47,000. ○ The following year, a promise was made that the land would be subdivided and the section with the house would be his so long as he did not accept work from his father-in-law. • Robert then divorced and was reassured by his parents that the promised lot would be transferred to him. In reliance, Robert planted a new orchard. • Robert then remarried to a woman of whom his parents disapproved. His parents told him to choose between his family or his new wife. Robert chose his new wife and left. • Following this falling out with his parents, his brother Steven moved into the house and made further improvements to the land. • The promised lot was never transferred to Robert. • Robert sued his parents asserting a proprietary estoppel, seeking a declaration that they held the land on trust for him and an order that they convey the promised lot to him.
Issue	Whether Robert's parents were estopped from denying Robert and interest in the property.
Outcome	• The parents were estopped from denying Robert an interest in the property BUT the appropriate remedy was an award of equitable

		compensation, and not a constructive trust. • HCA remitted the matter back to a judge of the Supreme Court of WA to determine the quantum of equitable compensation.
	Held	The appropriate remedy was an award of equitable compensation, and not a constructive trust, having regard (among other factors) to the improvements made to the property by Steven. The amount to be paid as equitable compensation was secured by a charge over the whole of the Dwellingup property. Per Gleeson CJ, McHugh, Gummow and Callinan JJ: • ‘There may be a case for an allowance in [Robert’s] favour representing a share of anticipated profits from the partnership in relation to the Promised Lot for a specified period of future years, perhaps contingent upon the joint lives of Mr and Mrs Giumelli.’ • ‘Before a constructive trust is imposed, the court should first decide whether, having regard to the issues in the litigation, there is an appropriate equitable remedy which falls short of the imposition of a trust. At the heart of this appeal is the question whether the relief granted by the Full Court was appropriate and whether sufficient weight was given by the Full Court to the various factors to be taken into account, including the impact upon relevant third parties, in determining the nature and quantum of the equitable relief to be granted.’ • When these matters are taken into account, it is apparent that the order made by the Full Court reflected what in <i>Verwayen</i> was described as the prima facie entitlement of Robert. However, qualification was necessary both to avoid injustice to others, particularly Steven and his family, and to avoid relief which went beyond what was required for conscientious conduct by Mr. and Mrs. Giumelli. The result points inexorably to relief expressed not in terms of acquisition of title to land but in a money sum... This is a case for the fixing of a money sum to represent the value of the equitable claim of the respondent to the Promised Lot.’
	Ratio	Equitable relief may be qualified, if necessary, both to avoid injustice to third parties and to avoid relief which goes beyond what is required for conscientious conduct by the defendant. Trust was an inappropriate remedy because the parents were living on the property (as well as Steven) – not a ‘clean’ remedy.

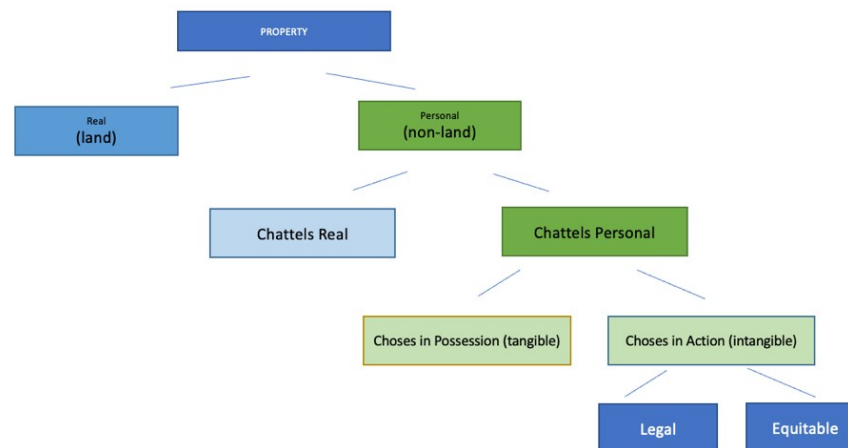
EQUITABLE PROPERTY	
1. What is Property? What are Proprietary Rights?	1.1. An object or thing capable of being owned/possessed by a person; or the proprietary rights (rights of ownership) to that object or thing. • <i>Yanner v Eaton</i> [1999] HCA 53: “bundle of rights” ○ Right to possess. ○ Right to use. ○ Right to manage. ○ Right to income and/or capital. ○ Right to security. ○ Power to transfer. ○ Right to demand (i.e., vote – shareholders). ○ Absolute, indefinite nature of rights. ○ Duty of others to refrain from use.

- Liability to execution.
- Residual rights.

1.2. Relevant characteristics in identifying interests as being “proprietary”:

- The power to possess/recover the *specific* property.
- The power to transfer the property to another.
- The persistence of remedies in respect of the interest against third parties who assume the burden of such remedies (conferring rights or excluding them).
- The extent to which the interest (by way of security) may be displaced in favour of competing dealings by the grantor or others with interests in the subject matter (i.e., priorities).

1.3. The classification of proprietary rights – group types of property that share the same attributes so that you can apply different rules to each type of property:



- Chose in action = person has not the present enjoyment, but merely a right to sue to recover it.
- Chose in possession = owner has actual enjoyment.

2. Equitable Interests in Property

2.1. Nature of equitable interests in property:

- Equitable property rights can vary in terms of the characteristics of transmissibility, priority, permanence, the remedies available to enforce them, etc.
- Equity at all times presupposes the existence and validity of the common law and legal rights to property but recognises additional rights to that