Overview of Equity ............................................................................................................................................... 1
What is equity? .................................................................................................................................................. 1

The emergence of institutional equity ............................................................................................................. 1
Competition between common law and equity .................................................................................................... 1

Reform and the Judicature legislation ............................................................................................................. 1

The reception of equity in Australia .................................................................................................................. 2
Exclusive and auxiliary jurisdiction .................................................................................................................. 2

Equity and contract law ..................................................................................................................................... 2
Equity and property law .................................................................................................................................... 2

Civil wrongs ....................................................................................................................................................... 3
Civil procedure .................................................................................................................................................. 3

The maxims of equity ......................................................................................................................................... 3

Equitable Remedies .......................................................................................................................................... 4
Personal and proprietary remedies ..................................................................................................................... 4
Personal remedies .............................................................................................................................................. 4
Proprietary remedies ....................................................................................................................................... 4

The objective of equitable remedies ................................................................................................................. 4

Specific performance ......................................................................................................................................... 5
Fairness to both parties ....................................................................................................................................... 5
Supervision ......................................................................................................................................................... 5
Prerequisites to award ....................................................................................................................................... 6
Bars to specific performance ............................................................................................................................. 6

Injunctions .......................................................................................................................................................... 6
Classification ....................................................................................................................................................... 6
Jurisdiction ......................................................................................................................................................... 6
Criteria ............................................................................................................................................................... 7
Interlocutory injunction ...................................................................................................................................... 7
Mandatory and prohibitory injunctions ................................................................................................................ 7
Injunction to restrain breach of contract .............................................................................................................. 7
Injunction to restrain the commission of a tort ................................................................................................... 7
Can impose conditions ..................................................................................................................................... 8

Plaintiff’s remedy is specific performance or injunction denied ..................................................................... 8

Equitable damages ............................................................................................................................................. 8
How are equitable damages assessed? ............................................................................................................. 8

Account of profits .............................................................................................................................................. 9
How are account of profits calculated? ............................................................................................................. 9

Equitable compensation .................................................................................................................................. 10

What are equitable damages assessed? ........................................................................................................... 10
Equitable assignments
Equities and equitable interests
Priority disputes and the doctrine of notice
The nature of equitable ownership
Equities and equitable interests
Equitable assignments

Recision
When can a voidable contract be rescinded?
Recission at law and in equity?
Total and partial rescission
The election to rescind
Restoring the parties to their pre-contractual position
The proprietary consequences of rescission
Bars to rescission
Pecuniary restitution
Bars to rescission

Rectification
The elements of rectification

Declaration
Criteria for award of declaration

Bars to relief
Laches
Acquiescence
Unclean hands
Hardship

Effect of a relief order on third parties

Equity and Contract Law
Equity intervention into contract law

Equity & estoppel
Common law estoppel
Equitable or promissory estoppel
Proprietary estoppel

Equity & voidable transactions
Undue influence
Unconscientious conduct
The rule in Yerkey v Jones and the Garcia case

Equity and substantive fairness: penalties and relief from forfeiture
The penalties doctrine
Equitable relief against forfeiture

Equity and Proprietary Interests
Equitable proprietary interests

The nature of equitable ownership

Equitable assignments
Equitable assignments........................................................................................................... 24
Assignment of legal property............................................................................................. 24
Equity and legally ineffectiv assignments.......................................................................... 24
Non-assignable rights........................................................................................................ 25
Future property................................................................................................................ 25
Assignment of equitable property..................................................................................... 26
Statutory assignments........................................................................................................ 26
Absoluteness..................................................................................................................... 26
Form................................................................................................................................... 27
When does the assignment take effect?............................................................................ 27
Who gives notice............................................................................................................... 27
Statutory method of assignment and equitable choses in action...................................... 27
Legal property that can only be assigned in equity.......................................................... 27
Statutory formalities.......................................................................................................... 27
Summary of principles........................................................................................................ 28
Attempted gifts of equitable property................................................................................ 28
Legal property................................................................................................................... 28
Fiduciary obligations.......................................................................................................... 30
Fiduciary relationships....................................................................................................... 30
Recognised fiduciary relationships.................................................................................... 30
Outside the recognised relationships............................................................................... 30
Fiduciary obligations.......................................................................................................... 32
Authorisation and ratification......................................................................................... 32
How strict are fiduciary obligations.................................................................................. 32
Informed consent as a defence to a breach of fiduciary obligations............................... 33
Remedies for breach of fiduciary obligation.................................................................... 34
Participants in a breach of fiduciary obligations............................................................... 34
Third party liability: the rule in Barnes v Addy............................................................... 34
Other forms of participatory liability............................................................................... 36
Equitable obligations........................................................................................................ 37
Breach of confidence........................................................................................................ 37
Specificity......................................................................................................................... 37
Quality of confidentiality................................................................................................... 37
Circumstances importing an obligations of confidence.................................................... 37
Misuse of confidential information................................................................................... 38
Does the plaintiff need to show detriment will be suffered?......................................... 38
Defences to breach of confidence.................................................................................... 38
Public interest................................................................................................................... 38
Change of position.......................................................................................................... 38
Protection of private information..................................................................................... 39
Remedies for breach of confidence.................................................................................. 39
Express Trusts.................................................................................................................... 40
The concept of the express trust..................................................................................... 40
### Trustee duties

- Duty to adhere to the terms of the trust .................................................. 54
- Duty to get in the trust assets ................................................................... 54
- Duty to keep assets separate ..................................................................... 54
- Keeping and rendering accounts ............................................................... 54
- Duty to give information to beneficiaries .................................................. 55
- Duty of care ............................................................................................... 56
- Duty to act impartially ............................................................................... 56
- Duty to act personally ................................................................................ 56
- Duty to consider exercise of powers ......................................................... 57
- Fiduciary obligations .................................................................................. 57
- Duties on the winding up of a trust ............................................................ 58

### Trustee’s powers

- Exercise of power and review ................................................................... 58
Effect of improper exercise of discretion......................................................... 59

Duties and powers when investing trust funds.................................................. 59
The power to invest.......................................................................................... 60
Duty of prudence.............................................................................................. 60
Duty to review investments............................................................................. 60
Applying other duties to investing................................................................. 60
Matters to be considered by the trustee when investing................................. 62

Trustees’ Rights and Liabilities........................................................................ 63
Trustee’s liabilities............................................................................................ 63

Trustee’s right of indemnity............................................................................ 63
Limitation on the right to be indemnified....................................................... 63
Liability of directors of trustee companies...................................................... 64
Third parties and trustee’s right of indemnity.................................................. 64
Indemnification by beneficiaries..................................................................... 64

Trustee’s right to impound beneficiary’s interest............................................. 65

Trustee’s right of contribution from co-trustees.............................................. 65

Trustee’s right to recover overpayment from a beneficiary........................... 65

Breach of Trust............................................................................................... 66
Exculpation in the trust instrument................................................................. 66

Statutory exculpation...................................................................................... 66
Wilful default.................................................................................................. 66
The general statutory defence......................................................................... 66

Equitable defences......................................................................................... 67
Consent........................................................................................................... 67
Acquiescence and release.............................................................................. 67

Remedies for breach of trust......................................................................... 68
Unauthorised profits....................................................................................... 68
Prohibited breaches....................................................................................... 68
Negligence in performance............................................................................ 68
Compensation for breach of the conflicts rule.............................................. 68
Statutory provisions....................................................................................... 69
Non-monetary remedies for breach of trust................................................... 69

Tracing............................................................................................................ 71
What is tracing?.............................................................................................. 71

Fiduciary requirement?................................................................................... 71

The equitable tracing rules............................................................................ 71
Mixing money in a bank account................................................................. 71

Defences to equitable tracing claims............................................................. 73

Resulting Trusts.............................................................................................. 74
What is a resulting trust?................................................................................ 74
The presumption of advancement.................................................................................. 74
Application of presumptions to family property....................................................... 74
Voluntary transfers of property.................................................................................. 75
Resulting trusts arising on failure of an express trust............................................... 75
Resulting trust arising in other cases of failure of basis: Quistclose trust............... 76

Constructive Trusts....................................................................................................... 77
What is a constructive trust?........................................................................................ 77

Categories of constructive trust................................................................................ 77
Unconscionability........................................................................................................ 77
Wrongdoing................................................................................................................ 77

Common intention constructive trust........................................................................ 77

The Baumgartner constructive trust.......................................................................... 78
Assessing contributions.............................................................................................. 78
Equitable adjustments............................................................................................... 79
Impact of family law legislation................................................................................ 79

Constructive trust as a remedy for estoppel.............................................................. 79

Constructive trusts imposed for breach of fiduciary obligation................................ 79

Constructive trust imposed over stolen money and its proceeds............................. 80

The constructive trust as a restitutionary remedy for unjust enrichment................. 80
Non-contractual transfers of property....................................................................... 80
Contractual transfers of property............................................................................. 81

The doctrine of mutual wills...................................................................................... 81

Constructive trusts imposed over property under specifically enforceable contracts 81
What is equity?

- *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 186, 193: Most obvious meaning of equity is ‘objective concepts such as fair, reasonable and just’.
- Equity can also refer to the principles applies by judges where the law is deficient.
- Equity corrects or supplements the law; it does not replace it.
- Equity follows the law.

The emergence of institutional equity

- Essence of institutional equity is the creation of a special court, distinct from courts administering the general law, having the power to modify or correct the general law.
- Has origins in the 14th century English common law and the rigidity of procedures for initiating writs to commence a common law action.
- Medieval common law processes were initiated by a writ by Chancery.
- Claims could only be brought before a common law court if the facts fitted within the formula or wording of a writ.
- The strictness meant not all complainants could obtain a writ.
- If the complaint did not fit within a writ (match the list of required facts), complainants could petition the king.
- The king investigated some complaints himself but often referred them to the Chancellor.
- Chancellor eventually began to hear petitions in his own right.
- Any doctrinal issues raised by the plaintiff’s proof of the matters alleged in the write were in practice settle by the jury verdict, not judicial ruling.
- Chancery was a court of conscience in which defendants could be compelled to do whatever conscience required.
- Court of Chancery in England existed until the mid-nineteenth century.
- General courts have now inherited the jurisdiction of the Chancery Court.

Competition between common law and equity

- Chancery jurisdiction rested on the sovereign’s prerogative power to administer justice, which was challenged by a parliament inclined to test the limits of the prerogative.
- The resolution of the dispute between the Chancellor and common lawyers established the basis of the relationship between the common law and equity which still exists today.
- Chancellor had power to grant a ‘common injunction’ to prevent the enforcement of a judgement obtained in a common law court. (See *Throckmorton v Finch* (1598) Co Third Inst 124).
- *Earl of Oxford’s Case* (1615) 1 Ch Rep 1: Chief Justice Coke challenged the jurisdiction of the Chancellor to award a common injunction. Coke had the law on his side as common injunctions were contrary to statute and had been held illegal in *Throckmorton*. However, King James I rules in favour of equity and established the supremacy of the Chancery/equity over the common law.

Reform and the judicature legislation

- Early 19th Century the Chancery Court attracted criticism due to delays in hearing and disposing of cases.
- *Judicature Acts 1873-6* enacted reforms which improved the administration of common law and equity but which, with exceptions, did not change the substantive law of either.
- *Judicature Act 1873* made the following 4 major changes:
  - Old superior common law courts were abolished and replaced by divisions of a new High Court of justice including common law and Chancery divisions;
  - A unified code of procedure applied to both common law and equitable claims. Equity’s discovery and interlocutory procedures were extended to the common law.
• S 24 made a provision for giving effect to the equitable estates, interests and defences in legal proceedings in the manner that the Chancery Court would have done. It also abolished the common injunction, while preserving the power to issue injunction in cases in which the jurisdiction to do so was established.
• S 25 resolved a number of conflicts between common law and equity by providing that the equitable rule was to prevail or by enacting new law.
• The legislation was not intended to fuse or integrate legal and equitable rights.

The reception of equity in Australia
• First Charter of Justice 1787 created a court of Civil Judicature which did not distinguish between common law and equity.
• Administration of justice Act 1840 had provision for appointment of a Primary Judge in Equity.
• Rapidly adopted English-style judicature legislation in all states except NSW.
• In most states the judicature legislation has been reduced to a short common form, for example s 29 of the Supreme Court Act 1986 (Vic).

Exclusive and auxiliary jurisdiction
• Exclusive jurisdiction consists of matters which prior to the judicature legislation could only be adjudicated upon by Chancery, and not by common law courts e.g enforcement of trusts, rescission of contracts on equitable grounds such as misrepresentation
• Only equitable remedies can be awarded when equity acts in its exclusive jurisdiction.
• Equity acts in auxiliary jurisdiction when a tort or breach of contract has been committed and common law damages are an inadequate remedy for the plaintiff; need an equitable remedy to fix something.
• Plaintiff’s legal rights are then enforced by the award of an equitable remedy, for example specific performance or an injunction.

Equity and contract law
• Equity modified contractual obligations and provides relief for a breach and where the plaintiff’s consent to the agreement has been vitiated.
• The principal areas of equitable intervention are:
  • The creation and modification of enforceable promissory obligations. Estoppel prevents the enforcement of some promises which would otherwise give rise to legal obligations;
  • Setting aside contracts on the ground that the party’s consent was vitiated by fraud, duress, unconscionable conduct, undue influence, mistake, misrepresentation. Rescission restores parties to their pre-contractual position;
  • Rectification of the terms of a written contract where the do not conform to the agreement the parties made;
  • Assigning the benefit of the performance of contractual obligations in equity.
  • Preventing disproportionate relief of a plaintiff as a result of the defendant’s breach of conduct;
  • Enforcement of the contract or of its particular provisions (specific performance, injunction).

Equity and property law
• The trust imposes obligations on a titleholder of property to manage the property for the benefit for other individuals or for legally approved purposes.
• Equity made the trust
• Apart from the trust, equitable intervention includes:
  • The recognition and enforcement of equitable titles to property;
  • Enforces new interests in property which have no common law counterpart, for example the mortgagee’s equity of redemption;
  • The creation of special rules governing the assignment of property interests;
• The recognition and enforcement of proprietary interests by application of the doctrine of equitable and estoppel.
• The application of special rules, known as tracing rules (allows you to find value through a chain of transactions), to identify a claimant’s property;
• Equitable intervention in the law of deceased estates.

Civil Wrongs
• The principal equitable wrongs are:
  • Breach of fiduciary obligation;
  • Breach of confidence.

Civil Procedure
• The principal applications are:
  • Contribution: Equity, operating in conjunction with the common law and statute, provides that two or more persons who are liable for a loss are rateably liable to compensation for the plaintiff for that loss;
  • Subrogation: Where legal rights are taken over by one person from another by operation of the law, the transferee is said to be subrogated to the rights of the transferor;
  • Marshalling: This doctrine regulates the enforcement of securities against a debtor where a creditor is entitled to enforce his security against more than one asset of the debtor.

The maxims of equity
• Equity will not suffer wrong without a remedy;
• Equity follows the law;
• When the equities are equal, the first in time prevails;
• He who seeks equity must do equity;
• He who come into equity must do so with clean hands;
• Equity assists the diligent and not the tardy;
• Equity is equality;
• Equity looks to the intent rather than the form;
• Equity regards as done that which ought to be done;
• Equity imputes an intention to fulfil an obligation;
• Equity will not assist a volunteer;
• Equity will not perfect an imperfect gift;
• Equity acts in personam.