• The exam is 3.5 hours with 15 minutes reading time and is open book
• All questions on the exam are compulsory
  1. There is a large equity problem worth a total of 30 marks
  2. There is a large trusts problem worth a total of 30 marks
  3. There are two short answer questions each worth 5 marks and a total of 10 marks.
• The exam result and the assignment result will be added together to determine the overall final result.

**Time breakdown:**

Q1 (30 marks) = 90 mins (1½ hours)
Q2 (30 marks) = 90 mins (1½ hours)
  Q3 (5 marks) = 5 mins
  Q4 (5 marks) = 5 mins
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1. The nature of equity

- Equity is the body of law developed by the Court of Chancery in England as applied in that court up to the introduction of judicature legislation in 1873 and as applied before and since in courts invested with equitable jurisdiction in England and elsewhere. The essential features of the judicature system are that common law and equity are administered by the one court which has power, in all of its divisions, to administer legal and equitable remedies and to hear pleas and defences based on legal and equitable grounds and that, where there is any conflict between the rules of equity and the common law with reference to the same matter, the rules of equity must prevail.

- As stated by Sir Anthony Mason:

  [T]he ecclesiastical natural law foundations of equity, its concerns with standards of conscience, fairness, equality and its protection of relationships of trust and confidence, as well as its discretionary approach to the grant of relief, stand in marked contrast to the more rigid formulae applied by the common law and equip it better to meet the needs of the type of liberal democratic society which has evolved in the twentieth century.

- Thus, equity is:
  1. Informed by conscience;
  2. In large part, discretionary and remedial – and
  3. The result of a long historical developmental process.

- Although initially equity was an entirely discretionary jurisdiction based on notions of conscience, it has today developed more stable rules. Today it is a distinct source of law, containing a unique set of principles, doctrines, concepts and remedies.

- From an early time, conscience or unconscionable behaviour was ingrained in the Court of Chancery and has suffused all equitable principle since. “The Office of the Chancellor is to correct men’s consciences for frauds, breach of trust, wrongs and oppressions of what nature so ever they be” – Earl of Oxford’s Case.

- This conscientious jurisdiction is encapsulated in the maxim that “a person who comes in equity must come with clean hands”.

- On an Aristotelian view of equity, it provides collective justice in that each case is considered individually and the proportionality of the conduct is considered on that basis alone.

2. Features of Equity

- The broad features of equity may be summarized into the following points:
  1. Equity corrects the law, but does not overwhelm it. The justice provided by equity is corrective, and not distributive as Aristotle notes. It follows from this that equity is neither strictly guided nor bound by the black letter of the common law.
  2. Equity is discretionary. This operates on two levels – not only does it allow the court itself to make a decision as to whether the equitable principles apply, but it also refers to the discretion to determine the level and nature of any remedy provided. This differs from the common law, where once a cause of action is established the right to a remedy is immediately enlivened.
  3. Equity is informed by conscience.

3. Equitable Maxims

- There are a number of recognised maxims of equity which express the collected wisdoms of equitable principle. Most of these are historical and honoured in the breach rather than the observance but they serve a purpose as an explanation of the nature of equity and the broad concepts which have influenced the growth of modern equity. They are a summary of a broad theme which underlines equitable concepts and principles – Corin v Patton.
In Corin v Patton the High Court identified that a maxim is not a rule (or even principle) of law, but is rather “a summary statement of a broad theme which underlies equitable concepts and principles. Its precise scope is necessarily ill-defined and somewhat uncertain.

- **FACTS:** The High Court held that Mrs Patton had not transferred her joint title interest in Torrens title land which she held with her husband to Mr Corin as trustee because she had not done everything which she alone could do and therefore the assignment was complete in both common law and equity and the trust was incomplete. If the assignment had been effective in equity, Mr Corin would have become a beneficiary under an interim remedial constructive trust until the legal title to the land could be transferred into the names of Mr Corin and Mr Patton as tenants in common. When this occurred, Mr Corin would become trustee of Mrs Pattons share as tenant in common in accordance with the express trust requirements.

However, as broad generalizations they will sometimes prove incorrect. For example, the maxim that ‘equity follows the law’ is contradicted by section 29(1) of the Supreme Court Act 1980 (Vic), which describes equity as actually prevailing over ‘the law’. What this maxim is conventionally understood as describing is the rule in property law that the legal interest prevails over its equitable counterpart.

Moreover, the maxim that ‘equity acts in personam’ traditionally meant that equity acts against the bad conscience of the defendant (i.e., against their person). However, it can also create proprietary interests and impose remedies binding on third parties (for example, remedies against the defendant’s property such as under a constructive trust).

1. **Equity follows the law** (qui prior est tempore, potior est jure). The equitable jurisdiction follows the law and alleviates its deficiencies – it does not overrule it.

2. **Equity is equality**. As far as possible, equity will attempt to grant relief which is proportionate to the loss suffered or the unfairness involved.

3. **Equity looks to intent rather than form**. Equity does not consider itself bound by formality or procedure. It looks to the intent or substance behind a set of circumstances to determine the most just result.
   - This maxim underlies the equitable doctrine of rectification and can also be seen in other areas where equity will look at the substance of some contract or other document rather than at its strict wording. However, equity will not construe contracts or other documents if it is clear that the parties agreed on the form of the contract – Muschinski v Dodds.

4. **Those seeking equity must do equity** (equity will only assist those with clean hands). A plaintiff who wishes to avail himself or herself of an equitable remedy may only do so on terms that the plaintiff fulfils his or her own legal and equitable obligations arising out of the subject matter of the dispute – Hanson v Keating.
   - In any proceedings in equity under its inherent jurisdiction, the court will examine the conduct of the party seeking relief in the transaction or arrangement which is the subject of the suit – Overton v Banister.
   - Should a petitioner be guilty of any impropriety in the legal sense in a matter pertinent to the suit, equity may refuse the decree sought – Harrigan v Brown.
   - The impropriety must be direct and immediately related to the equity relied on. If the relationship of the impropriety to the cause of action relied on by the plaintiff is indirect, it is irrelevant – Meyers v Casey. Thus if there is no link between the unclean hands and the equity seeking to be enforced by the plaintiff, the clean hands defence will fail.
   - These maxims are closely linked, both in origin and application, and are a historical reflection of the fact that courts of equity began as courts of conscience.

5. **Equity acts in personam**. It was once said that equity acted in personam, as the relief offered and the decrees passed were primarily directed at the defendant, and not the property. This derived from the proposition that equity did not conflict with the common law because it took the common law as it found it, never disputing that the person with common law title was entitled to a legal interest but merely insisting that the legal titleholder should not exercise that legal title in an unconscionable manner.
   - While it is no longer correct to say that equity acts in personam (for example, the development of the constructive trust as a form of equitable relief demonstrates an in rem response to unconscionable conduct), the maxim retains continuing relevance by way of explanation of various aspects of the modern equitable jurisdiction.
6. **Equity deems to be done what ought to be done.** This maxim provides that where there is a legal obligation to carry out some task, particularly the duty of an executor to convey property from unauthorised into authorised investments, this task should be carried out – Howe v Earl of Dartmouth. This is limited in its operation to situations in which what ought to be done can be done. The maxim's importance is evident in the doctrine of Walsh v Lonsdale which applies to agreements to grant a lease and the creation of some types of equitable mortgage.

7. **Equity will not assist a volunteer (and equity will not perfect an imperfect gift).** Volunteer = someone who hasn't handed over a consideration. This is based on the principle that the equitable jurisdiction will only grant relief where there is a valid reason to provide conscious. A voluntary promise doesn’t constitute a binding legal obligation, and therefore relief shouldn’t be granted. This is of significant concern in trusts

   - **Collin v Patton** – equity has a disinclination to provide relief if you are a volunteer. There are ways of getting around this (English COA has ignored this maxim, see Kirby J)

4. **Development of Equity**

4.1. **The Medieval Period**

- Prior to 1863, the Lord Chancellor was the head of the King’s council. This was an ecclesiastical position (i.e. usually filled by a bishop) performing a function similar to prime minister. The Lord Chancellor was responsible for keeping the Great Seal of the Realm, and using it to issue writs on the King’s behalf.
- Writs were issued in response to petitions by subjects. Initially, they were addressed to the King (though later, to the Lord Chancellor himself). They frequently complained of injustice or unfairness. The Chancellor heard and responded to these requests on his Majesty’s behalf. In this way, the Lord Chancellor used the King’s judicial power to undermine the authority of common law courts.
- The rationale of Chancery was normative: the common law would sometimes produce harsh or unjust results, which should be capable of rectification. ‘Equity’ provided this correcting mechanism. This was a broadly Aristotelian conception of equity: ‘a rectification of law where the law falls short by reason of its universality’.
- Gradually, the number of petitions and consequent writs grew. By the mid 1300s, the Lord Chancellor was issuing many writs. This is thought to be because the common law was becoming too strict, technical and rule-bound. The body administering this process became known as the Court of Chancery, and the Chancellor as minister of state was said to be administering equity through that Court.
- In short, Chancery was willing to be more flexible and creative in assessing legal entitlements, interests and obligations than the common law. During this period, the common law insisted on adjudication rigor juris (i.e. strictly) and the two streams began to diverge.

4.2. **The Formative Period**

- Although law and equity continued to diverge throughout the 15th and 16th centuries, by the 17th century Chancellors were increasingly drawn from the ranks of practicing lawyers. This had a significant effect upon the nature of the equities that they pronounced. It signaled a trend towards systemization: principles were consolidated into doctrines, maxims were articulated, and reasoning became less ad hoc.
- Decisions in equity were seldom recorded authoritatively (due mainly to the fact that it did not purport to enforce a doctrine of stare decisis), which contributed to an unstable and largely contextual nature of adjudication. An analogy might well be drawn with modern tribunals and commissions: factors relevant to equitable remedies were sui generis in many cases.
- Adjudication in Chancery was therefore contextual and pragmatic. There was no doctrine of binding precedent and, accordingly, no commitment to the values of continuity, consistency, uniformity and predictability which support and justify that doctrine at common law. Rules were not abstracted from previous cases in Chancery and justice between the parties could therefore be done in consonance with the Chancellor's conscience without fear of distorting any rule or introducing a new and dangerous precedent. Without a doctrine of precedent, there was little or no need for the reporting of
judgments and there is only a scant written record of cases decided in Chancery before the middle of the 17th century.

- During the 1600s, there was also competition between equitable Chancery and common law jurisdictions. The issue was highly political, with Lords Coke (Lord Chief Justice) and Ellesmere (Chancellor) arguing at some length in the House of Lords. Lord Coke accused Lord Ellesmere of pandering to royal absolutism and weakening the rule of law.
- Lord Ellesmere, in turn, claimed that Lord Coke was attempting to undermine the equitable jurisdiction and contribute to an unjust rule of law.
- This conflict culminated in the **Earl of Oxford’s Case (1615)**, followed by the issue of a decree by King James I: in the event of a different outcome being reached between common law and equity, equity prevails.
  - In this case the plaintiff had received judgment at common law and sought to enforce his right. Lord Ellesmere, on behalf of the Chancery, felt that this would be against conscience and sought to apply an injunction to prevent the plaintiff from enforcing their common law rights.
  - Lord Ellesmere sought to argue that the role of equity was to temper and mitigate the law – “to soften and mollify the extremity of the law”.
  - Note also that this case saw the express recognition that ‘conscience’ was a fundamental aspect of the equitable jurisdiction: “The Office of the Chancellor is to correct Mens Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions, of what Nature soever they be” (Lord Ellesmere).
  - King James I thus issued a decree stating that the King’s subjects ought not be left ‘to perish under the rigor and extremity of our law’. This rule of law still operates today, and is reflected in s 29(1) of the Supreme Court Act 1986 (Vic). Essentially, the ‘King’s discretion’ approach continues to take precedence.

- There was, however, one fundamental requirement before the equitable jurisdiction could be invoked: the application of common law rules must lead to an unjust or unconscionable outcome. Otherwise, the Lord Chancellor had no jurisdiction to interfere.
- In the 17th century, pressure to reform and systematise the equitable jurisdiction was exerted on Chancery from various sources, both internal and external. Despite Chancery’s success in establishing its supremacy over the common law by royal decree, its close association with the monarch and with royal prerogative justice placed it under constant threat from the democratic revolutionary forces of the Commonwealth in the political upheavals of 17th century England. In 1653, Parliament, under Cromwell, considered a number of law reform measures, including the proposed abolition of Chancery, which was called the “greatest grievance in the nation”. Parliament passed a resolution that "the High Court of Chancery of England shall be forthwith taken away", but the Bill incorporating the resolution was never enacted. After the Restoration in 1660 the immediate threat to Chancery passed away. In 1690, a Bill to reverse the Earl of Oxford's Case (1615) and thereby statutorily reverse the supremacy of equity over the common law, was introduced into Parliament but never enacted.

### 4.3. The period of systemization

- The transformation of the equitable jurisdiction accelerated during the latter half of the 17th century under the Chancellorship of Lord Nottingham (1673–1682) who has since been described as "the first modern Lord Chancellor" and "the father of systematic equity".
- Lord Nottingham’s systematising work was then carried on by subsequent Lord Chancellors, most notably Lord Hardwicke (1737–1756), who is credited with achieving "the full development of the principles of equity”.
- The concept of conscience was transformed, signalled in the judgment of Lord Nottingham LC in **Cook v Fountain (1676)**:

  > With such a conscience as is only naturalis et interna, this Court has nothing to do – the conscience by which I am to proceed is merely civilis et politica, and tied to certain measures – and it is infinitely better for the public that a trust, security, or agreement, which is wholly secret, should miscarry, than that men should lose their estates by the mere fancy and imagination of a chancellor.

- Considerations of certainty, security of property interests and the public good supplanted the earlier concern with justice on the facts of the particular case.
Throughout the 18th and 19th centuries, the development of authoritative, positive and coherent rules, fixed in their application and founded in precedent, became the aim of one Lord Chancellor after another. As stated by Lord Eldon LC in *Davis v Duke of Marlborough* (1819): "It is not the duty of a Judge in equity to vary rules, or to say that rules are not to be considered as fully settled here as in a court of law". And again in *Gee v Pritchard* (1818) the "doctrines of this Court ought to be as well settled and made as uniform almost as those of the common law".

The demise of equitable decision-making based on the Chancellor's sense of moral right and good conscience and on Chancery's commitment to informal, pragmatic, contextual adjudication was seen by Atiyah as the "first and most striking legal development of the nineteenth century".

However, as the traditional equitable jurisdiction declined, and probably because of that decline, there were significant developments in substantive doctrine.

Reported judgments from the 19th century still form "the greater part of modern equity".

During this period of systemization equity shed its ex tempore characteristics (i.e. judgments without preparation or consideration of previous decisions) and developed positive rules. The whims of the Lord Chancellor were no longer sufficient.

It was during this, for example, that the Chancellors began:

(i) A systematic classification of trusts;
(ii) Developed the modern rule against perpetuities;
(iii) Outlined the doctrine of specific restitution;
(iv) Invented the equitable doctrines governing contribution between co-sureties;
(v) Invented the doctrine that, in equity, covenants would run with the land when they did not at law – and
(vi) In general, succeeded in making equity what it is today.

5. **Three basic relationship principles**

5.1. **The exclusive jurisdiction**

- The exclusive jurisdiction of equity refers to those claims which are only enforceable in equity. When equity is acting in its exclusive capacity, it is only capable of administering equitable relief.
- The exclusive jurisdiction applies to all equitable principles and remedies exclusively recognized by equity such as trusts and fiduciary relationships. Where a principle is exclusively recognized by equity, it can only be enforced by an equitable remedy.

5.2. **The concurrent jurisdiction**

- The concurrent jurisdiction will apply to situations where both equity and the common law recognize the unfairness and are prepared to apply relief. Equity will only grant relief where it can be established that the relief under common law would be inadequate.

5.3. **The auxiliary jurisdiction**

- The auxiliary jurisdiction is an additional, ancillary jurisdiction in equity to provide assistance for the enforcement of legal rights and includes the award of injunctive relief.

6. **The Judicature system**

- The English Supreme Court of Judicature Act 1873 (UK) and its statutory counterpart in each of the Australian States (Supreme Court Act 1986 s 29) merged the administration of the common law and equitable jurisdictions.
- It also abolished the common injunction, and enshrined in statutory form the principle that where there is a conflict between the rules of the common law and the rules of equity, the latter prevails – s 29(1).
- The massive change in the legal order brought about by the Supreme Court of Judicature Act 1873 was of a purely administrative and procedural character. There was no merger of equitable and common law rules and principles, no joining of substantive legal and equitable doctrines and no alteration of legal or equitable principle – *Salt v Cooper*.
- This is not to suggest that the principles of either the common law or equity ceased to change and develop after the passing of the Supreme Court of Judicature Act 1873. The Act had no direct effect on the substantive development of common law and equity. Its effect was described in Ashburner's
famous metaphor: "[T]he two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters".

- The abolition of the common injunction was an important development under the Judicature Acts. The common injunction was simply an equitable remedy which was issued to restrain a judgment from being obtained in law by a plaintiff when equitable defences were available to the defendant. This type of injunction was replaced by a new jurisdiction that gave the court power to grant an injunction in all cases where the court feels it to be ‘just or convenient’ that such an order should be made and it is capable of being issued upon such terms and conditions as the court thinks fit. The provision of the Judicature Act effecting this abolition was s 25(8) – the equivalent Victorian provision is s 37.

- In summary, the Judicature Acts of 1873 (and the equivalent Victorian Supreme Court Act 1986) effected the following:
  - The old Court of Chancery was abolished and a new court created that could exercise both the common law and equitable jurisdictions.
  - A single, consistent method of procedure was introduced.
  - Concurrent jurisdiction over law and equity was introduced in all divisions – s 29 Supreme Court Act 1986 (Vic).
  - The Act set out that equity would prevail over the common law whenever there was a conflict – s 29(1) Supreme Court Act (mirroring the original s 21(11) in the English Act).
  - Abolished the common injunction and replaced it with a new jurisdiction giving the court the right to grant an injunction in all cases where the court felt it to be ‘just and convenient’. The modern form of the injunction can be found in s 37 of the Supreme Court Act.

7. Fusion fallacies

- Failure to appreciate the exclusively procedural and administrative effect of the Supreme Court of Judicature Act 1873 (UK) has occasionally resulted in judgments which mix rules and principles from separate jurisdictions. Such errors in legal reasoning have been characterised as “fusion fallacies”.
- It has been said that:

  The fusion fallacy involves the administration of a remedy, for example, common law damages for breach of fiduciary duty, not previously available either 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, for example, by holding that the existence of a duty of care in tort may be tested by asking whether the parties concerned are in fiduciary relations.

- It has been continually reinforced that the Acts effected a fusion of two systems of administration, and not two systems of principle – O’Rourke v Hoeven. The Acts were merely intended to ‘achieve procedural improvements in the administration of law and equity in all courts’ – Proceeds Inc v Lehman Bros International.
- A good example of a fusion fallacy is the case of Walsh v Lonsdale. This involved a lease which was not executed as a deed and was therefore equitable. The plaintiff sought a common law remedy of distress (i.e. self-help seizure of the property) after the defendant (the lessee) did not pay rent as required under the agreement. The issue was whether a common law remedy (distress) could be sought when the interest was purely equitable.
- The Court held that the situation was to be assessed ‘as if’ all of the steps had been taken to make the deed legally enforceable (i.e. as if the lease was a legal lease).
- Jessel MR felt that, since the Judicature Act, legal and equitable interests were merged:

  There are not two estates as there were formerly, one estate at common law...and an estate in equity under the agreement. There is only one court and the equity rules prevail in it.

- Taken literally, the judgment represents a gross fusion fallacy as it tends to elucidate the view that the Judicature Act completely washed away any distinction between equitable and legal rights.
- For further examples of fusion fallacies, see Redgrave v Hurd (Jessel MR again concluding that the conflict provision obliterated the distinction between law and equity) and Seager v Copydex

**Is there a case where post-Judicature act, it is ok to use CL damages in an equitable case?**

- **Harris v Digital Pulse** – (trial judge decision, pg 12 CB) – the issue was whether or not exemplary damages should be awarded for a particularly egregious breach of fiduciary duty. On the facts, it was
clear that the defendants had calculated that breach, particularly setting out to deceive the employer and to take off profits by setting up their own business. Can exemplary damages be made in a purely equitable case?

- In first instance → Palmer J allowed the award arguing the nature of the breach made the award appropriate in the circumstances. He concluded that there was no rule that exemplary damages couldn’t be given by the equitable jurisdiction
- Justified granting exemplary damages as being a deterrence for those thinking of acting in the same way and to send a message to the community that such dishonesty is not acceptable. However, equitable remedies are suppose to account for the loss caused, and not to punish
- “Wrongful and reprehensible conduct” – compensation isn’t enough to combat this – sending out an additional message to those who have the capacity to exploit and to compensate for the plaintiff’s sense of outrage, therefore, its not relevant that the damagers are derived from common law, rather than equity
- The NSW COA rejected this argument → Smeagle CJ focused on the fact that equity is based on a balances assessment of the conscience of the parties rather than a punitive assessment. Vindication etc. is not a basis for providing exemplary damages, and the absence of precedent meant that they couldn’t make such an award
- See David Need article re contributory negligence and compensatory damages

Should and equitable remedy be available for a common law offence?

- **Attorney-General v Blake (HC)** – B was employed by MI6 for 14 years (self-confessed traitor). In 1951 he became an agent for the Soviet Union. For 9 years (until 1960) he disclosed valuable secrets and documents to the SU which he gained through his employment with the British Secret Service. In 1961 he was sentenced to 42 years in jail. The sentence “reflected the extreme gravity of the harm brought about by his disclosure of secret information”. He escaped from prison in 1966 and fled to Berlin and subsequently Moscow. He remains there as a fugitive from justice. There, he wrote an autobiography. Certain parts related to his activities as a secret service intelligence officer. However, by this point, the disclosure of this information was not damaging but the book sold well. JC was the publisher, he had an exclusive right to publish in return for royalties. The book was published in 1990.
  - Crown could not have sued for breach of confidence because the information published was no longer confidential. There was also no fiduciary duty because of B’s dismissal. The crown had to generate an action based on the Employment Act 1944 which stopped B from publishing sensitive information
    - Therefore attracting an account of profit, which meant that the Crown could receive £90,000
    - Lord Nicholes felt that this was an exceptional breach of contract which required exceptional remedies. In some instances, CL remedies that relate to breach of contract do not do justice to the circumstances.
    - [Pg. 293] “Remedies are the laws response to a wrong when exceptionally a just response to a breach of contract so requires, the court should be able to grant the exceptional remedy for a defendant to account to the plaintiff for the profits they made”
    - Only time when account for profits was ordered for breach of contract
    - What is ‘exceptional’?? Unclear case, doesn’t adequately describe why an account of profits is necessary here? More likely to be just to send a message
    - Legitimate fusion?
  - It was not appropriate to seek damages because they had not suffered any actual loss