EQUITY
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The History and Nature of Equity

What is Equity? History and Nature of Equity

Equity refers to the body of cases, maxims, doctrines, rules, principles and remedies that derive from the specific jurisdiction established by the Court of Chancery. It remains a key pillar of the Australian legal system, with the HCA referring to the normative complexity of the legal system with the interaction between the rules of law, principles of equity, requirements of statute and between legal, equitable and statutory remedies’ (Bankstown City Council v Alamdo Holdings).

History and the rationale of equity hold it together.

- All equitable doctrines originated in the equitable jurisdiction of the Lord Chancellor sitting judicially in the Court of Chancery
- With the CL, you had to develop evidence in a particular way and fit your facts within the writs of action
  - Requirements and constraining nature could lead to unjust results
    - This is why people moved towards the Chancery i.e. because it operated on conscience, allowed witnesses to be heard etc
      - Chancellor was the ‘fountain of justice’ who took the place of the King when people used to petition to the King for assistance (delegated prerogative power)
- Originally the Lord Chancellors were ecclesiastic and over time became lawyers and developed principles/rules as to when would exercise jurisdiction and what remedies they would focus on (whole system of law began to develop)
- Thus, as Maitland (1936) notes, while equity was originally enforced by the ‘Courts of Equity,’ now we no longer have courts which are merely courts of equity – it is a body of rules administered by English courts of justice which is part of the general legal system

The underlying principle of equity is conscience. Equity controls/constrains CL judgments to control what happens with them and if can be enforced. The development of equity led to a system of principles which developed and it resulted in it looking and operating like a rival system and causing Chancery/CL to conflict (i.e. would get judgment in CL; rush off to Chancery to get injunction to prevent enforcing CL).

*The Earl of Oxford’s Case (1615) 1 Ch Rep 1 (21 ER 485)*

Represents quasi-resolution between the two courts between Lord Chancellor Elsemere (Chancery) and Lord Coke (CJ of the King’s Bench) who couldn’t stand the fact that people kept getting injunctions to prevent the enforcement of CL judgments.

- College owned land in London
- Was the nature of the college that they couldn't sell land they owned
- As they couldn’t do it legally, tried to grant it to the Queen and the Queen can grant to purchaser and then purchaser can give the money
- Purchaser buys the land and spends considerable sums of money improving the land and then sells it to the Earl of Oxford
- The Earl dies and the son inherits the property
- The college decides that it was a mistake and want property back by arguing that the land was not validly given away
- They purport to grant a lease of the land to a tenant and then they evict the tenant from the land (tenant can sue for wrongful eviction) and then I court they can say we never legitimately gave the land away
- Legally, there was not a capacity to grant land in the first place
• But the person who loses goes to Chancery to try and get a judgment saying that this is against good conscience
• Lord Ellesmere: Chancery is there to correct Mens Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions, of what Nature soever they be and to soften and mollify the Extremity of Law
  o Says that Law and Equity are distinct in their courts, their judges and their rules of justice yet they both act to the same end which is to do right even though Justice/Mercy differ in their effects and operations
  o Where a judgment is obtained by Oppression, Wrong and a hard Conscience the Chancellor will frustrate it and set it aside, not for any error or wrong or defect in the judgment but for the conscience of the individual party that has been wronged

*The judgment in the case reveals a moral jurisprudence that was sophisticated, developed and coherent by the year 1615, within a legal system which treated common law and equity as two separate bodies of law. It also illustrates a pattern of contextual legal and moral reasoning which has persisted in the Anglo-Australian equitable jurisdiction until this day.*

P L Loughlan (In Parkinson, 103) notes that the Aristotelian conception of equity as a ‘rectification of law where the law falls short by reason of its universality’ was of great significance in early equity jurisprudence because one of the perceived sources of inadequacy and injustice in the common law was the generality of the law’s rules, and the law’s inability to mould its rules to fit the circumstances of the particular case. The equitable jurisdiction functioned to prevent, correct and reverse the individual failures of justice of a rule-governed decision-making forum.

Today, where the principles of CL/Equity conflict, equitable principles prevail. This does not mean that equity is taking over and displacing the CL. Equity knows the CL is there and if there’s a valid judgment this will stay in place but we will look at your conscience to determine whether that’s something you can enforce: “the conscience of the appellant, which equity will seek to relieve is a properly formed and instructed conscience. The real task is to decide what a properly formed and instructed conscience has to say” (ABC v Lenah Game Meats)

**The Effects of the Judicature Acts and the ‘Fusion Fallacy’**

• Equity and CL were never completely divided e.g. in England the Lord Chancellor had a limited CL jurisdiction and a large statutory jurisdiction; in Australian colonies there were never two sets of courts (just had the different jurisdictions)
• Equity knew the CL – ‘equity follows the law’ in the sense of its concurrent and auxiliary jurisdiction had legal rights as their subject matter
• There were areas of limitation upon equity’s recognition of legal rights which made it procedurally complex for parties to litigation
  o Chancery had no power to decide a disputed legal right or title as a step in protecting it against invasion
  o Before the judicature system Chancery had limited power to transfer a suit to the CL courts – would have to start again (so needed to make sure you started at the right court as could be thrown out if started in the wrong court)
    • **Doe d Reade v Reade (1799):** beneficiary of a trust of land; trustee had disposed the beneficiary; the beneficiary tried to sue at CL for ejectment but this wasn’t possible as CL does not acknowledge such rights
  o Court of Chancery differed greatly from the CL courts in its procedures; it did not dispose of suits by the CL system of pleading and oral evidence of witnesses before judge and jury; it relied heavily upon affidavit evidence, eschewed juries and was assisted by discovery and interrogatories
An image of a document has been provided. The document contains the following text:

- Even if you started at the right place, might have to go to the courts sequentially to get a full remedy i.e. go to CL to prove nuisance, Chancery for injunction
- Complicated by the fact that the CL did not ignore equitable rights/titles e.g. the QB noted that a plaintiff's copyright was held on trust for a TP (Sims v Marryat)
- Many principle and doctrines, equitable in origin were borrowed by the CL with the result that they thereafter applied throughout the legal system e.g. estoppel by representation or conduct was taken to the CL
- However remember that (a) the CL courts, even when adjudicating on legal claims in contract/tort did not have inherent power to award the remedies of injunction and SP and other remedies and (b) the CL courts could not entertain actions brought to recover damages or other relief for infringement of purely equitable titles and claims e.g. a beneficiary could not sue his or her trustee for breach of trust unless in Chancery
- There was always a chronic delay in Chancery
- Expense in Chancery as well as clerks wanted to be paid per page
- The Judicature Acts came into force in 1875
- Where there had been conflicts in principle between law and equity the latter would prevail in the end by means of common injunction
- The general significance of the English judicature legislation has been put by Professor Simpson (1974): "the effect of it must be sought largely in social advantages secured through procedural simplification … the so called ‘fusion’ has never occurred and was never intended; the catch phrase is most misleading. The principle that equity trumped law had been established at least since the early 17th century and there are only two senses in which fusion could occur had it occurred – first the development of settled, customary or precedent based principles, rules and concepts of equity came to differ only in substance from the common law; secondly, before the Judicature Acts there had been a scheme of harmonious relationship between the two systems, one in which equity presupposed the law to which it was supplementary … the chief effect of the Judicature Acts upon the common law derived from its establishing a three tiered structure of civil courts, manned by three different categories of judge."
- In Australia today this is exemplified in the Supreme Court Act 1970 (NSW) s 57 and the Law Reform (Law and Equity) Act 1972 (NSW) s 5 which hold that the SC can administer concurrently all rules including all rules of equity
- Leeming in 'Equity, the Judicature Acts and Restitution' (2011) suggests that fusion took a long time in Australia as there were never separate courts in Australia that needed to be joined (i.e. just had the two divisions, so less pressing as it was in England)

Effect of the Judicature Act can be seen in the example of the NSWCA case Harrison v Schipp (2002). In that case, a plaintiff, who had lost to the defendant both at trial and on appeal subsequently brought further proceedings in the Equity Division. The plaintiff argued that new evidence had, since the appeal become available and that the plaintiff was therefore entitled in equity to bring bill of review proceedings and be granted a new trial on the basis of the fresh evidence. It was held by the CA that since the judicature legislation, there was no equitable jurisdiction vested in a single judge of the SC to set aside judgments on the ground of fresh
evidence. The judicature legislation had abolished the bill of review procedure and replaced it with appeals to the CA and that was the case whether or not the bill of review jurisdiction in equity was regarded as original in nature or appellate.

**Fusion fallacy**

- The Judicature system has two essential and conceptually distinct effects
  - First, it fuses the procedures of the old CL/equity jurisdictions in the sense above
  - Second, it embodies in statutory mandate the supremacy of equity over law in cases of conflict between rules
- Reflection will confirm that neither of these changes will give the plaintiff a cause of action or remedy or a defendant a defence which he/she lacked under the old system
  - The same result now obtainable but issue directly and without risk of passage from one court to another to bring the dispute to conclusion
- The result of the Judicature Acts has been called ‘fusion fallacies’ i.e. they are explicable neither by application of law or equity but only a product of a change in substantive principles of English jurisprudence
- Such change would require legislation and the clear implication in the fallacies is that this was supplied by the terms of the 1873 Act
  - But where are the terms in the Act which so state? There are none!
    - One must ask two questions – what does it meant to say a substantive ‘fusion’ occurred and what sections of the legislation had that result?
- Maitland claimed that law and equity were not inherently in opposition – equity came not to destroy the CL but to fulfil it; what this meant is not entirely clear but reflected the view of the proponents of the judicature system i.e. that law and equity now run in the same stream but do not mingle their waters (Asburner).

"It is stated very plainly that the main object of the Act was to assimilate the transaction of equity business and common law business by different Courts of Judicature. It has been sometimes inaccurately called the 'fusion of Law and Equity' but it was not any fusion, or anything of the kind, it was the vesting in one tribunal the administration of Law and equity in every cause, action, or dispute which should come before that tribunal. That was the meaning of the Act. Then, as to that very small number of cases in which there is an actual conflict, it was decided that in all cases where the rules of Equity and Law were in conflict the rules of Equity should prevail' (Salt v Cooper (1880)).

"The movement for merger of equity into law discounted the preoccupation with the belief that law and equity do not conflict, that equity is noting more than a body of more enlightened principles of conduct which could be smoothly mortised into the common law ... there is a conflict between them. A judgment of common law creates rights in the plaintiff. A decree in equity, operating in personam imposes duties upon the defendant. From this fundamental difference, conflict results ... law and equity cannot be blended or homogenised for they are antitheses. The one strives for predictability and treats cases as belonging to a generalised type, the other strives for individual justice and treats cases as being unique. Each has a function to perform which requires freedom to act upon the other ... in 1905, Dean Pound, although upholding the unified court notes "examination of the current reports will disclose four tendencies in the amalgamated system: (1) legal rules superseding equitable rules in certain cases; equitable rules or portions of them disappearing; equitable principles becoming hard and fast and legal in the application; (4) equitable rules becoming adopted in such way as to confuse instead of supplement the legal rules." (Emmerglick, 1945, USA). Are these four tendencies (or any of them) described by Dean Pound to be discerned in Anglo-Australian case law?

- Examples include
  - The awarding of exemplary damages in equity (Harris v Digital Pulse) which ignores the idea that equity does not punish
An equitable cause of action with CL remedy (*Redgrave v Heard*)

**Procedural fusion?**

The Report of the Judicature Commission essentially said that we want this court to be a one-stop shop, you go to the court and they can provide you with the remedy at CL/Equity as is necessary according to your facts. Therefore essentially achieve the same outcomes, but just change the procedure to get to those outcomes.

*Berry v Berry* [1929] 2 KB 316

- Couple were married but separated
- Entered into a deed of separation and agreed that he would pay maintenance to her in the amount of 216 pounds per year
- 8 years later they agreed to halve that amount
  - This was made by contract and supported by valuable consideration
    - CL rule of evidence prior to the Judicature Act – variation of a covenant in a deed had to be contained in a deed otherwise ineffective
    - Equity focused on substance, not form and the agreement in substance was to vary the covenant in the deed to equity gave that effect
- After the Judicature Act – where the conflict between equity/CL rules of equity prevail (s 25 of the Judicature Act); thus only needed to pay 108 pounds per annum
- The same result would have been achieved before the JAs – she sues at CL, proves the deed, he can't prove the variation in CL court, she gets a CL judgment but then he goes to Chancery for an injunction; not enforced because it is unconscionable

*Zaccardi v Caunt* [2008] NSWCA 202

- If you had a time stipulation at CL, equity would only treat this as 'of the essence' only if this has been stipulated by the parties and that is clear
- S 25(7) of the Judicature Act says apply the equitable rule
  - Wiped away the CL rule
- Reason for doing this was because now that the Court was one, the Court would need to know precisely when 'time' would start

This has sometimes been described as ‘substantive fusion’ because it changes the rule – and this is specified in the case at [87]-[100]. However, if it’s substantive fusion it would be MINOR as the outcome is not different and pre the Judicature Acts.

**Substantive fusion?**

The statute was designed to achieve procedural fusion i.e. Lord Diplock held in *United Scientific Holdings* that it was only a fusion of administration (and not substantive fusion). But does it also achieve substantive fusion?

I.e. following the Judicature Acts, if there has been substantive fusion, if your claim is purely equitable you may get damages and not just equitable compensation? Or the modification of principles in one branch of the jurisdiction by concepts which are imported from the other? The fallacy however is committed explicitly, covertly and on occasion with apparent inadvertence (Meagher, Gummow and Lehane, 2002).

- Clear that per s 25(11) not intended to substantively fuse law/equity
- In terms of substantive law, the purpose of the Judicature Acts was to leave in place the settlements that were already there
  - Statutes were merely streamlining how you got to judgment at the end
**MCC Proceeds Inc v Lehman Bros International (Europe) [1998]**

- Plaintiff beneficiary of a trust of shares
- Under the trust the beneficiary entitled to have all shares delivered to it
- Rather than doing that the trustee wrongfully pledged the share certificate to defendant
- The defendant was a BFPFVWN of the legal estate in the shares from the trustee without notice of any breach of trust or claim by the plaintiff
- The claim could not maintain an action in conversion against the defendant
  - Equitable owner cannot sue in conversion where TP has equitable rights
- Mummery LJ maintained that the judicature Acts intended to achieve procedural improvements in the administration of law and equity in all courts not to transform equitable interests into legal interests or change the effect of the CL

**Walsh v Lonsdale (1882) 21 Ch D, 9 CB**

- Case involved agreement to lease a weaving shed for 7 years
- In writing, no formal lease granted by deed (there is just the agreement to lease that is supported by consideration)
- The tenant was allowed into possession and started payment of rent in arrears
- 3 years after that landlord served a notice demanding a year’s rent be paid in advance
  - That demand was permitted under the contract
- The tenant didn’t pay the rent for two days and the landlord sought to destrain for non-payment of rent (destraint is a process where take the tenant’s chattels and hold them until the rent has been paid) through the common law
- However there was no legal lease here as not created by deed
  - The CL however said pre-Judicature Acts, if you were in possession and paying rent the CL would imply a lease from year-to-year, had to pay rent quarterly and the obligation to pay rent was only in arrears
  - In equity pre-Judicature Acts would treat it as a separate lease because of the availability of specific performance would treat it as existing already
- Jessel said can restrain for rent here even though equitable lease
  - This is a consequence of the Judicature Acts
  - Looks like a fusion fallacy – equitable lease, but applying the CL rules
    - A person who enters into possession of land under a specifically enforceable contract for a lease is regarded by a court having jurisdiction to enforce the contract as being in the same position as between itself and the other party to the contract, as if the lease had been granted

How can the case be understood in orthodox terms? Without the fusion fallacy idea?

**Chan v Cresdon Pty Ltd (1989) 168 CLR 242**

- Cresdon agreed in writing to lease land to S but this was never registered (never legal)
- S defaulted and Cresdon took action against Chan as a guarantor ‘under this lease’
- This was unsuccessful as there was no registered lease, hence no enforceable guarantee
- The alternative claim of equitable lease in line with W v L also unsuccessful as W v L only gives an equitable lease and thus would not be agreement ‘under this lease’

Some fusion fallacies in the books from NZ:

**Day v Mead [1987] 2 NZLR 443**

- Concerned breach of fiduciary duty – equitable claim for equitable compensation
• CA reduced the compensation award on basis of contributory fault
• This is applying a CL concept to an equitable remedy in a way that wouldn't have occurred before the Judicature Acts

**Aquaculture Corp v New Zealand Green Mussel Co Ltd [190] 3 NZLR 299**

• Award of exemplary damages (CL remedy) for breach of confidence
• Cook J says two doctrines are merged and the full range of remedies should be available

“For all purposes now material, equity and common law are mingled or merged. The practicality of the matter is that in the circumstances of the dealings between the parties the law imposes a duty of confidence. For its breach a full range of remedies should be available as appropriate, no matter whether they originated in common law, equity or statute.’

**However look again at the NSW view** -

**Harris v Digital Pulse Pty Ltd [2003] NSWCA 10**

• Breach of fiduciary duty
• Can you get exemplary damages for breach of fiduciary duty? In NSW no:

“What the NZ CA contemplated in the Aquaculture Corporation case was a form – perhaps a mild form – but a form nonetheless – of fusion. It was fusion in the sense of selecting a remedy from the common law range of remedies which a court of equity administering the law relating to equitable wrongs before the introduction of a judicature system would not have administered ... whatever one calls the process, it must be recognised as a process having involved a deliberate judicially-engineered change in the law.”

**Fusion by convergence over time?**

• Andrew Burrows (2002) advanced this argument that perhaps over time the CL principles/equitable principles might develop to the point you get fusion by convergence
• If this happens it is not by way of the Judicature Acts (as the Acts say if there is a conflict between law and equity then equity prevails so why would they converge?
  o   Judicature Acts achieve procedural, not substantive fusion
• In Harris v Digital Pulse Heydon J acknowledged the law can develop over time, but he thought that equity has not developed since the 19th century
• But McGhee (2010) states “to subsume equity into a larger scheme of private law obligations and property rights would risk losing an explicit ethical element that has stimulated the development of doctrines in the past and that can usefully continue to do so in the future”
  o   Don't lose sight of conscience-based reasoning that underpins equity
    ▪   For example property means different things in different contexts

Remember: equitable principles presuppose the existence of CL rights/remedies (can take the equitable doctrine away and CL makes sense but not vice versa). Equity is ‘intersticial’ – it appears in the interstices (gaps), fits in and around the common law and makes it more just.

**The Maxims of Equity**

**No hard and fast doctrine** re the maxims, they ‘guide the posts’ about how equity operates so can't take it and say this gives me the answer in every single case.

Maxims themselves can conflict with eachother and if they do, the **court has to resolve the conflict and figure out what to do as must be the case that one is applied only.**
### Equity regards as done what ought to be done

_Walsh v Lonsdale_: parties had agreed to grant a lease but not yet actually done that, and because specific performance was available, equity considers you to have done what you ought to have done (create a lease).

### Equity follows the law

Equity doesn’t deny the legal position – it adopts it and says this is what will be done in respect of the legal position.

### He who seeks equity must do equity

If you ask a court of equity for relief, you must yourself be prepared to do what conscience required of you (forward-looking – if you want a remedy, act conscientiously for the relief you want).

### He who comes to equity must come with clean hands

Plaintiff in equity jurisdiction must act conscientiously themselves (more about what you have done in the past). But the conduct which disentitles you has to be series, not entirely acting in breach of application.

- _Geltch v MacDonald_ [2007] NSWSC – a mere breach of contract is not enough to disentitle you to relief
- _Black Uhlans Inc v NSW Crime Commission_ [2002] NSWSC – the unconscionable conduct must relate to the relief you’re seeking
  - Concerned a motorcycle club which had put money towards buying a club-house, bought in the name of one man
  - Later the club argued that the house was held by the owner on trust for club
    - As the club had put up the purchase money; held on resulting trust for club, not legal owner beneficially
  - NSW Crime Commission said you can’t argue for an equitable remedy (held on resulting trust) because you have engaged in criminal conduct and thus you do not have clean hands
  - This argument was rejected by the court; and equitable relief was granted because the misdemeanours did not relate in any way to ownership of the club house
  - Came with sufficiently clean hands in respect to relief

### Where the equities are equal the first in time prevails

If you have two parties with interests the first in time prevails; but if there is postponing conduct from a prior owner the equities are not equal and the subsequent owner will prevail.

### Delay defeats equity

If you don’t do anything about your equitable rights, equity may refuse to give you assistance akin to statutory limitation rules.

The Doctrine of Laches holds if you have rights which have been breached and you acquiesce in the breach by doing nothing about it, may be sufficient to make it unjust in the circumstances that you get relief.

### Equity looks to intention rather than form

I.e. if you are declaring a trust you don’t actually have to use the word ‘trust’ – look at your intention to set up the arrangement (_Paul v Constance_). Note as stated in _Corin v Patton_, if a donor has done all that he can do (especially when the instrument of transfer is delivered to the donee) equity will give effect to the instrument rather than insisting on strict compliance.

### Equity presumes equality

Two people with an interest and can’t figure out what the quantum is – you fall back and equity will presume equality.

_Waikato Regional Airport Ltd v Attorney-General of NZ_ [2003] confirms equity is a fall back provision when you can’t figure out any other way to do something (i.e. if evidence is clear that there should be a 1/3 and 2/3 division, you should give effect to that).

### Equity acts in personam

Continues to have importance in real cases now days.

Mareva injunctions/orders – if I’m suing you, you have assets I’m worried...
you may dissipate before I get my judgment, it is an order from the court freezing your assets (until the case is disposed of). This is even if you’re in Australia and you have assets in the Cayman; as this is an in personam action which acts on the individual and not the assets and so makes Marevas more powerful and can apply worldwide.

| Equity will not assist a volunteer | If you have given value so that you’re not a volunteer equity will not normally step in to assist you. Equity does not destroy your position in this instance, but it does not add anything to your rights. |

**Corin v Patton (1990) 169 CLR 540**

Re equity assisting a volunteer: “Of course it would be a mistake to set too much store by the maxim. 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 concepts and principles.”

- Shows that clear that not a precise statement in all circumstances
- Question whether tenancy had been severed before Patton died
- Mrs Patton tried to transfer her share to Mr Corin – had that severed the joint tenancy between the Pattons?
  - Executed the memo of transfer in favour of Corin and given the documents to her solicitor and not Corin’s
  - She had told her solicitor to register but he hadn’t done it yet
  - But Corin was a volunteer trying to get property through gift, not sale

**Friend v Brooker [2009] HCA 21**

- F&B entered into a joint venture
- Did it through corporate vehicle – rather than running it themselves, they set up a company to run business and they were owners of the company
- To fund the venture Brooker himself borrowed $350K from SMK (TP) at a high rate of interest of 19.5%
- He then lent it to the joint venture company
- The loan from SMK was secured by a mortgage over Mr Brooker’s home and he also guaranteed it personally
- By the time of the trial the interest had racked up and the debt owed was not $1.35 mill
  - Brooker sought contribution from Friend to pay half of it
- The HCA rejected this and said that B did not have to pay half of the loan
- Applied equitable maxims:
  - ‘Equity follows the law’ – doesn’t deny the legal position
    - B owed money to SMK; SMK can sue Brooker, even if in equity order Mr Friend to pay some of it that’s ok; if he gets anything out of Friend it’s a contribution to him; he still owes money to SMK
  - ‘Equity presumes equality between the parties’ – so was there a right of contribution needed from Mr Friend?
    - Because Mr Friend had not borrowed the money he did not owe a common obligation by Mr Brooker; owned by Mr B alone as he had borrowed it himself and lent it to the joint venture so B was solely obliged to pay it back at law and even in equity no basis for requiring him to contribute to that amount
      - B could sue the company and say you owe me money, but the company had no money so he didn't sue them

Remember maxims are not strict: they are flexible, they conflict, and the court goes to the one they think will achieve the best justice/conscience-based result in the case.
The Conscience of Equity

Fiduciary Obligations

“The terms ‘unconscientious’ and ‘unconscionable’ are ... used across a broad range of the equity jurisdiction. They describe in their various applications the formation and instruction of conscience by reference to well-developed principles. Thus, it may be said that breaches of trust and abuses of fiduciary position manifest unconscientious conduct, but whether a particular case amounts to a breach of trust or abuse of fiduciary duty is determined by reference to well-developed principles, both specific and flexible in character. It is to those principles that the court has first regard rather than entering into the case at that higher level of abstraction involved in notions of unconscientious conduct in some loose sense where all principles are at large” (Tanwar Enterprises Pty Ltd v Cauchi [2003]).

- We need to look at what equitable doctrines require of fiduciaries
- Who owes fiduciary duties? What is a fiduciary relationship?
  o A fiduciary relationship is one where one party reposes confidence in another who is expected to act in the interests of the former party rather than the latter
    ▪ This may in a given case require close examination of a disputed fact (Hospital Products Ltd v United States Surgical Corp)
  o Overriding duty not to be disloyal; not a duty of loyalty (Stevens v Premium Real Estate Ltd [2009] NZSC 15)
- Keep in mind that some relationships which would appear to involve confidence or trust in a non-technical sense are not fiduciary e.g. parent and child, husband and wife
- Further, not all fiduciary duties arise simply from the reposing of confidence by A in B in a personal sense i.e. thus the power of directors to issue shares is reposed in them by company legislation and the articles of association of the company in question, although equity has then treated the exercise of that power as subject to fiduciary constraints (Whitehouse v Carlton Hotel Pty Ltd)
- Most of the fiduciary’s obligations are couched in negative form i.e.
  o The fiduciary’s interest and duty must not be placed in conflict
  o The fiduciary must not do for their own benefit what ought to have been done, if at all for the principal (Hospital Products) case
  o The duty of a fiduciary is a negative one i.e. to avoid certain conduct, not a positive duty to act in a particular way

Trustee-beneficiary

“™The archetype of a fiduciary is of course the trustee” (Hospital Products Ltd v US Surgical Corp)

Keech v Sandford (1726) Sel Cas t King 61

- Trust whereby the trustee held a lease of a market
- Lease of the market (generates profit from the stall holders) held on trust for an infant
- The lease was coming to an end
- Trustee approached the landlord of the market lease and asked for a renewal for the benefit of the infant (i.e. the benefit of the trust)
  o The landlord said no
    ▪ Said that the landlord refused because infant beneficiary was incapable of signing the necessary covenant
    • Not clear – trustee could have signed the lease?
- Trustee got a renewal of the lease for his own benefit
  o This was a breach of a fiduciary duty vis-à-vis the beneficiaries
When we talk about trustees as fiduciaries, normally talking about express trusts (which are intentionally created). Be careful when you talk about other types of trusts (such as constructive trusts) as it is not clear that constructive trusts necessarily involve fiduciary duties – you could be constructive trustee of property without knowing it (i.e. transferred to you as a gift but it is on trust; you are holding trust property but may not realise). If you do not realise it is extremely unlikely fiduciary duties will be applied to you in full rigour. But if someone came and told you and you used this to then benefit yourself you may find you do have enough knowledge for fiduciary duties to apply to you.

**Agent-principal**

- Agent expected to act on behalf of the principal and not for their own benefit
- Agents may hold property for their principal and if they're doing this they may be a trustee of that property as well
- But agency does not necessarily involve property, i.e. permit me to go into the world and enter into contracts that bind me

**De Bussche v Alt (1878) 8 ChD 286**

- Plaintiff owned a ship and wanted to sell in the Orient
- Plaintiff owned on an island in Britain and didn't want to go to Orient
- Engaged the agent to sell the ship (Colombine) on their behalf
  - The agent instructed to sell; express instructions do not sell for less than $90,000
    - Knew a Japanese prince who wanted to buy it for $160K
  - The agent sold it to himself knowing he would make money – so to himself for $90K and then resold it to the prince
- Breach of fiduciary duty – a fiduciary is not permitted to profit from the relationship; agent expected to act in the interests of the principal and not for themselves; should have sold it for $160K to Japanese prince and give all the money to the plaintiffs
- Was forced to hand over all money he made on it to plaintiffs

**Director – company**

- Company controls own assets but the directors control them in a way akin to the trustees controlling property
- Because a company has no existence in reality, it can only operate through its directors and agents which is why these people **owe fiduciary duties to the company** (not to the shareholders, as cf the company being itself a legal person)

**Regal (Hastings) Ltd v Gulliver [1967] 2 AC 134n**

- Regal wanted to buy 2 cinemas in Hastings (when company is sold attracts higher price)
- To do this the company formed a subsidiary company (Amalgamated) of Regal
- Regal did not have enough money to buy all the shares in subsidiary (needed this money to be able to buy the cinemas)
- Amalgamated could afford to buy 40% of the shares in Regal, while directors bought the other 60% of shares in Amalgamated, allowing Amalgamated to buy the cinemas
- The directors then sold their shares in Amalgamated to make a profit
- While they were directors of Regal, nothing happened; but with new management they sued the former directors for breach of fiduciary duty saying you profited out of your fiduciary position because you used it to acquire these shares and make profit
- Subsequently they had to discharge the profits of the company back to Regal

**Brunninghausen v Glavanics (1999) 46 NSWLR 538**
• In certain circumstances have direct fiduciary duties to shareholders but that is unusual
• Get a chain of relationships
  o Shareholders own the company and entitled to anything that comes out of it
    ▪ Don't need duties owed to them as they get duties indirectly because if
      the company is good they receive this indirect benefit
  • This is confirmed in Friend v Brooker
• Same point arises with respect to trusts
  o Trustee holds property for beneficiaries – and if the trustee says it is a good time
    to sell the trust, any benefit from it is held on trust for beneficiaries
    ▪ Don’t square it off and say directly goes to the beneficiaries

Solicitor-client

• By acting on behalf of their clients they owe fiduciary duties to their clients

**Farrington v Rowe Mcbride & Partners [1985] 1 NZLR 83**

• RWP acted for plaintiff in personal injury suit and he won
• He then said where to invest money to get money to solicitors
• Invested in a company called Pioneer Land
• The solicitors did not reveal that they were advising that other company of which
  Pioneer Land was a member as to their finances and administration
• Solicitors acted in breach of fiduciary duty
  o Did not take benefit for themselves but were fiduciary and allowed duties they
    owed to Farrington to conflict with duties to other client

**NB: Maguire v Makonis; Bolkiah v KPMG**

Partner-partner

• Partner owes a fiduciary relationship to other partners as they are expected to act for
  the benefit of the partnership and not just for themselves
• If a partner takes out a benefit for themselves personally from business that was within
  the scope of the partnership’s business, that has to be given to the partnership as ought
  to have been done for the benefit of the partnership in the first place
• Similarly, if partner makes benefit from property or information partner must give that
  benefit to the partnership as a whole

**Chan v Zacharia (1984) 154 CLR 178**

• Chan and Zacharia had operated a medical practice in partnership
• They had rooms and worked from a practice premises which they leased
• Lease ran for three years with a right of renewal for a further two years
• After a couple of years Chan gave notice that he was terminating the partnership
• The lease was valuable in its own right because of the way they had run practice
  o Had good will attached to it with the local community as a venue where medical
    practices were run
  o Secondly, there was a scarcity of similar venues in the area from which you could
    run a medical practice
• Zacharia said I know you’ve terminated the partnership but can you renew the lease
  with me so I can continue to run the business/continue the goodwill of the premises
• Chan did not do this but went and got a new lease of the premises himself
• HCA held this was a breach of fiduciary duty
Partnership was being wound down, so not clear what’s going on in terms of relationship but court said that within the winding down all of the property that was partnership property needs to be realised for their joint benefit

- For Chan to refuse to renew the lease to enable it to be dealt with profitably was a breach of fiduciary duty when he then went and made a profit for himself (acted in his own interests, not those of partnership)

**Employee-company**

**Worman International v Dwyer** (see below)

**Categories not closed**

The categories of fiduciary relationships are not closed and can arise in individual settings even if the category is not always seen as fiduciary (*English v Dedham Vale Properties Ltd*).

**Crown servants – Crown**

**Reading v Attorney-General [1951] AC 507**

- Sergeant Reading in Army Corps; based in Egypt
- Took bribes in 20,000 pounds and took bribes in return for escorting lorry loads of illicit whisky through checkpoints in Cairo
- The HL held that reading’s official position in army was fiduciary
  - Expected to use position for the benefit of the army and Crown, not for himself
  - He had acted for himself and so had to hand the bribes over to the Crown

**Attorney-General for HK v Reid [1994]**

- High level prosecutor working for HK govt
- Took 12.5 million from HK criminals who was prosecuting to slow down their prosecutions/delay and obstruct as much as could
- The PC held that like Sergeant Reading, Mr Reid’s position with the HK govt meant he owed fiduciary duties to the HK govt, and the only reading Reid got bribes was because of his fiduciary position as a senior prosecutor

**Crown – indigenous peoples**

These relationships have been explored in the US/Canada:

**Guerin v R [1984] 2 SCR 335**

- Canadian Indians surrendered land to Crown to lease that land later to a golf club
- The Crown leased land to golf club on less favourable terms than crown agreed with Indians that would lease the land
- SC Canada found acted in breach of fiduciary duty
- But even in Canada not as straightforward as that –
  - The mere fact there was a Crown-Indigenous peoples relationship was not itself enough for there to be a fiduciary relationship (doesn’t apply generally)
    - Reason it arose in the case was because there was a statute; which said that the band of Indians in general couldn’t deal with land except by surrendering it to the Crown (to stop the Indians from being exploited)
      - So the Indians couldn’t directly deal with golf club here
        - Crown akin to agent, trustee
  - Actual decision of indigenous fiduciary relationship not easy
Mabo v Queensland (No 2) (1992) 175 CLR 1

- Some support in the case that the Crown owes fiduciary duties to indigenous Australian in Toohey’s judgment in particular (Dawson's judgment was wholly against this)
- Toohey J said indigenous couldn’t alienate their relationship other than by transferring it to the Crown (like Guerin); and thus the mere fact that the Crown could take land exercising radical title generated a fiduciary relationship
- Relevance of this formulation raises the possibility of arguing that where the Crown does take land from Indigenous it owes a fiduciary relationship to them and thus can only deal with land to their benefit

Wik Peoples v Queensland (1996) 187 CLR 1

- Brennan addressed the indigenous people’s argument
- Said why should the ability to take something off someone mean you can only do it in their interests in this limited fiduciary way? Doesn’t make sense

Bodney v Westralia Airports Corp Pty Ltd [2000] FCA 1609: “The foregoing discussion leads to two conclusions. One is that the authorities from other jurisdictions do not provide a firm basis for the assertion of a fiduciary duty of the kind for which the second applicants contend. The other is that the tendency of authority in the HCA – including, significantly Breen v Williams – is against the existence of such a duty. That, of course does not mean that circumstances will not arise in which the Crown has fiduciary duties, owed to particular indigenous people, in relation to the alienation of land over which they hold native title. Nor does it mean that where, in particular circumstances a duty of that kind is breached (or a breach is threatened) a constructive trust might not appropriately be imposed.”

- Thus no general fiduciary relationship between the Crown and indigenous peoples
- To accept that in individual circumstances a fiduciary relationship might have been generated by something else is fundamentally a constitutional question, stands alone
- The particular circumstances od the relationship might lead to an ad hoc relationship?

Ad hoc fiduciary relationships

“The authorities ... provide no comprehensive statement of the criteria by reference to which the existence of a fiduciary relationship may be established” (Hospital Products v US Surgical Corp)

“Australian courts have consciously refrained from attempting to provide a general test for determining when persons or classes of persons stand in a fiduciary relationship with one another” (Breen v Williams)

What must be remembered when looking at ad hoc relationships however is that “the critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense” (Hospital Products v US Surgical Corp). This statement of ‘undertakes or agrees to act’ means undertaking to act on behalf of someone else for their benefit (not just holding property etc) (Bristol & West Building Society v Motherwell)

Fiduciary expectation: “A person will be a fiduciary in his relationship with another when and in so far as that other is entitled to expect that he will act in that other’s interests or (as in a partnership) in their joint interests, to the exclusion of his own several interest” (Finn, 1992)

This statement is heavily influenced by Finn: “As to who is a 'fiduciary' while there is no generally agreed and unexceptionable definition, the following description suffices for present
purposes: a person will be in a fiduciary relationship with another when and insofar as that person has undertaken such responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other's interest to the exclusion of his or her own or a third party's interest” (Grimaldi v Chameleon Mining NK (No 2) [2012] FCAFC 6)

**Joint Ventures**

- If parties enter into joint ventures there are different ways to structure them
  - One way is a corporate joint venture (Friend v Brooker)
  - Another is a formal partnership arrangement (established category)
  - Can enter into a venture simply through contract as well
    - Does this create a fiduciary relationship?
    - Not a per se category as the mere fact that we are in a joint venture does not mean we are fiduciaries to each other
      - In the US this would be the case
      - Need to go through and say yes this is an ad hoc relationship, would it be legitimate or sensible in the circumstances

*Hospital Products* and *United Dominions Corp* cases both use joint ventures which in Australia are not recognised as a settled category. Fall back on fiduciary expectation to see if ad hoc. The cases reach opposite conclusions on their facts (UDC was fiduciary; HS no fiduciary).

**Hospital Products Ltd v United States Surgical Corp (1984) 156 CLR 41, CB 11.5C**

- Make surgical staplers in the US
- Blackman was USSC’s NYC dealer
  - He worked out that surgical staplers not patented in Australia
- Acquired HPI in Australia which distributes USSC’s products in Australia
  - Now Blackman has access to USSC’s products in Australia and can reverse-engineer them (i.e. go backwards and make them from the beginning)
    - Once you’ve done this, you can create product yourself
- Started making/selling surgical instruments in Australia and stops taking orders from USSC in the US
- Arrangement between HPI/USSC was a joint venture agreement but Blackman had not promised to act for their common benefit in the agreement
  - HPI could act in a way that suited its business model
- Blackman did not undertake NOT to sell competing products; all the contract between Blackman/HPI said was that Blackman had to used his best endeavours to promote HPI products and HPI was in breach of that contract (as stopped buying the USSC product)
- USSC also argued there was breach of fiduciary duty, but they lost this argument
  - This was a commercial relationship where USSC if it wanted to could have put a term in the contract to say you must not compete with our products (not done)
    - Without something like that the court thought no basis to expect HPI solely act in the interests of USSC and HPI
    - Contract not set up in a way that made fiduciary relationship legitimate – no fiduciary relationship so no fiduciary duty
    - The fact that you misplace your trust in someone doesn’t itself generate a fiduciary relationship in the circumstances
- Mason’s dissent was that there was a limited fiduciary relationship when HPI was dealing in a way where it would affect USSC’s goodwill (had to act in the interests of USSC and not of HPI)

Why did they care about fiduciary duty when they could win claim based on breach of K? With breach of K can get damages; but breach of fiduciary duty is stripping the company of the profits they had made (which is more of a remedy).
United Dominions Corporation v Brian (1985) 157 CLR 1, CB 11.13C

- Parties negotiating to create a partnership (settled category of fiduciary relationship)
- Events that matter happened before the partnership formally entered into – still negotiating the terms
  - Intended partners – SPL, UDC and Brian
- Joint venture arrangement – going to buy land/develop it – UDC would provide finance
- SPL went and bought land pursuant to the partnership (in consequence that they were going to do that) using money UDC has lent and runs mortgage over that land to UDC
- Central problem – clause in mortgage which permitted UDC to treat the mortgage as security not just for the debts the joint venture owned but any debts SPL owed to UDC
- Brian unaware of clause in mortgage
- Land SPL bought was developed and sold at a profit
  - Because of clause in mortgage, UDC kept all the profit to account for amount lent to joint venture and other money SPL had owed it
- The HCA held during the negotiations towards the partnership agreement, fiduciary relationship arose at that stage even before formally entered into partnership because already started performing the intended deal before formally created partnership and a partnership is a clear category of a fiduciary relationship
  - This made it easier to figure out it was a fiduciary relationship whereas in Hospital Products it was not:
    - “The fact that the arrangement between the parties was of a purely commercial kind and that they had dealt at arm’s length and on an equal footing has consistently been regarded by this Court as important, if not decisive in indicating no fiduciary duty arose” (Hospital Products)
    - This does not mean commercial relationships CANNOT be fiduciary; but the reason why the quote is true is because in commercial relationships it is understood that the parties are acting in their own interests
      - The commercial expectation that comes out of the circumstances is key to deciding whether the relationship between the two is fiduciary or not
      - Remember that many settled categories exist in commercial situations, so don’t discard them

Re Goldcorp Exchange [1995] 1 AC 74

Gives a more nuanced view of commercial relationships:

“The fact that one person is placed in a particular position vis-à-vis another through the medium of a contract does not necessarily mean that he does not also owe fiduciary duties to that other by virtue of being in that position.”

John Alexander’s Clubs v White City Tennis Club [2010] HCA 19

- An option to purchase part of land at White City tennis grounds from NSW tennis
- JAC exercised rights for himself
- Breach of fiduciary duty?
- Held to be a commercial transaction, generally no fiduciary duty
  - Bad contract, bad luck

Look at the specific position that you’re dealing with.
Recap:
- Start with the settled categories: if these are fulfilled; person is a fiduciary (don’t need to think about the fiduciary expectation)
- If it’s not in a settled category, think of fiduciary expectation
  - If it’s legitimate in the circumstances – fiduciary relationship
  - If it’s not legitimate – no fiduciary relationship

If it’s not fiduciary, maybe the doctrines of estoppel and confidence influence it

What do fiduciary duties require?

“To say that a man is a fiduciary only begins analysis, it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty? (Securities and Exchange Commission v Chenery Corp (1943))

“The distinguishing obligation of a fiduciary is the obligation of loyalty” (Bristol & West Building Society v Mothew [1998]). This has now been accepted widely in the case law (ASIC v Citigroup Global Markets Australia Pty Ltd [2007] FCA 963).
- This is a very broad, general statement
  - One thing it does emphasise is not all of the duties that a fiduciary owes are necessarily fiduciary duties
  - They can owe duties which are fiduciary but other duties at the same time

“The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty” (Bristol & West Building Society v Mothew [1998]).

Fiduciary duties are **proscriptive, not prescriptive:**

*Breen v Williams (1996) 186 CLR 71*

- Breen put in breast implants, which caused problems for her
- Went back to the doctor for help but he didn’t remedy the problem
- One option to sue the doctor i.e. for negligence etc
- She wanted to join a class action in the US suing implant manufacturers
  - In order to join the class action she needed the doctors records i.e. what the doctor had done and not done
- The records of the doctor belonged to the doctor, not to her
- The doctor said he would release the records if she gave an undertaking not to sue him – but she wasn’t prepared to do that
  - She wanted to try get her remedy in US but keep open the possibility of suing him in Australia
    - He in turn said no to the records
    - Problem for her – can’t join the class action
- Sues the doctor to get access to the documents/records and ran a number of arguments in contract, negligence etc
- She argued that the doctor was a fiduciary and therefore owed a fiduciary duty to act in her best interests – of her joining the US action – so to give her the records to do that
- That argument worked in Canada in McInerney v Macdonald [1992]– fiduciary duty to hand over the records (best interests of patient)
- But the HCA did not accept the argument
“Australian courts only recognise proscriptive fiduciary duties ... In this country, fiduciary obligations arise because a person has come under an obligation to act in another's interests. As a result, equity imposes on the fiduciary proscriptive obligations – not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. If these obligations are breached, the fiduciary must account for any profits and make good any losses arising from the breach. But the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed.”

“It would be to stand established principle on its head to reason that because equity considers the defendant to be a fiduciary, therefore the defendant has a legal obligation to act in the interests of the plaintiff so that failure to fulfil that positive obligation represents a breach of fiduciary duty.”

This view of fiduciary duties as proscriptive, not prescriptive is affirmed in *Pilmer v Duke Group Ltd [2001] HCS 31.*

The proscriptive concept of loyalty involves two themes of liability:
1. Not taking unauthorised profits;
2. Not acting with profit.

This is outlined (a bit differently) in *Chan v Zacharia:*

“Stated comprehensively ... the principle of equity is that a person who is under a fiduciary obligation must account to the person to whom the obligation is owed for any benefit or gain (i) which has been obtained or received in circumstances where a conflict or significant possibility of conflict existed between his fiduciary duty and his personal interest in the pursuit or possible receipt of such a benefit or gain or (ii) which was obtained or received by use or by reason of his fiduciary position or of opportunity or knowledge resulting from it” (*Chan v Zacaria*)

“The no-conflict and no-profit rules encompass the whole content of fiduciary obligations and the duty of loyalty imposed on a fiduciary is promoted by prohibiting disloyalty rather than by prescribing some positive duty” (*P & V Industries Pty Ltd v Porto [2006] VSC*)

**SO:** in a fiduciary relationship, you can have fiduciary duties and other duties. Out of those fiduciary duties – they are proscriptive.

- How do the different types of duties interact with one another?
  - Seen element of this with *Hospital Products* – duty to promote USSC’s products; but not to act solely within their interests.

*Geltch v MacDonald [2007] NSWSC 1000*

- Partnership case – Geltch & MacDonald were partners in local business
- Poker machines in hotel pub; pub operator had licence to run them; and the licence was valuable as these were valuable assets
- G wanted to sell the licensing agreements
- M did not want to sell the other entitlements because they viewed that when the lease terminated the poker machine entitlements would go to the landlord (which was M); thus when the lease finished they would get licence for themselves
- Looks like a breach of fiduciary duty (as M, being a partner is taking benefit to himself individually out of the partnership)
- But it was held that this was not a breach of fiduciary duty (Brereton J)
  - Another clause in contract said tenants had obligation to maintain poker machine entitlements, effectively making them attach to the land so that they
would pass to the landlord when the lease ends (but in the meantime they would have an obligation to maintain them)

• Upshot is that partners are not actually allowed to sell the entitlements and therefore it is not a breach of fiduciary duty of M to refuse to sell them because complying with the underlying arrangement that G/M had entering into the lease
  o The lease effected content of fiduciary duties (as settled category)
• Contract meant could not be bound by fiduciary relationship because this would be inconsistent with contract

This is summarised in “the precise scope of fiduciary duties must be moulded according to the nature of the relationship” ([New Zealand Netherlands Society ‘Oranje’ Inc v Kuys [1973]])

**ASIC v Citigroup Global Markets Australia Pty Ltd [2007] FCA**

• Citigroup was advising Toll when Toll considering takeover bid for Patrick Corporation
• At the same time, other employees in Citigroup were buying shares in Patrick to make money for Citigroup
• Toll didn’t really care about this, nor did Patrick but ASIC did and ASIC sued Citigroup
• Argument that Citigroup in a fiduciary relationship with Toll because were advising them and if it was a fiduciary relationship couldn’t allow conflict to arise (i.e. advising Toll how to buy Patrick etc and making money out of advice giving)
• That argument failed – agreement with Citigroup/Toll was not a fiduciary relationship
  o If you’ve agreed in your advice retainer that this is not a fiduciary relationship, then having that expectation doesn’t make sense
    • The content of non-fiduciary duties however can affect fiduciary analyses i.e. fiduciary relationships are moulded according to non-fiduciary relps

Even where something would constitute a breach of a fiduciary duty (i.e. solicitor is permitted to buy a client’s house) **this can be permitted by the parties.** However for this permission to be given, the consent must be fully informed. If there is no consent that is fully informed, then this consent will be useless ([Chan v Zacharia](McPherson v Watt (1877) 3 App Cas 254)

• Trustees held trust property which included 4 houses to sell
• Went to Mr Watt (solicitor)– asked for his advice how much the houses should be sold for and asked him to find purchaser for houses
• Watt comes back to them and says I suggest you sell them to my brother he will pay this price and that’s good
  o The trustees agree to do that and they know that purchaser is solicitor’s brother
• What the solicitor did not reveal – once his brother bought 4 houses, he said would directly buy 2 houses from brother (i.e. so was sale from the two together)
  o They don’t know that, think they deal with 2 together
• Solicitor purchasing from client is a breach of fiduciary duty
• Means transaction is voidable as there had not been full disclosure of all material facts
  o They key fact was that the solicitor himself purchasing two of the houses
    • “Equity looks at substance not to form” – that’s what matters to equity, breach of fiduciary duty

“Assume, if you please that in every respect, as to price, and as to all other things connected with the sale, this was a sale which might have been supported had the [trustees] been told that [the solicitor] wa the purchaser, in my opinion it cannot be supported from the circumstance that that fact was not disclosed to them.”