

## COMMON LAW DIVERGENCES

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*When Sir Owen Dixon commented in 1942 that no good could come of ‘divergences’ between the common law administered in English and Australian courts, the then orthodoxy was that the common law of England was the common law to be applied in Australia. Over 40 years later and in a much changed constitutional and legal environment, Sir Anthony Mason highlighted the need to fashion a common law for Australia that was best suited to our conditions and circumstances. The common law of England, like the law of other jurisdictions, was simply a possible source of law in Australia. The assistance properly to be derived from that source is a recurrent issue for our courts. The recent decision of the Full Court of the Federal Court in *Grimaldi v Chameleon Mining NL* [No 2] provides an extended illustration. This lecture focuses primarily upon equitable doctrine and remedy in Australia and England both to illustrate significant differences between the two legal systems and to explain at least some of the causes. Reference necessarily will be made to how divergence is reflected in the differing extents to which commercial dealings are regulated in the two jurisdictions; to the debates about unjust enrichment and its province; and to the significance statutes have in contriving the context in which Australia’s common law is evolving.*

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## I INTRODUCTION

Let me begin by setting the scene for what follows. The story of the changes in the formal character of the common law in Australia is well-known and requires little elaboration. Seventy years ago, ours was the common law of England. So much was this felt to be so that Sir Owen Dixon could state uncontroversially:

We are studious to avoid establishing doctrine which English courts would disavow. For we believe that no good can come of divergences between the common law as administered in one jurisdiction of the British Commonwealth and as administered in another.<sup>1</sup>

Thus, it was that the rules of contract law were the rules of English contract law. This was their justification. That was sufficient.<sup>2</sup>

Forty-five years later, but in a changed Australia, Sir Anthony Mason gave his imprimatur to a process which was then well in train:

There is ... every reason why we should fashion a common law for Australia that is best suited to our conditions and circumstances. ... The value of English judgments, like Canadian, New Zealand and for that matter United States judgments, depends on the persuasive force of their reasoning.<sup>3</sup>

A year later the transition from the common law of England to the common law of Australia was belatedly formalised for all practical purposes in the amendment made to s 80 of the *Judiciary Act 1903* (Cth).<sup>4</sup> As Justice James Allsop neatly put it extra-curially: ‘The common law of England had

<sup>1</sup> Sir Owen Dixon, ‘Two Constitutions Compared’ in Sir Owen Dixon, *Jesting Pilate: And Other Papers and Addresses* (Law Book, 1965) 104. This address was originally presented on 26<sup>th</sup> August 1942.

<sup>2</sup> This cast of mind was highly formalistic and largely unquestioning of the law’s policies and purposes. It was reflected in the style of legal education for much of the 20<sup>th</sup> century.

<sup>3</sup> Sir Anthony Mason, ‘Future Directions in Australian Law’ (1987) 13 *Monash University Law Review* 149, 154.

<sup>4</sup> *Law and Justice Legislation Amendment Act 1988* (Cth) s 41. The reference in s 80 of the *Judiciary Act 1903* (Cth) to the ‘common law of England’ was deleted and replaced with the ‘common law in Australia’.

ceased, literally overnight, to be law, but had become a source of law for legal development'.<sup>5</sup>

Today, it is abundantly clear that there are separate bodies of English and Australian common law.<sup>6</sup> And there are clear 'divergences' reflected, not merely in isolated and specific court rulings, but also in differing casts of mind, distinctive methodologies and markedly different contexts (particularly legislative ones) in which the respective bodies of common law do their work. My purpose in this lecture is to illustrate these matters.

If I have a message it is this. We have in the past borrowed, and will continue to borrow, from abroad in the endeavour of making our own law. But to adapt the language of a great Californian Chief Justice and jurist, Roger Traynor, we must, of necessity, 'subject [foreign decisions] to inspection at the border to determine their adaptability to native soil'.<sup>7</sup>

This challenge for judge and counsel alike was demonstrated starkly in the very recent decision of the Full Court of the Federal Court in *Grimaldi v Chameleon Mining NL [No 2]* ('*Grimaldi*')<sup>8</sup> (a decision in which I participated). It did so in two respects. First, despite the importuning of the appellants' counsel, the Court declined to engage in detailed consideration of apparently relevant English authority on de facto directors.<sup>9</sup> This was because, when examined by the Court, 'the legislative context of the English decisions ... so differs from Australia's', as to warrant their being treated with considerable reserve.<sup>10</sup> In any event, the present state of Australian jurisprudence on de facto directors made it unnecessary to seek guidance from abroad.<sup>11</sup>

The second illustration from *Grimaldi* is the more revealing. In the late 19<sup>th</sup> century, the English Court of Appeal held in *Lister & Co v Stubbs*<sup>12</sup> that, while

<sup>5</sup> James Allsop, 'Some Reflections on the Sources of Our Law' (Speech delivered at the Supreme Court of Western Australia Judges' Conference, 18 August 2012) 7 [20] <<http://nswca.jc.nsw.gov.au/courtsofappeal/Speeches/allsop180812.pdf>>. I am grateful to his Honour for providing me with a copy of this important piece.

<sup>6</sup> See Mark Leeming, 'Subrogation, Equity and Unjust Enrichment' in Jamie Glistler and Pauline Ridge (eds), *Fault Lines in Equity* (Hart Publishing, 2012) 27, especially 29–33.

<sup>7</sup> Roger J Traynor, 'Statutes Revolving in Common Law Orbits' (1968) 17 *Catholic University Law Review* 401, 409.

<sup>8</sup> (2012) 200 FCR 296.

<sup>9</sup> Including the United Kingdom Supreme Court decision in *Revenue and Customs Commissioners v Holland* [2010] 1 WLR 2793: see *ibid* 318–19 [51]–[53] (Finn, Stone and Perram JJ).

<sup>10</sup> *Grimaldi* (2012) 200 FCR 296, 320–1 [59] (Finn, Stone and Perram JJ). This matter was not explored by counsel.

<sup>11</sup> *Ibid*.

<sup>12</sup> (1890) 45 Ch D 1.

an agent was accountable to its principal for a bribe or secret commission received, the agent did not hold the bribe as a constructive trustee nor could the bribe be traced by the principal. That proposition was recently reaffirmed by the English Court of Appeal in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* ('*Sinclair Investments*'),<sup>13</sup> notwithstanding the contrary conclusion reached by the Privy Council in 1994.<sup>14</sup> The Full Court in *Grimaldi* refused to follow *Sinclair Investments*. It applied what it considered to be orthodox Australian fiduciary law; it endorsed the policy reasons informing the grant of proprietary relief to sanction the corruption of fiduciaries,<sup>15</sup> and in so doing it aligned Australian law on bribes and secret commissions with that of the United States,<sup>16</sup> Canada,<sup>17</sup> Singapore<sup>18</sup> and New Zealand.<sup>19</sup> To revert to my opening comments, this is the legal universe of Sir Anthony Mason, not Sir Owen Dixon.

The subject of divergence has attracted recent scholarly attention in this country.<sup>20</sup> However, it has been the ongoing, sometimes strident, debate between the predominantly English advocates of an encompassing law of restitution and the predominantly Australian defenders of equity against the extravagant claims of unjust enrichment which has given the subject its sharper edge.<sup>21</sup>

<sup>13</sup> [2012] Ch 453. This decision was widely, but not universally, acclaimed in England by academic commentators: see, eg, Graham Virgo, 'Profits Obtained in Breach of Fiduciary Duty: Personal or Proprietary Claim' (2011) 70 *Cambridge Law Journal* 502. Cf David Hayton, 'Proprietary Liability for Secret Profits' (2011) 127 *Law Quarterly Review* 487. See also, since *Grimaldi*, Lord Peter Millett, 'Bribes and Secret Commissions Again' (2012) 71 *Cambridge Law Journal* 583; *FHR European Ventures LLP v Mankarious* [2013] 3 WLR 466.

<sup>14</sup> *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324.

<sup>15</sup> *Grimaldi* (2012) 200 FCR 296, 422 [582] (Finn, Stone and Perram JJ).

<sup>16</sup> *United States v Carter*, 217 US 286 (1910).

<sup>17</sup> *Insurance Corporation of British Columbia v Lo* (2006) 278 DLR (4<sup>th</sup>) 148.

<sup>18</sup> *Sumitomo Bank Ltd v Tharir* [1993] 1 SLR 735 (Singapore High Court).

<sup>19</sup> *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324.

<sup>20</sup> See, as recent examples, Justice James Douglas, 'England as a Source of Australian Law: For How Long?' (2011) 86 *Australian Law Journal* 333; Jamie Glistler and Pauline Ridge (eds), *Fault Lines in Equity* (Hart Publishing, 2012); Allsop, above n 5.

<sup>21</sup> See, eg, Joachim Dietrich, 'Unjust Enrichment Versus Equitable Principles in England and Australia' in Jamie Glistler and Pauline Ridge (eds), *Fault Lines in Equity* (Hart Publishing, 2012) 1; Andrew Burrows, 'The Australian Law of Restitution: Has the High Court Lost Its Way?' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) 67; Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *University of Western Australia Law Review* 1; Justice W M C Gummow, 'Moses v Macferlan: 250 Years On' (2010) 84 *Australian Law Journal* 756. See also *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516.

My own interest is longstanding. Over 40 years ago, as a student in Cambridge, I began to write an equity related textbook. Save for the slight marring caused by the need to refer to differing local statutory regimes in the two countries, the equity I wrote about appeared to be able to be described properly as Anglo-Australian law. One matter was apparent to me at the time. A very large part of the English case law to which I referred was from the 19<sup>th</sup> century. The 20<sup>th</sup> century decisions — and they were not voluminous — were primarily those of first instance judges. Save for the first decade or so of that century, House of Lords decisions were few and far between and, as the century progressed, their reasoning appeared more problematic to Australian eyes. I would instance the two fiduciary decisions, *Regal (Hastings) Ltd v Gulliver*<sup>22</sup> and *Boardman v Phipps*<sup>23</sup> to illustrate the latter comment. By way of contrast, while late 19<sup>th</sup> century Australian cases were reasonably represented in what I wrote, there was a considerable number of 20<sup>th</sup> century cases, many of which were important High Court contributions to Australia's equity jurisprudence. The significance of this will later become apparent.

Now let me move forward 40 years. I was again in England teaching in a course on equitable intervention in commercial dealings. It was presented on a comparative basis using a number of other common law countries as comparators. I was well aware that outside of the law of trusts<sup>24</sup> and the remedies of specific performance and the injunction, the equity jurisprudence of England and Australia had long since parted company in significant respects. What surprised me though, was that in relation to quite a number of equitable doctrines, English law stood apart (though not invariably) from most or all of the other countries with which I was concerned. It had its own concerns which were not shared elsewhere (either to the same extent or else at all). I will mention four of these.

The *first* is the privileging of contract law as the all but exclusive source of voluntarily assumed rights and obligations — hence, for example, the observation in the Court of Appeal denying relief to a person who was excluded

<sup>22</sup> [1942] 1 All ER 378; [1967] 2 AC 134. For an excellent account of the course of this problematic litigation, see Richard Nolan, 'Regal (Hastings) Ltd v Gulliver (1942)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing, 2012) 499.

<sup>23</sup> [1967] 2 AC 46. I obviously exempt Lord Upjohn from the criticism implicit in what I have said.

<sup>24</sup> I leave out of consideration the bewildering English preoccupation with the proper taxonomy of trusts. For recent examples in this genre, see Ying Khai Liew, 'Rochefoucauld v Boustead (1897)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing, 2012) 423; William Swadling, 'Understanding Resulting Trusts' (2008) 124 *Law Quarterly Review* 72.

from the commercial exploitation of a confidential business plan to which he was a contributor: ‘Mr Murray’s lack of any remedy arose from the undisputed fact that his relationship with the other five members of the original team was not regulated by contract.’<sup>25</sup> Associated with privileging contract is a corresponding reluctance to enlarge the scope of equitable intervention in contracts. Relatedly, there is a marked antipathy to making relied upon voluntary promises and representations actionable. The *second* concern is with property and with maintaining the integrity of property law as such. Emblematic of this is Lord Neuberger’s observation in *Sinclair Investments*:

Whether a proprietary interest exists or not is a matter of property law, and is not a matter of discretion ... It follows that the courts of England and Wales do not recognise a remedial constructive trust as opposed to an institutional constructive trust.<sup>26</sup>

The *third* concern, which infuses Lord Neuberger’s observation, is a marked reticence in allowing judicial discretion to determine the appropriate type of equitable relief to be awarded. If there is to be a choice of remedy, that is for a party to make.

*Fourthly*, a constant refrain in the cases is the earnest to leave commercial parties to fend for themselves — hence the sentiment: ‘In a commercial context ... a degree of self-seeking and ruthless behaviour is expected and accepted to a degree.’<sup>27</sup> The assumption in this, seemingly, is that commercial parties could and should look after their own interests<sup>28</sup> and should bear the risk of their failure to do so. Little by way of concession is to be made for the possibility that a small or medium business enterprise might be quite vulnerable to exploitation by a large, well-resourced enterprise because of its inexperience, lack of power, urgent need, etc.<sup>29</sup>

<sup>25</sup> *Murray v Yorkshire Fund Managers Ltd* [1998] 1 WLR 951, 960 (Schiemann LJ). For, to Australian eyes, a stunning example, see *Baird Textiles Holdings Ltd v Marks and Spencer Plc* [2002] 1 All ER (Comm) 737.

<sup>26</sup> [2012] 1 Ch 453, 470 [37].

<sup>27</sup> *Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch) (5 March 2010) [343] (Sales J).

<sup>28</sup> Including by taking legal advice if necessary.

<sup>29</sup> By way of contrast, the law in the United States, Canada and Australia is more alert to this possibility as the case law on franchises attests: see, eg, *Goodman v Dicker*, 169 F 2d 684 (DC Cir, 1948) (United States); *A & K Lick-a-Chick Franchises Ltd v Cordiv Enterprises Ltd* (1981) 119 DLR (3d) 440 (Canada); *Burger King Corporation v Hungry Jack’s Pty Ltd* (2001) 69 NSWLR 558 (Australia).

These four concerns are by no means reflected either at all, or else in the same degree, in Australian law, as will become apparent.

Another unsurprising conclusion readily suggested itself.<sup>30</sup> Our law in its substance bore close general affinities to that of major United States jurisdictions<sup>31</sup> — even though the Americans, to over-generalise, do not consider themselves now as having a separate body of doctrine which they call ‘equity’ and notwithstanding that relatively few Australian judges resort regularly to United States case law.

As a prelude to illustrating (necessarily selectively) our divergence and to provide some of the more obvious explanations for why English and Australian law are increasingly to be contrasted, not compared, it is necessary to begin with a little legal history. In England, the Judicature Acts of 1873 and 1875 brought together the administration of the common law and equity in a single court. Some, including Maitland, anticipated that over time the separate systems would themselves coalesce. One hundred and thirty-seven years on, one can see this happening in the United Kingdom.<sup>32</sup> Relatedly, the law of trusts and equitable remedies apart, one can see as well the progressive demise of significant parts of an enfeebled equity jurisprudence often unable to withstand the imperialism of restitution — an essentially common law invention as presently conceptualised.

In Australia, the story has been very different. In the colonial period, the Judicature Act system was quickly adopted in all of the colonies save New South Wales. There the separate systems remained. And so things stood until

<sup>30</sup> I say ‘unsurprising’ for this reason. For some time now, the citation of United States texts on equity and trusts in decisions of the High Court has been the commonplace: see, eg, *Andrews v Australia and New Zealand Banking Group* (2012) 247 CLR 205; *Aid/Watch Incorporated v Commissioner of Taxation* (2010) 241 CLR 539. I would instance specifically Joseph Story and Melville M Bigelow, *Commentaries on Equity Jurisprudence: As Administered in England and America* (Little, Brown, and Co, 13<sup>th</sup> ed, 1886); John Norton Pomeroy and Spencer W Symons, *A Treatise on Equity Jurisprudence: As Administered in the United States of America* (Bancroft-Whitney, 5<sup>th</sup> ed, 1941), Austin Wakeman Scott, William Franklin Fratcher and Mark L Ascher, *Scott and Ascher on Trusts* (Aspen, 5<sup>th</sup> ed, 2006); American Law Institute, *Restatement (Third) of the Law of Trusts* (2003). On the regular recent resort to Story’s work, see Chief Justice French, ‘Home Grown Laws in a Global Neighbourhood: Australia, the United States and the Rest’ (2011) 85 *Australian Law Journal* 147, 153. See also Allsop, above n 5, 14–15 [39]–[41].

<sup>31</sup> Explaining the reasons for the similarities is for another day.

<sup>32</sup> In the latest edition of Michael A Jones and Anthony M Dugdale (eds), *Clerk & Lindsell on Torts* (Sweet & Maxwell, 20<sup>th</sup> ed, 2010), for example, the action for breach of confidence and privacy has its own chapter: ch 27.

1970 when the Judicature Act system was adopted, although it did not come into force until 1972.<sup>33</sup>

This almost century long New South Welsh exceptionalism had profound effects. It produced generations of practising lawyers, judges and educators who were masters of equity jurisprudence. I mention only Sir Frederick Jordan, Sir Frank Kitto, Sir Kenneth Jacobs, Sir Anthony Mason and Sir William Deane. The legacy of this in turn was that Australia alone of the Commonwealth countries was to have some number of large, well-known textbooks devoted to equity, or to specific aspects of it (to the exclusion of trusts and property law). I note in contrast that the last significant equity textbook as such in England — *Ashburner's Principles of Equity*<sup>34</sup> — fell from grace not long after the publication of its second edition in 1933.<sup>35</sup>

A related development in New South Wales was also significant. The pre-1973 Equity Division developed a commercial jurisdiction — aided by the ability from 1965 to use the declaration in commercial matters.<sup>36</sup> An obvious consequence was that commercial disputes were being argued by equity lawyers. As is pointed out in *On Equity*,<sup>37</sup> perhaps a little extravagantly, the thinking used to solve commercial disputes was the thinking of equity.<sup>38</sup> Nonetheless, here again the contrast with England is marked. Perhaps it goes some way to explain the apparent differences in emphasis in the following two comments. First, Sir Peter Millett: 'It is of the first importance not to impose fiduciary obligations on parties to a purely commercial relationship'.<sup>39</sup>

<sup>33</sup> *Supreme Court Act 1970* (NSW). For an interesting account of the developments in New South Wales, see Mark Leeming, 'Equity, the Judicature Acts and Restitution' (2011) 5 *Journal of Equity* 199.

<sup>34</sup> Walter Ashburner and Denis Browne, *Ashburner's Principles of Equity* (Butterworth, 2<sup>nd</sup> ed, 1933).

<sup>35</sup> In saying this, I do not mean to demean John McGhee (ed), *Snell's Principles of Equity* (Sweet & Maxwell, 32<sup>nd</sup> ed, 2010).

<sup>36</sup> See Justice Peter W Young, 'Foreword' in Kanaga Dharmananda and Anthony Papamatheos (eds), *Perspectives on Declaratory Relief* (Federation Press, 2010) v; *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 435 (Gibbs J).

<sup>37</sup> Peter W Young, Clyde Croft, Megan Louise Smith, *On Equity* (Thomson Reuters, 2009) 51–2 [1.550].

<sup>38</sup> The Common Law Division, I should note, operated a Commercial List until 1 January 1987: *Supreme Court Act 1970* (NSW) s 56, as repealed by *Supreme Court Act (Commercial Division) Act 1985* (NSW) sch 1 item 5.

<sup>39</sup> Sir Peter Millett, 'Equity's Place in the Law of Commerce' (1998) 114 *Law Quarterly Review* 214, 217. See also, to like effect, *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752, 1785–6 [81] (Lord Walker).



Secondly, Sir Anthony Mason: ‘it is altogether too simplistic, if not superficial, to suggest that commercial transactions stand outside the fiduciary regime’.<sup>40</sup>

I do not for one moment suggest that a knowledge of equity was, and remains, the peculiar province of New South Wales lawyers. Far from it. Victoria’s role call is equally impressive: Sir Leo Cussen, Sir Owen Dixon, Sir Wilfred Fullagar and Sir Douglas Menzies. What I do suggest, though, is that the failure to adopt a Judicature Act system for so long had large consequences for the orientation, preoccupations and methodologies of Australian law.

This takes me back to a theme I have foreshadowed. Across the first seven decades of the 20<sup>th</sup> century, the High Court of Australia dealt regularly with cases involving equitable doctrines and, to a lesser extent, trust principles. That period was one of measured and orderly development of the law and one in which Sir Owen Dixon was a long and influential presence. Importantly, the contemporary significance and reach of doctrines evolved in England in earlier centuries were reaffirmed and elaborated. This provided the intellectual foundations for what was to come in the 1980s.

What needs emphasis is that the relatively large number of High Court decisions created for us a distinctive corpus of equity jurisprudence on which we could build, and have built. Outside of mainstream trust law and equitable remedy, there was no parallel English development. The doctrines then dealt with by the High Court — and I mention these without elaboration — included the unconscionable dealings doctrine,<sup>41</sup> undue influence,<sup>42</sup> fiduciary obligations,<sup>43</sup> the law of assignments and the rule in *Milroy v Lord*,<sup>44</sup> the constructive trust in its myriad of manifestations,<sup>45</sup> trusts of money receipts,<sup>46</sup> contribution,<sup>47</sup> statutory trusts,<sup>48</sup> and directors’ duties and judicial review of board decisions.<sup>49</sup>

<sup>40</sup> *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 100.

<sup>41</sup> See, eg, *Blomley v Ryan* (1956) 99 CLR 362.

<sup>42</sup> See, eg, *Johnson v Buttress* (1936) 56 CLR 113.

<sup>43</sup> See, eg, *Furs Ltd v Tomkies* (1936) 54 CLR 583. The cases involving fiduciary obligations are numerous.

<sup>44</sup> (1862) De GF & J 264; 45 ER 1185. See, eg, *Anning v Anning* (1907) 4 CLR 1049.

<sup>45</sup> See, eg, *Birmingham v Renfrew* (1937) 57 CLR 666 (mutual wills); *Black v S Freedman & Co* (1910) 12 CLR 105 (stolen property).

<sup>46</sup> See, eg, *Palette Shoes Pty Ltd (in liq) v Krohn* (1937) 58 CLR 1.

<sup>47</sup> See, eg, *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342, 348–52 (Kitto J).

<sup>48</sup> See, eg, *Fouche v Superannuation Fund Board* (1952) 88 CLR 609.

<sup>49</sup> See, eg, *Mills v Mills* (1938) 60 CLR 150; *Thorby v Goldberg* (1964) 112 CLR 597.

Now to the 1980s. The first truly creative burst in the rethinking of Australian law began in 1983. Almost predictably given what I have said so far, its focus was in the main on equitable intervention in contract and commercial dealings. In the ensuing decade it travelled far beyond equity, but that is not my present concern. One need only go to the Commonwealth Law Reports of 1983 and 1984 to appreciate the dimensions of the change that was on foot.<sup>50</sup> The equity cases are well-known. I will mention only three by name: *Commercial Bank of Australia v Amadio* ('Amadio'),<sup>51</sup> *Taylor v Johnson*<sup>52</sup> and *Hospital Products Ltd v United States Surgical Corporation* ('Hospital Products').<sup>53</sup> Much more was to come.

Here, in contrast to the earlier period, resort was made to basal principle and to organising ideas. It was necessary. This was a time of evolution and adaptation. And in revealing their mastery of equity jurisprudence, Justices Mason and Deane took us back far more explicitly to 'unconscionable conduct'. They were using language more than half forgotten in England, but not so in Australia or the United States.<sup>54</sup>

How the concept of unconscionable conduct has been used both historically and in Australian law is often misunderstood by English judges and scholars,<sup>55</sup> increasingly to the point of criticism, rejection or abandonment.<sup>56</sup> Forgetting, though, is as much a characteristic of legal memory as is remembering.<sup>57</sup>

<sup>50</sup> See Paul Finn, 'Commerce, the Common Law and Morality' (1989) 17 *Melbourne University Law Review* 87.

<sup>51</sup> (1983) 151 CLR 447.

<sup>52</sup> (1983) 151 CLR 422.

<sup>53</sup> (1984) 156 CLR 41.

<sup>54</sup> Explicit reference was made to such conduct: see, eg, *Uniform Commercial Code* § 2-302 (2012) ('UCC').

<sup>55</sup> An egregious example is to be found in Birks, above n 21, 16–17.

<sup>56</sup> See, eg, *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 392 (Lord Nicholls) ('*Royal Brunei*'); *Twinsectra Ltd v Yardley* [2002] 2 AC 164; *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2006] 1 WLR 1476; Sir Anthony Mason, 'Fusion' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook, 2005) 15; George Spence, *Equitable Jurisdiction of the Court of Chancery* (Lea and Blanchard, 1846) vol 1, 411; *National City Bank of New York v Gelfert*, 29 NE (2d) 449, 452 (Loughran J for Lehman CJ, Loughran, Finch, Rippey, Sears and Conway JJ) (1940). I have attended quite some number of lectures and seminars in England where Australian equitable doctrine has been subjected to misguided and ahistorical criticism precisely because of its fidelity to the idea of 'conscience' as a fundamental precept of equity.

<sup>57</sup> To take but one example. Speaking in the context of accessory liability in equity in *Royal Brunei* [1995] 2 AC 378, 392, Lord Nicholls observed:

Largely, I venture, as a response to English inspired criticisms, the High Court has on several occasions explained how the unconscionable conduct formula is used in Australian equity. So, for example, in *Tanwar Enterprises Pty Ltd v Cauchi* the plurality commented:

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.<sup>58</sup>

So far I have told only the Australian story. However, it needs to be said that outside of the mainstream of trust law, breach of confidence and equitable remedy, there is little by way of an English counterpart story to narrate. House of Lords decisions have been few indeed until the near end of the 20<sup>th</sup> century. It is difficult to avoid the conclusion that there was a progressive decline of equity jurisprudence from the early 20<sup>th</sup> century until a rebirth or, perhaps more accurately, a re-imagining of sorts began in the 1980s. This obviously is a crude oversimplification but it will suffice for present purposes.

Unconscionable is a word of immediate appeal to an equity lawyer ... It must be recognised, however, that unconscionable is not a word in everyday use by non-lawyers. If it is to be used in this context, and if it is to be the touchstone for liability as an accessory, it is essential to be clear on what, *in this context*, unconscionable means. If unconscionable means no more than dishonesty, then dishonesty is the preferable label. If unconscionable means something different, it must be said that it is not clear what that something different is. Either way, therefore, the term is better avoided in this context.

Given the less than distinguished sequel to this invocation of ‘dishonesty’, one cannot be altogether surprised at Sir Anthony Mason’s later wry comment: ‘So much for the superior claims of “dishonest” conduct over “unconscionable” conduct in the search for certainty’: Sir Anthony Mason, ‘Fusion’, above n 56, 15.

<sup>58</sup> (2003) 217 CLR 315, 324 [20] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ). The judgment went on to acknowledge that

the phrase ‘unconscionable conduct’ tends to mislead in several respects ... [I]t encourages the false notion that (i) there is a distinct cause of action, akin to an equitable tort, wherever a plaintiff points to conduct which merits the epithet ‘unconscionable’; and (ii) there is an equitable defence to the assertion of any legal right, whether by action to recover a debt or damages in tort or for breach of contract, where in the circumstances it has become unconscionable for the plaintiff to rely on that legal right: at 325 [23]–[24].

With the benefit of hindsight one can venture some possibly controversial suggestions to explain this. Relatively speaking, the 20<sup>th</sup> century in England can properly be described as the century of the common law. For much of it the pre-eminent Law Lords were, generally, common and commercial lawyers.<sup>59</sup> Save for its early years,<sup>60</sup> it was not a Chancery lawyer's century.<sup>61</sup> One very obvious manifestation of this was to be seen in the shaping of English contract law. That certainty should triumph over fairness became an almost unchallenged and unchallengeable creed<sup>62</sup> and made the more so because, unlike in Australia, the United States, Canada and New Zealand, statute did little to redress the imbalance between certainty and fairness. The misnamed *Australian Consumer Law*<sup>63</sup> (and its predecessor)<sup>64</sup> has no British counterpart. Yet, it has federal and state reflections in the United States, in the Canadian province of Ontario and in New Zealand.

In the last 40 years there have been obvious changes in the constitutional, social and legal concerns of the two countries. I would instance simply one legal concern which is of present consequence because of its impact on equity jurisprudence in England. That is the fascination with the law of restitution or unjust enrichment.<sup>65</sup> How much over time it will be invoked to explain, rebadge or replace in England what in this country is longstanding equitable doctrine remains to be seen. There are some intimations it is happening already.<sup>66</sup>

Let me turn now to a few specific doctrines and principles to illustrate what I have been saying. There is quite a number from which I could have chosen.

<sup>59</sup> As, for example, Lords Atkin, Wright, Radcliffe, Devlin and Diplock.

<sup>60</sup> See, eg, *Nocton v Ashburton* [1914] AC 932; *Vatcher v Paull* [1916] AC 372; *Cook v Deeks* [1916] 1 AC 554.

<sup>61</sup> One must nonetheless mention Lord Upjohn and Lord Wilberforce.

<sup>62</sup> The efforts of Lord Denning MR to ameliorate this state of affairs were often flawed and were largely unsuccessful as, for example, the proposed principle of inequality of bargaining power. Even where they served purposes that have been embraced in other jurisdictions, eg mistake in equity, they have suffered reverses and abandonment in England: see, eg, *Great Peace Shipping Ltd v Tsavlis Salvage (International) Ltd* [2003] QB 679; cf *Chwee Kin Keong v Digilandmall.com Pte Ltd* (2005) 1 SLR 502 (Singapore Court of Appeal).

<sup>63</sup> *Competition and Consumer Act 2010* (Cth) sch 2.

<sup>64</sup> See *Trade Practices Act 1974* (Cth) pts IVA, V.

<sup>65</sup> Even the correct nomenclature has produced a battleground.

<sup>66</sup> See, eg, *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 231, where Lord Hoffman asserted that equitable subrogation belongs to unjust enrichment. See also Burrows, above n 21. Cf *ENE Kos 1 Ltd v Petroles Brasilere SA* [No 2] [2012] 2 AC 164.

## II THE UNCONSCIONABLE DEALINGS DOCTRINE

It is this doctrine which precludes a person from taking advantage of a person in a position of special disadvantage. The doctrine itself had its modern genesis in the mid-18<sup>th</sup> century decision of Lord Hardwicke in *Earl of Chesterfield v Janssen*.<sup>67</sup> Quite some number of the earlier cases involved the exploitation of that now all but extinct species, the expectant heir. By the 19<sup>th</sup> century many of the cases involved the improvident sale of land by an ignorant vendor whose only advice came from the purchaser's solicitor. The last reported English case of that century was *Fry v Lane* in which the following formulation of the law was given:

The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction.<sup>68</sup>

Consistent with what I am going to say, after *Fry v Lane* the English version of this doctrine went into hibernation for almost 90 years.<sup>69</sup> There was, not for the first time, an historical discontinuity. As reborn, the doctrine now required the conduct in question to be 'morally reprehensible'.<sup>70</sup> This is quite some distance from what in Australia is required to establish unconscionable conduct.<sup>71</sup> It was later confirmed in England that this particular jurisdiction had very limited availability.<sup>72</sup>

The Australian 20<sup>th</sup> century story was markedly different. Beginning with *Dowsett v Reid*<sup>73</sup> in 1913, the High Court by mid-century considered the

<sup>67</sup> (1750) 2 Ves Sen 125, 155–6; 28 ER 82, 100.

<sup>68</sup> (1889) 40 Ch D 312, 322 (Kay J).

<sup>69</sup> See David Capper, 'The Unconscionable Bargain in the Common Law World' (2010) 126 *Law Quarterly Review* 403. Its limp resuscitation occurred in *Cresswell v Potter* [1978] 1 WLR 255, in which no High Court decision, of which there were now a number, was cited.

<sup>70</sup> *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84, 110 (Browne-Wilkinson J). See also *Boustany v Pigott* (1995) 69 P & CR 298, 303–4 (Lord Templeman for Lords Templeman, Lowry, Mustill and Slynn).

<sup>71</sup> See *Amadio* (1983) 151 CLR 447, 478 (Deane J).

<sup>72</sup> *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221. In a comparative piece, a British scholar, David Capper, above n 69, 408, concluded:

It is quite clear that the doctrine applied by the English courts during this period of reincarnation for the unconscionable bargain is significantly different from that applied by courts in other common law jurisdictions. ... [W]hat is more curious is that English developments equally clearly reject the English doctrine of the late 19<sup>th</sup> century.

<sup>73</sup> (1912) 15 CLR 695.

doctrine on some number of occasions.<sup>74</sup> In that process the simple formulation of *Fry v Lane* had become the authoritative exposition of Fullagar J in *Blomley v Ryan*:

The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-à-vis the other. It does not appear to be essential in all cases that the party at a disadvantage should suffer loss or detriment by the bargain.<sup>75</sup>

The concluding ‘common characteristic’ identified by Fullagar J is of no little importance. The platform had been laid for the landmark decision of the High Court in *Amadio*.<sup>76</sup> It is unnecessary to elaborate here upon *Amadio* other than to say it signalled an enlarging of the reach of the doctrine in the fashion suggested by Fullagar J. The issue it left open was the extent to which the doctrine could have any purchase in commercial dealings. Both United States and Canadian courts have acknowledged it can, albeit in unusual circumstances.<sup>77</sup> The High Court has shown diffidence in this regard,<sup>78</sup> although it is hard to see why, in appropriate circumstances, the doctrine should not be able to be so invoked by vulnerable small business parties. The Canadian cases in particular are testament to this.

The final point to be emphasised, and this has real contextual significance now, is that in Australia, the United States and Ontario, but not in the United Kingdom, the equitable doctrine (or the common law in the United States) is reinforced by significant statutory provisions.<sup>79</sup>

<sup>74</sup> See, eg, *Wilton v Farnworth* (1948) 76 CLR 646; *Blomley v Ryan* (1956) 99 CLR 362.

<sup>75</sup> (1956) 99 CLR 362, 405.

<sup>76</sup> (1983) 151 CLR 447.

<sup>77</sup> See, eg, *Construction Associates Inc v Fargo Water Equipment Company*, 446 NW 2d 237 (1989), especially 242 (Erickstad CJ); *Harry v Kreutziger* (1978) 95 DLR (3d) 231; *A & K Lick-a-Chick Franchises Ltd v Cordiv Enterprises Ltd* (1981) 119 DLR (3d) 440. See also the provocative dissent of Frankfurter J in *United States v Bethlehem Steel Corporation*, 315 US 281 (1941), especially at 326.

<sup>78</sup> See *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51; *Kakavas v Crown Melbourne Ltd* (2013) 298 ALR 35.

<sup>79</sup> See *Australian Consumer Law* pt 2-2; UCC § 2-302 (US). On Canadian law, see generally G H L Fridman, *The Law of Contract in Canada* (Carswell, 5<sup>th</sup> ed, 2006) ch 9.

## III UNDUE INFLUENCE

A like, though more complex, story could be told of the fates of the law of undue influence in 20<sup>th</sup> century Australia and England. As was emphasised both by Mason J and Deane J in *Amadio*, unconscionable dealing and undue influence are closely related but are distinct.<sup>80</sup> Again against the background of 19<sup>th</sup> century English cases, the course of Australian law was set: first in the 1936 decision of *Johnson v Buttress*, and particularly in the reasons of Dixon J which gave relational undue influence a fiduciary (or abuse of trust and confidence) orientation;<sup>81</sup> and, secondly, in *Bank of New South Wales v Rogers*<sup>82</sup> in 1941 which extended liability to a third party who knowingly dealt with the person subject to influence. English law again parted company from ours in the 1985 House of Lords decision of *National Westminster Bank Plc v Morgan*<sup>83</sup> when, unexpectedly, the law was given a new foundation. Any fiduciary connection was discarded. Put inexactly, undue influence was now to be tied to victimisation resulting in manifest disadvantage. So conceived, it appears to be subsuming much of what potentially fell within the unconscionable dealings doctrine which, as I have noted, is now near to lifeless.<sup>84</sup>

It was no matter for surprise that Lord Browne-Wilkinson, an eminent Chancery lawyer, was later to question the requirement of ‘manifest disadvantage’ and the unexplained departure from long established principle.<sup>85</sup> I

<sup>80</sup> (1983) 151 CLR 447, 461 (Mason J), 474 (Deane J).

<sup>81</sup> (1936) 56 CLR 113, 134–6.

<sup>82</sup> (1941) 65 CLR 42.

<sup>83</sup> [1985] 1 AC 686.

<sup>84</sup> John McGhee (ed), *Snell's Equity* (Sweet & Maxwell, 32<sup>nd</sup> ed, 2010) treats undue influence over 25 pages, and unconscionable dealing over 9 but 3 of which are devoted to money lending statutes: at 251–85 [8-008]–[8-042].

<sup>85</sup> See *CIBC Mortgages Plc v Pitt* [1994] 1 AC 200, 209 where his Lordship observed:

The difficulty is to establish the relationship between the law as laid down in [*National Westminster Bank Plc v Morgan* [1985] AC 686] and the long standing principle laid down in the abuse of confidence cases viz the law requires those in a fiduciary position who enter into transactions with those to whom they owe fiduciary duties to establish affirmatively that the transaction was a fair one. The abuse of confidence principle is founded on considerations of general public policy, viz that in order to protect those to whom fiduciaries owe duties as a class from exploitation by fiduciaries as a class, the law imposes a heavy duty on fiduciaries to show the righteousness of the transactions they enter into with those to whom they owe such duties. This principle is in sharp contrast with the view of this House in *Morgan* that in cases of presumed undue influence (a) the law is not based on considerations of public policy and (b) that it is for the claimant to prove that the transaction was disadvantageous rather than for the fiduciary to prove that it was not disadvantageous. Unfortunately, the attention of this House in *Morgan* was not

will not refer further to this other than to say that English law cannot sensibly be a subject of comparison with our doctrine.<sup>86</sup>

#### IV AUSTRALIAN FIDUCIARY LAW

The principles which inform this body of law date back some centuries, but the calls made upon it grew exponentially from the late 19<sup>th</sup> century with the rise of new business forms and relationships, the proliferation of types of agency relationship, the increasing utilisation of advisers and the value and advantage that could be given by the possession of non-public information or the awareness of a yet unexploited opportunity. Given the nature and size of the Australian economy in the 20<sup>th</sup> century, it is almost counterintuitive to suggest that we earlier developed a more defined and coherent fiduciary law than other Commonwealth countries including the United Kingdom.<sup>87</sup> Yet we did.

I would ascribe this to the phenomenon I have been discussing — the regularity with which fiduciary cases came to the High Court and the equity scholarship brought to bear on them. I note first those cases concerned with setting the standards of conduct to be imposed on fiduciaries — standards which find their ultimate expression in the two themes of ‘conflict of duty and interest’ and ‘misuse of fiduciary position’ identified by Deane J in *Chan v Zacharia*.<sup>88</sup> The roll call is impressively long. I merely note the following: *Birtchnell v Equity Trustees, Executors & Agency Co Ltd*,<sup>89</sup> *Furs Ltd v Tomkies*,<sup>90</sup> *Peninsular and Oriental Steam Navigation Co v Johnson*,<sup>91</sup> *Keith Henry and Co Pty Ltd v Stuart Walker and Co Pty Ltd*,<sup>92</sup> *Hospital Products*,<sup>93</sup> *Chan v Zacha-*

drawn to the abuse of confidence cases and therefore the interaction between the two principles (if indeed they are two separate principles) remains obscure (citations omitted) (emphasis in original).

<sup>86</sup> A lengthy account of why this is so is to be found in Rick Bigwood’s critique: Rick Bigwood, ‘From *Morgan* to *Etridge*: Tracing the (Dis)Integration of Undue Influence in the United Kingdom’ in Jason W Neyers, Richard Bronaugh and Stephen G A Pitel (eds), *Exploring Contract Law* (Hart Publishing, 2009) 379.

<sup>87</sup> See, eg, Charles Hollander and Simon Salzedo, *Conflicts of Interest* (Sweet & Maxwell, 4<sup>th</sup> ed, 2011) 1–2 [1-001].

<sup>88</sup> (1984) 154 CLR 178, 198–9.

<sup>89</sup> (1929) 42 CLR 384.

<sup>90</sup> (1936) 54 CLR 583.

<sup>91</sup> (1938) 60 CLR 189.

<sup>92</sup> (1958) 100 CLR 342.

<sup>93</sup> (1984) 156 CLR 41.



ria,<sup>94</sup> *United Dominions Corporation Ltd v Brian Pty Ltd*,<sup>95</sup> *Breen v Williams*,<sup>96</sup> and *Pilmer v Duke Group Ltd (in liq)*.<sup>97</sup>

To these may be added those decisions concerned with judicial review of the exercise of fiduciary powers, especially by directors — and I instance such decisions as *Mills v Mills*<sup>98</sup> and *Thorby v Goldberg*<sup>99</sup> — and, finally, those concerned with the remedies available against defaulting fiduciaries as, for example, *Warman International Ltd v Dwyer*<sup>100</sup> and *Hospital Products*.

It is fair to say that the principles of modern Australian fiduciary law have anticipated and so provide the benchmarks of orthodoxy both in doctrine and for remedy against which the law of other Commonwealth countries, including England, is to be measured.<sup>101</sup> This said, and save in relation to remedy, English fiduciary law more closely approximates to our own.<sup>102</sup> A likely reason for this is the regard that has been had both to High Court decisions, in particular both to Mason J's judgment in *Hospital Products* and Deane J's in *Chan v Zacharia*, and to Australian legal scholarship.

<sup>94</sup> (1984) 154 CLR 178.

<sup>95</sup> (1985) 157 CLR 1.

<sup>96</sup> (1996) 186 CLR 71.

<sup>97</sup> (2001) 207 CLR 165.

<sup>98</sup> (1938) 60 CLR 150.

<sup>99</sup> (1964) 112 CLR 597.

<sup>100</sup> (1995) 182 CLR 544.

<sup>101</sup> See, eg, P D Finn, 'The Fiduciary Principle' in T G Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989). See also Hollander and Salzedo, above n 87, 1–2 [1-001].

<sup>102</sup> It is appropriate though to mention that what has become known in England as the rule in *Pallant v Morgan* [1953] Ch 43 seems to be a superfluous invention so far as Australian law is concerned. It has been referred to but, seemingly, never applied here. The rule, as later described in *Holiday Inns Inc v Broadhead* (Unreported, Court of Chancery, Megarry J, 19 December 1969), as quoted by Chadwick LJ in *Banner Homes Group Plc v Luff Developments Ltd* [2000] Ch 372, 391, is that:

if A and B agree that A will acquire some specific property for the joint benefit of A and B on terms yet to be agreed and B in reliance on A's agreement is thereby induced to refrain from attempting to acquire the property equity ought not to permit A when he acquires the property to insist on retaining the whole benefit for himself to the exclusion of B.

That is, a constructive trust arises. I merely note that in Australia that problem would be dealt with either as a breach of fiduciary duty or on the basis of equitable estoppel. It needs no separate rule. The English rule is explicable though. It dates from 1953 and thus predates modern English developments both in fiduciary law and equitable estoppel. See the unsuccessful attempt by Etherton LJ to bring *Pallant v Morgan* within the fiduciary regime in *Crossco No 4 Unlimited volan Ltd* [2012] 2 All ER 754.

## V ESTOPPEL IN EQUITY

This provides much the most important but complex illustration of divergence. For present purposes I will focus primarily on those aspects of estoppel which give rise to a cause of action in equity. Their 19<sup>th</sup> century development was tortuous and confused. Four strands in the modern emergence of what I will call ‘cause of action (or equitable) estoppel’ warrant note.

Historically, two of these related exclusively to property. If I encouraged you to believe my property was or would be yours, or if I acquiesced in your mistaken belief that my property was yours, and if, in either case you acted in reliance on that assumption, I could be compelled to make the assumption good or else make good your loss because of your reliance on it. These two forms of estoppel, which have differing requirements, themselves give rise to causes of action. They are often referred to collectively as ‘proprietary estoppel’. They have survived in England and Australia to this day, though again both experienced a long hibernation in the first half of the 20<sup>th</sup> century.<sup>103</sup>

A third species of estoppel, which applied both to representations of fact and, importantly, of intention, could in some circumstances require a representation to be made good or else compensation be paid for loss arising from detrimental reliance. That is, it could give rise to a cause of action. This jurisdiction was emasculated by a series of House of Lords decisions in the second half of the 19<sup>th</sup> century.<sup>104</sup> Estoppel by representation in equity was limited to representations of fact. And only fraudulent representations were actionable. At the centre of these developments was the sentiment expounded by Lord Cranworth in *Jorden v Money*<sup>105</sup> that to be enforceable, a representation of intention had to be contractual in character. Contract and the doctrine of consideration were driving equity from the field. That proprietary estoppel escaped the scythe of *Jorden v Money* (to the extent proprietary estoppel would enforce reliance upon gratuitous promises) was probably due to its being totally overlooked in England in the first half of the 20<sup>th</sup> century.<sup>106</sup>

<sup>103</sup> Their reinvigoration commenced in New Zealand in 1956: *Thomas v Thomas* [1956] NZLR 785. This was followed quickly, but often confusingly so, in England: see P D Finn, ‘Equitable Estoppel’ in P D Finn (ed), *Essays in Equity* (Law Book, 1985) 59.

<sup>104</sup> On this jurisdiction and its emasculation, see generally Michael Lobban, ‘Part Two — Contract’ in William Cornish et al, *The Oxford History of the Laws of England* (Oxford University Press, 2010) vol 12, 366–72, 416–17. See also Finn, ‘Equitable Estoppel’, above n 103, 62–5.

<sup>105</sup> (1854) 5 HLC 185, 216; 10 ER 868, 882.

<sup>106</sup> There were some number of Indian Privy Council appeals in the early decades of the century which had no apparent influence in England.

A fourth species of estoppel involved a slight retreat from *Jorden v Money*. If a person represented how they would exercise their right against another, and that other relied upon that, he or she could use estoppel defensively so as to prevent the right being exercised otherwise than as represented, or at least only after giving reasonable notice that the representation was no longer operative. It is this species of estoppel that Lord Denning resurrected in 1947 in *Central London Property Trust Ltd v High Trees House Ltd*,<sup>107</sup> and which the High Court in *Legione v Hateley*<sup>108</sup> incorporated into Australian law as ‘promissory estoppel’ in 1983. *Legione v Hateley*, I would note in passing, was the herald of the equity revolution in Australia which commenced in that year.

The first seven decades were wholly unremarkable for equitable estoppel in Australia. This body of law had its long sleep as in England. And when ‘promissory estoppel’ and then ‘proprietary estoppel’ were resurrected we followed English law. However, there were in the interim three important extraneous developments that require notice.

The first resulted from two landmark judgments on common law estoppel, *Thompson v Palmer*<sup>109</sup> and *Grundt v Great Boulder Pty Gold Mines Ltd* (‘*Grundt*’).<sup>110</sup> In them, Dixon J exposed the essential unity of the manifestations of estoppel by conduct at common law. Their rationale lay in not permitting ‘an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations’.<sup>111</sup> The trigger to this species of estoppel (which was not a cause of action) was that:

That other must have so acted or abstained from acting upon the footing of the state of affairs assumed that he would suffer a detriment if the opposite party were afterwards allowed to set up rights against him inconsistent with the assumption.<sup>112</sup>

A foundation had been laid for the rejuvenation of estoppel in equity.

The second development occurred in the United States. At the turn of the 20<sup>th</sup> century there were marked similarities in presently relevant equity

<sup>107</sup> [1947] KB 130.

<sup>108</sup> [1983] 152 CLR 406.

<sup>109</sup> (1933) 49 CLR 507, 547 (Dixon J).

<sup>110</sup> (1937) 59 CLR 641, 674–5 (Dixon J).

<sup>111</sup> *Ibid* 674.

<sup>112</sup> *Ibid*.

jurisprudence between United States jurisdictions and the United Kingdom.<sup>113</sup> Nonetheless, there was real appreciation in the United States that in a number of disparate areas of the law, the courts were enforcing relied upon gratuitous promises and that this was apparently anomalous given that United States contract law was premised on a bargain theory. A promisee's unsolicited reliance on a promise would not constitute consideration precisely because it was not bargained for. To give several examples, apart from gratuitous promises to convey land, charitable subscriptions were enforced as were promises to abandon existing rights — the very thing that, in *Jorden v Money*, the House of Lords refused to do.

These disparate strands<sup>114</sup> provided the underpinning for the 'Promissory Estoppel' doctrine propounded by the American Law Institute in § 90 of the first *Restatement of the Law of Contracts* in 1932.<sup>115</sup> In its present form, § 90 provides:

- (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.<sup>116</sup>

To make the obvious observation, this eliminated the need to find a bargain. It did not require consideration to hold a person liable on his or her promise. A real and early issue for § 90 was whether its reach would be extended by the courts beyond what I will call donative promises (or proposed gifts) to gratuitous promises made in commercial transactions.<sup>117</sup> Could promissory

<sup>113</sup> So much so that Story's *Equity Jurisprudence* then had an English edition: Justice Joseph Story and W E Grigsby, *Commentaries on Equity Jurisprudence: First English Edition* (Stevens and Haynes, 1<sup>st</sup> ed, 1884).

<sup>114</sup> Outlined in Samuel Williston and Richard A Lord, *A Treatise on the Law of Contracts* (Lawyers Cooperative Publishing, 4<sup>th</sup> ed, 1992) 38–70, § 8:4.

<sup>115</sup> The title 'promissory estoppel' has since been adopted in United States jurisprudence — it is not used in the *Restatements* — to differentiate estoppels relating to assumptions of fact and those relating to promises or assurances as to future conduct. With the promulgation of the first *Restatement* the promissory estoppel doctrine began to flourish. As Williston notes, the extent to which the courts made use of the doctrine inspired the drafters of the *Restatement (Second) of Contracts* (1981) to expand dramatically the applicability of promissory estoppel: Williston and Lord, above n 114, 48. The story of the evolution of the two *Restatements of Contracts* is outlined in, amongst other places, Jay M Feinman 'Promissory Estoppel and Judicial Method' (1983) 97 *Harvard Law Review* 678, 679–96.

<sup>116</sup> American Law Institute, *Restatement (Second) of Contracts* (1981).

<sup>117</sup> By gratuitous promises I here mean no more than promises not supported by consideration.

estoppel be used as a substitute for a bargain in a commercial setting, especially where a later contract was contemplated? There was initial resistance to this but a number of originally controversial decisions broke the opposition.

There were three particularly noteworthy cases all of which involved pre-contractual negotiations in which representations of intention as to entry into a future contract were made and relied upon.<sup>118</sup> The representations in each case were relied upon but not honoured. In each case damages were awarded for reliance losses. I only mention one of these cases by name — *Drennan v Star Paving Co*<sup>119</sup> — for reasons which will next appear. I should add that the *Restatement's* provision and this subsequent case law were the subject of debate in Australia in the 1980s.<sup>120</sup>

The third development passed unnoticed. It was a decision of the Supreme Court of India in 1978 in *Motilal Padampat Sugar Mills Co Ltd v State of Uttar Pradesh*.<sup>121</sup> India was the first Commonwealth country to adopt what we in this country now call 'equitable estoppel' as a cause of action. Voluntary or gratuitous promises or representations made and assurances given, if reasonably relied upon, were actionable, if resiled from to the detriment of the reliant party. The Supreme Court reached that conclusion by drawing together the English law of proprietary and promissory estoppel, Dixon J's judgment in *Grundt*, § 90 of the *Restatement*<sup>122</sup> and the decision in *Drennan v Star Paving Co*.

Then, in 1987 in *Waltons Stores (Interstate) Ltd v Maher* ('Waltons Stores'),<sup>123</sup> the High Court began Australia's journey down the same path — a path against which England has resolutely turned its back. While our estoppel waters have been muddied unhelpfully by a regression by some judges of the New South Wales Court of Appeal to an earlier prescriptive formalism more suited to English law,<sup>124</sup> the High Court has not subsequently disavowed the

<sup>118</sup> Two cases related to the proposed grant of a franchise: *Goodman v Dicker*, 169 F 2d 684 (DC Cir, 1948); *Hoffman v Red Owl Stores Inc*, 133 NW 2d 267 (Wis, 1965); the other to a subcontractor's bid: *Drennan v Star Paving Co*, 333 P 2d 757 (Cal, 1958).

<sup>119</sup> 333 P 2d 757 (Cal, 1958).

<sup>120</sup> See, eg, K C T Sutton, 'Promises and Consideration' in P D Finn (ed), *Essays on Contract* (Law Book, 1987) 35, 65–9; P D Finn, 'Equity and Contract' in P D Finn (ed), *Essays on Contract* (Law Book, 1987) 104, 112, 119–20, 122.

<sup>121</sup> [1979] 2 SCR 641.

<sup>122</sup> American Law Institute, *Restatement of the Law of Contracts* (1932).

<sup>123</sup> (1988) 164 CLR 387.

<sup>124</sup> The principal exponent of this manoeuvre is the Hon Ken Handley: see, eg, Justice K R Handley, *Estoppel by Conduct and Election* (Sweet & Maxwell, 2006) 180–1 [11-030], 220–4 [13-037]–[13-042]; Justice K R Handley, 'The Three High Court Decisions on Estoppel

views of Mason CJ and Wilson J, and Brennan J, in *Waltons Stores*, that cause of action estoppel (ie equitable estoppel) is not limited to what in England is now designated as ‘proprietary estoppel’.<sup>125</sup>

That there was no reason in principle for so limiting equitable estoppel was adverted to explicitly by Brennan J in *Waltons Stores*:

If it be unconscionable for an owner of property in certain circumstances to fail to fulfil a non-contractual promise that he will convey an interest in the property to another, is there any reason in principle why it is not unconscionable in similar circumstances for a person to fail to fulfil a non-contractual promise that he will confer a non-proprietary legal right on another?<sup>126</sup>

Thus, the majority in *Waltons Stores* reached a conclusion similar to that of United States judges who, for example, could find no rational basis for distinguishing a relied upon non-contractual promise to give a franchise from one to give an interest in property.<sup>127</sup>

In both the United States and now Australia this development has given equitable estoppel a real salience in commercial settings — the very domain which the English wish to keep immunised from ‘fiduciary obligations and equitable estoppel’.<sup>128</sup> This in turn provides their justification for limiting equitable estoppel to cases of proprietary estoppel.

The difference between English and Australian jurisprudence here is stark and is acknowledged in England to be so. *Baird Textile Holdings Ltd v Marks and Spencer Plc*<sup>129</sup> demonstrates this. In that case, the Court refused to invoke equitable estoppel where a long-term business relationship involving large scale investment was terminated peremptorily after 70 years. The relationship was conducted designedly without any contract being entered into, but with assurances that it would only be terminated upon the giving of reasonable notice. There being no question of proprietary estoppel, it was recognised that such development as would be necessary to make Baird’s reliance loss

1988–1990’ (2006) 80 *Australian Law Journal* 724; *DHJPM Pty Ltd v Blackthorn Resources Ltd* (2011) 285 ALR 311, 333–9 [92]–[143].

<sup>125</sup> See Michael Bryan ‘Almost 25 Years On: Some Reflections on *Waltons v Maher*’ (2012) 6 *Journal of Equity* 131.

<sup>126</sup> (1988) 164 CLR 387, 426. See also Mason CJ and Wilson J’s judgment, which is consistent with Brennan J’s views: at 403–8.

<sup>127</sup> The landmark franchise cases in the US were *Goodman v Dicker*, 169 F 2d 684 (DC Cir, 1948) and *Hoffman v Red Owl Stores Inc*, 133 NW 2d 267 (Wis, 1965).

<sup>128</sup> See *Cobbe v Yeoman’s Row Management Ltd* [2008] 1 WLR 1752, 1785 [81] (Lord Walker).

<sup>129</sup> [2002] 1 All ER (Comm) 737.

actionable could only ‘now take place in the highest court’<sup>130</sup> although *Waltons Stores* was raised to point up ‘the road to development of English law’.<sup>131</sup> It was acknowledged that Baird could well have fared differently in Australia. There was no appeal.<sup>132</sup>

## VI THE CONSTRUCTIVE TRUST

Now let me turn briefly to the constructive trust and particularly to its use as a remedy. I have already referred to Lord Neuberger’s recent observation in *Sinclair Investments*: ‘the courts of England and Wales do not recognise a remedial constructive trust as opposed to an institutional constructive trust’.<sup>133</sup> As is well-known, the remedial versus institutional constructive trust debate was silenced in Australia by the landmark judgment of Deane J in *Muschinski v Dodds*.<sup>134</sup> As Deane J observed: ‘for the student of equity,

<sup>130</sup> Ibid [91].

<sup>131</sup> Ibid [95].

<sup>132</sup> The limiting effect of the proprietary interest requirement is demonstrated in the contrast of the decision of the House of Lords in *Cobbe v Yeoman’s Row Management Ltd* [2008] 1 WLR 1752 and that of White J in the Supreme Court of New South Wales in *E K Nominees Pty Ltd v Woolworths Ltd* [2006] NSWSC 1172 (16 November 2006). They have relevantly similar factual settings.

*Cobbe v Yeoman’s Row Management Ltd* was a property development case where, in anticipation of a contract for the sale to Cobbe of Yeoman’s property which was to be developed and sold on a proceeds sharing basis, Cobbe took steps to obtain planning permission as it was commonly assumed he would. Both parties proceeded on the understanding that the contract would only be entered into if planning permission was obtained, although its core terms had been agreed including as to price and proceeds sharing. Three months before the permission was granted, Yeoman’s decided to resile from the understanding. It did not tell Cobbe until after permission had been given. He made a claim based on equitable estoppel. Put shortly, it was held he had, and he knew he had, no contract. He took the risk of it not eventuating. Yeoman’s may have behaved unconscionably, but there could be no proprietary estoppel. Cobbe lost. This said, but with little explanation, he was awarded a quantum meruit payment for his services in obtaining regression to the planning permission by formalism on the ground of unjust enrichment.

In *E K Nominees v Woolworths Ltd* in contrast, Woolworths in falsifying a similar assumption upon which precontract action was taken, was held liable for E K’s reliance losses. It might have borne the risk of no contract being able to be successfully negotiated. It did not bear the risk of the assumption being falsified on which it was encouraged to act — ie a contract was to be negotiated. See also the decision of the Delaware Chancery Court in *Pharmathene Inc v Siga Technologies Inc* (Del Ct Ch, 2627-VCP, 22 September 2011) (Parsons V-C).

<sup>133</sup> [2012] 1 Ch 453, 470 [37].

<sup>134</sup> (1985) 160 CLR 583, 614.

there can be no true dichotomy between the two notions.<sup>135</sup> He went on to comment:

Indeed, in this country at least, the constructive trust has not outgrown its formative stages as an equitable remedy and should still be seen as constituting an in personam remedy attaching to property which may be moulded and adjusted to give effect to the application and interplay of equitable principles in the circumstances of the particular case. In particular, where competing common law or equitable claims are or may be involved, a declaration of constructive trust by way of remedy can properly be so framed that the consequences of its imposition are operative only from the date of judgment or formal court order or from some other specified date. The fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles.<sup>136</sup>

So much so has this been accepted in this country that the debate has moved on to the place of the constructive trust in equity's remedial scheme. Here, there is an interplay between considerations of 'appropriateness' and the requirement 'to do what is practically just'.<sup>137</sup> The High Court has stressed on a number of occasions now that: 'before the court imposes a constructive trust as a remedy, it should first decide whether, having regard to the issues in the litigation, there are other means available to quell the controversy'.<sup>138</sup>

The recent decision of the Full Court of the Federal Court in *Grimaldi*<sup>139</sup> illustrates the application of this. The facts were quite complex. The following is only an abbreviated version of them. Directors of Company A (Chameleon)

<sup>135</sup> Ibid.

<sup>136</sup> Ibid 615.

<sup>137</sup> *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, 1278–9 (Lord Blackburn). See also *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102, 113–14 (Deane, Dawson, Toohey, Gaudron and McHugh JJ).

<sup>138</sup> *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566, 585 [42] (Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See also *Giumelli v Giumelli* (1999) 196 CLR 101, 113–14 [10] (Gleeson CJ, McHugh, Gummow and Callinan JJ) (an equitable estoppel case); *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1, 45–6 [128]–[129] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ) (an alleged breach of fiduciary duty case).

<sup>139</sup> (2012) 200 FCR 296.



misappropriated \$150 000 which they paid to Company B thus enabling it to meet an instalment of the purchase price of \$1.1 million for the Iron Jack iron ore tenements in Western Australia. These were later acquired. Company B was found for *Barnes v Addy*<sup>140</sup> purposes to have been a knowing recipient. Company A claimed that it was entitled to a proportionate interest in the tenements which Company B held for it on a constructive trust. The Iron Jack tenements were developed into an operating iron ore mine exporting to China. Around \$400 million was spent in exploration and the development of the mine. At the trial it was suggested the value of the mine was in the order of \$1 billion.

On orthodox principles a constructive trust was an available remedy.<sup>141</sup> But was it an appropriate one? The Court said no and ordered an account of profits or compensation at Company A's election. It referred to quite a number of factors to explain why it exercised its discretion as it did. These included:

- a) the money paid was part of outlays being made for a projected mining operation;
- b) that operation required an enormous contribution of debt and equity finance, ie third parties were involved;
- c) the development required enterprise, expertise and risk-taking to which Company A did not contribute or was not exposed;
- d) to give Company A a proportionate interest would be to thrust the parties into a business relationship in which comity and mutual confidence were likely to be lacking;
- e) the increase in value of the tenements was brought about in large measure by the contributions etc of Company B and its investors and financiers; and
- f) the award of a constructive trust in such circumstances would be a punitive measure against Company B and would result in its liability becoming a vehicle for Company A's unjust enrichment.

As the Court concluded: 'Proprietary relief in the form of a constructive trust is in the circumstances an inappropriate remedy. It goes well beyond "the

<sup>140</sup> (1874) LR 9 Ch App 244.

<sup>141</sup> See, eg, *Paul A Davies (Aust) Pty Ltd (in liq) v Davies* [1983] 1 NSWLR 440.

necessities of the case.”<sup>142</sup> For those who strongly oppose judicial discretion in remedy — a prevalent view in English writings — this conclusion cannot be said to reflect ‘the formless void of individual moral opinion’.<sup>143</sup>

## VII THE STATUTORY CONTEXT

Left to last is what today is probably the most significant catalyst to our divergence from England. It is the legislative environment in which our common law and equity exist, evolve and do their work. In Australia, as in the United States<sup>144</sup> and to some degree in Canada and New Zealand, generally-cast statutes proscribe unfair trade practices, unconscionable conduct and deceptive or misleading conduct in trade or commerce. For present purposes, I need only refer to our misnamed *Australian Consumer Law* and to its predecessor the *Trade Practices Act 1974* (Cth) pts IVA and V (*Trade Practices Act*). Matching this is specifically focussed legislative regulation of particular commercial relationships, for example, franchisor and franchisee.<sup>145</sup>

Such legislation is without any substantial counterpart in the United Kingdom. In consequence, and given the state of English equity jurisprudence, it is essentially contract law and tort that are to be called on to provide relief, if at all, against a perceived wrong or injury suffered in commercial and other relationships and dealings. The significance of this becomes apparent once one appreciates that many failed contract cases in the United Kingdom — and there are some spectacular examples<sup>146</sup> — would have been likely to have been actionable in Australia under either the old pt IVA or s 52 of the *Trade Practices Act* and their equivalents in the *Australian Consumer Law* today.<sup>147</sup> But probably they would also have succeeded in equity. And this goes to the heart of the matter.

<sup>142</sup> (2012) 200 FCR 296, 442 [681] (Finn, Stone and Perram JJ), quoting *John Alexander's Clubs* (2010) 241 CLR 1, 46 [129] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ).

<sup>143</sup> *Muschinski v Dodds* (1985) 160 CLR 583, 616 (Deane J).

<sup>144</sup> In the main this is in state legislation: see, eg, Mass Gen Laws ch 93A, a statute which declares unlawful (§ 2) and renders actionable (§ 9) ‘[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce’.

<sup>145</sup> Such exists in Australia (*Trade Practices (Industry Codes — Franchising) Regulations 1998* (Cth)), the United States and a majority of the Canadian provinces.

<sup>146</sup> See, eg, *Baird Textiles Holdings Ltd v Marks and Spencer Plc* [2002] 1 All ER (Comm) 737; *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752.

<sup>147</sup> *Australian Consumer Law* s 18 (misleading and deceptive conduct), pt 2-2 (unconscionable conduct).

It has for some decades now been acknowledged that many of Australia's major developments in equity from the 1980s involved conduct which would have been actionable under legislation such as the *Trade Practices Act* in any event. *Amadio* and *Waltons Stores* are conspicuous examples. In the age of statutes, the influence of statute upon such as remains of the common law may often be no more than osmotic. Nonetheless, as statements of prevailing public policy and of appropriate standards to be adhered to in commercial and consumer dealings, they provide both a context in which judicial law making will take place and a measure against which it may be judged.

The High Court has on some number of occasions acknowledged the possibility of the common law adapting itself to a 'consistent pattern of legislative policy'.<sup>148</sup> The *Trade Practices Act* and the *Australian Consumer Law*, and their State and Territory equivalents, surely provide just such a pattern. It is more than likely that with these statutory analogues so close to hand, and with the Bar slowly awakening to this matter, our equity jurisprudence will continue to mutate in ways that are consistent with the policy of fair dealing in commercial and consumer dealings which is fundamental to that legislation.<sup>149</sup> A related impact of this legislation is that it mandates flexibility in the award of appropriate remedies. As with equitable remedy in Australia, so also in our statutes, discretion, appropriateness and practical justice are encouraged. Thus, the seeming inevitability of continuing divergence in remedy as well.<sup>150</sup>

## VIII CONCLUSION

It may seem to you that I have spoken as though I was equity's champion and an admirer of its separateness. I am not. As in the United States, we could get along well enough without equity. What we could not do without, though, are the animating ideas of our equity jurisprudence. These, in large measure,

<sup>148</sup> See especially *Eso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 61–3 [23]–[28] (Gleeson CJ, Gaudron and Gummow JJ). See also Paul Finn, 'Statutes and the Common Law: The Continuing Story' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 61–2; Paul Finn, 'Statutes and the Common Law' (1992) 22 *University of Western Australia Law Review* 7.

<sup>149</sup> A like story could be told of the impact of the *Corporations Act 2001* (Cth) (and its predecessors) and its symbiotic relationship with judge-made law. The treatment of de facto directors and officers in *Grimaldi* is testament to this: at 314–26 [28]–[76] (Finn, Stone and Perram JJ).

<sup>150</sup> By way of an aside I would simply ask, for example, whether, despite our agonising over the justifications for, and scope of, a duty of good faith and fair dealing in contract law, we already have the essence of such a duty in s 21 of the *Australian Consumer Law*?

temper our judge-made law. They mitigate the rigours and inflexibilities of the common law and stand ready to supplement its deficiencies. Often enough they control the abuse of power in our relationships and dealings, commercial and otherwise. Characteristically, one of their major functions is to promote fair dealing. And in the award of remedies, they often seek more than simply rough justice. As Roscoe Pound long ago recognised, it is these ideas and not a separate body of equity as such that a legal system requires.<sup>151</sup> The extent to which such ideas are acknowledged and respected necessarily requires balances to be struck and often enough between certainty and fairness. Different countries for differing reasons will strike their balances differently as the English and we have done — hence ‘divergences’ and this lecture.

<sup>151</sup> Roscoe Pound, ‘The Decadence of Equity’ (1905) 5 *Columbia Law Review* 20, 35.