

Lord Neuberger gives the Lehane Lecture 2014, Supreme Court of New South Wales, Sydney

Equity – The soul and spirit of all law or a roguish thing?

4 August 2014

1. It is a great honour to be giving the seventh John Lehane Memorial Lecture. I have cause, as a barrister and then as a judge, to be both very grateful to, and very admiring of, John Lehane, as one of the three authors of an outstanding book on equity¹. No better treatment of the topic exists. It is readable, inspired, wide-ranging, authoritative and, to put it mildly, not frightened of expressing the authors' views. Sadly, I never had the privilege of meeting Lehane himself, but he was, by all accounts, one of nature's gentlemen, and outstanding as an academic lawyer and book-writer, as a commercial solicitor at Allens and as a Judge of the Federal Court. His sadly short judicial career has been described by Dyson Heydon, no less, as "a conspicuous success from the start"². In all his roles he enormously enhanced the reputation of the legal system and the rule of law. John Lehane was a farsighted lawyer, but at the time of his premature death, not even he, I think, would have predicted that the end of the Law Lords and the creation of the United Kingdom Supreme Court was imminent. It was not even a twinkle in anyone's eye.

2. However, today, in August 2014, the Supreme Court is nearly five years old and, particularly with the advent of the Human Rights Act 1998, the perception of many commentators is that we deal largely with human rights, constitutional and public law issues. There is no doubt that cases involving such issues form a significant part of our diet. However, a more critical analysis suggests that no more than 40% of our cases are in this category³. In any event, it is somewhat artificial to refer to human rights cases, as many appeals, whether private law or public law, involve human rights points. Sometimes

¹ Meagher, Gummow and Lehane, *Equity: Doctrine and Remedies*

² http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/heydon_speeches.pdf

³ Alan Paterson, *Final Judgment: the Last Law Lords and the Supreme Court* (Hart Publications, 2013)

the sole points involved are human rights points, but very often they play only a part and frequently a minor part. And sometimes the courts below and the advocates think that the case involves human rights when in truth it does not. A recent example was *Kennedy v Charity Commissioners*⁴, where a journalist was seeking disclosure of the records of an investigation into a charity, and based his case on article 10 of the European Convention on Human Rights – freedom of expression. We concluded that the case should have been argued on the basis of the common law, which, we emphasised, was very much alive and kicking and should be brought out of what may be seen as something of the shadow where it has lurked during the fourteen years since the coming into force of the 1998 Act.

3. I know that some academics and judges in Australia and New Zealand have suggested that, while the English courts may have initiated and developed the common law for many centuries, they are now infected with the virus of European law, through the European Union and the Human Rights Convention, and that it is now the courts at the other end of the globe (if globes can have ends) to whom the common law baton has been passed. I have explained in other lectures⁵ how I think that it is mistake to see the common law as a separate system which has flourished free of European influences, and that the current development of the common law in the English courts with the benefit of European law is consistent with the way the common law developed in the past. It is not merely in medieval times that European influences introduced jury trial, the writ, discovery and other familiar common law topics: in the late 18th century it was to European *lex mercatoria* that Lord Mansfield looked in order to refashion English commercial law.

4. What has this got to do with the title of my lecture, you may ask – it's meant to be about equity not the common law. Well, as is so often the case with English law, nothing is quite as simple as it seems. Even the expression “common law” is ambiguous: it can be used either as phrase which covers the whole of our judge-made law and incorporates equity, or as a phrase to describe that part of our judge-made law which excludes equity.

⁴ [2014] UKSC 20, [2014] 2 WLR 808

⁵ Eg *The British and Europe*, Freshfields Annual lecture, Cambridge, February 2013

And although equity has been described as “the soul and spirit of all law [and] synonymous with justice” by Blackstone⁶ (no less), it has also been described by John Selden (no less) as “a roguish thing”⁷.

5. I started by referring to fact that, although the role of the UK Supreme Court may be seen by many as concentrating almost exclusively on public law, human rights, and quasi-constitutional issues, consideration of our caseload shows that to be inaccurate. It is particularly striking that we have given judgment in nine equity cases since June last year, and that excludes cases on tax law and insolvency. In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*⁸, we had to decide whether a patentee who had obtained judgment for damages against an infringer could proceed with the assessment after his patent had been revoked in other proceedings. In *Prest v Petrodel Resources Ltd*⁹, we had to decide the law on piercing the corporate veil and resulting trust. *Szepietowski v The National Crime Agency*¹⁰ was concerned with the equitable doctrine of marshalling. *Marley v Rawlings*¹¹ was a case where a husband and wife had mistakenly signed each other’s will and the question was whether the will of the survivor was valid. In *Coventry v Lawrence*¹², we had to deal with various questions including whether the right to create a nuisance could be acquired by prescription and when damages in lieu of an injunction were appropriate. In *Williams v Central Bank of Nigeria*¹³ we were required to decide whether a dishonest assister in a breach of trust or a knowing recipient of trust monies was a trustee properly so called. *R (Barkas) v North Yorkshire County Council*¹⁴ was a village green case, but it required us to consider the circumstances in which an easement could be acquired by prescription. In *Shergill v Khaira*¹⁵, we had to consider the extent to which trustees could define the terms of their trust, and to what extent the court was precluded from deciding who could remove and appoint trustees in the face of a religious dispute. And *FHR European Ventures LLP v Cedar Capital LLP*¹⁶ involved deciding whether a principal had a

⁶ *Blackstone Comm* Bk III, c 17, p 222

⁷ *Table Talk of John Selden* (ed Pollock, 1927), p 43

⁸ [2013] UKSC 46, [2014] 1 AC 160

⁹ [2013] UKSC 34

¹⁰ [2013] UKSC 65, [2014] 1 AC 338

¹¹ [2014] UKSC 2, [2014] 2 WLR 213

¹² [2014] UKSC 13, [2014] 2 WLR 433

¹³ [2014] UKSC 10, [2014] 2 WLR 355

¹⁴ [2014] UKSC 31, [2014] 2 WLR 1360

¹⁵ [2014] UKSC 33, [2014] 3 WLR 1

¹⁶ [2014] UKSC 45

proprietary interest in a bribe or secret commission paid to his agent. On top of that we have heard argument in a case which will require us to reconsider the controversial House of Lords decision in *Target Holdings Ltd v Redfern*¹⁷, and we also heard argument in another case which is concerned with joint tenancies. Further in the Privy Council, we have considered the basis upon which the principles governing relief from forfeiture or the equity of redemption of a mortgagee is to be dealt with, as well as the effect of tender - see *Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd*¹⁸.

6. So equity is alive in the UK Supreme Court – and, I hope, well. Let me turn now to the title topic, which suggests that equity is not only alive, but kicking – or being kicked. Some of these cases have brought home to me, a former property lawyer and Chancery Judge, the inconsistencies of respected Chancery judges on some fundamental principles of equity.

7. Like any organic entity, equity has always developed as a result of both the internal influences from its genes received from its forebears and the external influences which permeate its environment. Its parental genes are fairness and flexibility, as equity was developed to mitigate the rigours and technicalities of the common law. Its environmental influences are multifarious, but they include the need for consistency and certainty, without which any legal code risks falling into disrepute. The development of equity through judicial decisions has not been a seamless progress by any means. But that is scarcely surprising. Just as hiccups in the reproductive process result in mutations which can represent beneficial genetic developments, so can judicial hiccups result in anomalous decisions which help clarify and develop the law. By concentrating on anomalous decisions, I am not seeking to rubbish earlier judges or the development of equity. The law is made and administered by human beings and pressures on judges can be enormous. Nonetheless, one does neither the judiciary nor the common law any favours by not facing facts – and besides it can be quite fun to find that our famous judicial forebears were not without blemishes.

¹⁷ [1996] 1 AC 421

¹⁸ [2013] UKPC 20

8. Indeed, Judges whose judgments display an impressive and intimidating confidence appear, when tested by the passage of time, to have demonstrated a lack of consistency and a fallibility which did not quite justify that confidence. Many of them have occasionally been judicial Pied Pipers leading future generations of judges into mountains of error where they rested for a long time, like so many Sleeping Beauties, only to be woken up after many decades by a posse of handsome princes in the form of the Lords of Appeal or Supreme Court Justices, cutting through the thicket, and overruling the initial mistaken decision. (I cannot forebear from sharing with you the comment made by my Judicial Assistant¹⁹ on this last sentence which she described as “dreadful”, and as having a “metaphor [which] is mixed on a number of levels, including that of fairy stories” and not even being “internally consistent – Sleeping Beauty slept in a four poster bed, not a mountain”. Consolingly, she added “But I do like the idea of Lords of Appeal being a posse of handsome princes”.)

9. In our very recent decision in *FHR European*²⁰, we had to consider whether a principal whose agent had received a bribe or secret commission from a third party could claim to be the proprietary owner of the bribe or commission. Three or four years earlier, the Court of Appeal in a judgment given by Lord Neuberger MR had held that the answer was “no” – see *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*²¹. In *FHR European*, the Supreme Court, in a judgment given by Lord Neuberger PSC, held that the answer was “yes”.

10. But Lord Neuberger is not on his own when it comes to judicial tergiversations on the issue of a principal’s proprietary interests in his agent’s bribe. His volte-face is by no means an exception in what is seen by some as the placid waters of equity. Indeed, equity may sometimes look like a minefield of unpredictability rather than, as its fans like to suggest, a haven of principle. Far from being a seamless collection of clear principles, equity sometimes appears to be a hot-bed of uncertainty where the judicial foot not merely comes in all shapes and sizes, but seems to set off in opposite directions. Thus,

¹⁹ Zahler Bryan, to whom I am indebted for her contributions to this talk

²⁰ [2014] UKSC 45

²¹ [2011] EWCA Civ 347, [2012] Ch 453

the 21st century does not stand alone as providing a Janus-like judiciary on the topic of proprietary interests in bribes.

11. Let me take you back to the last quarter of the 19th century. In two cases, *Metropolitan Bank v Heiron*²² in 1880 and *Lister & Co v Stubbs*²³ in 1890, the Court of Appeal unanimously held that a plaintiff could not claim a proprietary interest in a bribe paid to a director (in *Heiron*) or a commercial agent (in *Lister*). The judges who decided those two cases were all well-known and some were in the first rank. They included Chancery heavyweights such as Lindley, James and Cotton, and two other great judges, namely Brett and Bowen – Bowen a future Law Lord, and Lindley and Brett each a future MR and a future Law Lord.

12. *Heiron* was decided by Cotton, James and Brett LJJ, who all agreed that a bribe paid to a director was not held on trust for the company. Cotton LJ had been party to a decision three years earlier, *Bagnall v Carlton*²⁴, which is very hard to reconcile with the decision in *Heiron*. James LJ said in *Heiron* that the liability for an agent to account for a bribe “is a debt only differing from ordinary debts in the fact that it is merely equitable”. Yet five years earlier in *Carling’s case*²⁵, he had said that “a simple bribe or present to the directors, constituting a breach of trust on their part” would be something which “the company would be entitled to get back from their unfaithful trustees” as they “had acquired [it] by reason of their breach of trust”. And three years earlier he repeated that view in *Pearson’s case*²⁶, where he agreed with Sir George Jessel MR and referred to a director of a company who received a bribe in connection with company business as a “trustee” for the company. Brett LJ, who as Brett J had also been a party to *Carling’s case*, nonetheless said in *Heiron* that “[n]either at law nor in equity” could a bribe to a director “be treated as the money of the company”.

²² (1880) 5 Ex D 319

²³ (1890) 45 Ch D 1

²⁴ (1877) 6 Ch D 371

²⁵ (1875) 1 Ch D 115, 124

²⁶ (1877) 1 Ch D 336, 342

13. *Lister* is equally perplexing; it was decided by Cotton, Lindley and Bowen LJJ, who all agreed that a bribe paid to an agent was not held on trust for his principal. I have already commented on Cotton LJ's earlier decision in *Bagnall*. Lindley LJ in *Lister* said he was "clearly of opinion" that a principal had no proprietary claim to a bribe paid to his agent, and to suggest otherwise was "an entire mistake". Yet, little more than a year earlier in *Eden v Ridsdales Railway*²⁷, he had agreed with Lord Esher MR who had said "In such a case the remedy of the principal is an option either to claim what the agent has received, or to sue for damages. If that which the agent has received is money he must hand it over to his principal"; indeed Lindley LJ added that "it would be contrary to all principles of law and equity to allow" a director "to retain" a bribe – ie the bribe was the property of the company, flatly contradictory to what he was to say a year later in *Lister*. Bowen LJ was "of the same opinion" as Lindley LJ in *Lister* in holding that a principal could not claim a proprietary interest in his agent's bribe; yet a year earlier, as Bowen J, he had decided *Whaley Bridge Co v Green*²⁸, where he said that "the relation in which [an agent] placed himself towards the company is one in which equity will not allow him to retain any secret advantage for himself", so that the company had "a clear right to treat all profit made by Smith out of such a transaction as profit belonging to them".

14. What is also striking about this saga is that in not a single one of the cases I have mentioned (all decided between 1875 and 1890) was a unanimous decision of the House of Lords in 1862, *Tyrrell v Bank of London*²⁹, cited. Yet, to put it at its lowest, this decision, less than twenty years before *Heiron* and less than thirty years before *Lister*, provided some support from the highest court in the land for the conclusions reached in those two cases by the Court of Appeal. Lord Westbury LC, Lord Cranworth and Lord Chelmsford all seemed to have thought that the answer to the question whether a bribe to a fiduciary was held on trust for his principal was plainly "no". Yet the decision was not cited to rebut the conclusion reached by judges in subsequent cases that a bribe was held on trust for a principal such as *Bagnall*, *Carling*, *Pearson*, *Eden* or *Whaley Bridge*. Nor was *Tyrrell* cited to support the opposite conclusion in *Heiron* or *Lister*.

²⁷ (1889) 23 QBD 368, 372

²⁸ (1879) 5 QBD 109, 112

²⁹ (1862) 10 HL Cas 26

15. One might have thought that, by the last quarter of the nineteenth century, the law would have been sorted out on the issue of whether a bribe or secret commission received by an agent should be treated as the principal's property. And, *Tyrrell* apart, one would have been right until *Heiron* appeared on the scene, as all the cases before *Heiron* which I have referred to, and a fair number of others³⁰, contained generalised but unambiguous statements to suggest that the answer was clearly "yes". For a century after *Lister*, English courts tended to assume that they should follow it and take the answer to be "no", but Lord Templeman's judgment on behalf of the Privy Council in 1993, *Attorney-General for Hong Kong v Reid*³¹ took a different "yes" view. However, Lord Templeman was rather flip in his treatment of *Tyrrell*, suggesting that only Lord Chelmsford's speech was inconsistent with his conclusion that a bribe to an agent was held on trust for his principal. I disagreed with him in *Sinclair*, and, while Lord Millett, writing extra-judicially³², has tried to defend Lord Templeman's treatment of *Tyrrell*, I think the quietus to that defence was given by Peter Watts in his instructive and engaging article, *Tyrrell v Bank of London – an Inside Look at an Inside Job*³³. But I would say that, wouldn't I, as it serves to justify my change of stance between the Court of Appeal (where we were bound by *Tyrrell*) and the Supreme Court (where we were entitled to disapprove it).

16. Having said that, it is only right to pay tribute to the enormous contributions which Peter Millett has made judicially and extra-judicially to equity, and to acknowledge that his consistent view on the topic of proprietary interests in bribes since 1993 has finally been vindicated by our recent decision in *Cedar*. Peter is one of a number of people who have written strongly expressed articles over the past twenty years on the issue raised in *FHR European*. Many of those articles are listed by the Chancellor of the English and Welsh High Court, Sir Terence Etherton, in what, according to him, must be at least the twenty-fifth such article³⁴ in 2014 – and that does not take into account the

³⁰ Many are considered in *FHR v Cedar* [2014] UKSC 45, paras 13-20

³¹ [1994] 1 AC 324

³² *Bribes and Secret Commissions Again* [2012] CLJ 583

³³ (2013) 129 LQR 527

³⁴ *The Legitimacy of Proprietary Relief* (2014) Birkbeck Law Review vol 2(1), 59, at p 60

views expressed in textbooks, where one often finds equally strongly felt views. In his article³⁵, Sir Terence refers to “this relentless and seemingly endless debate”, which, in the Court of Appeal in *FHR European*, Pill LJ described as revealing “passions of a force uncommon in the legal world”³⁶.

17. Before I turn to other equitable *faux pas*, I would like to ask rhetorically why the issue of whether an agent holds a bribe on trust for his principal has caused such strong feelings. The sceptic might say that it is an example of Sayre’s Law³⁷, which states that “in any dispute the intensity of feeling is inversely proportional to the importance of the issues at stake”. In a way, that is not quite fair in this case, as the consequences of the principal having a proprietary interest are significant: (i) it is easier to recover the money in practice if it is based on a proprietary interest; (ii) if the agent goes bankrupt, the principal will enjoy priority over other, unsecured, creditors; and (iii) a proprietary interest ensures that the principal is entitled to exercise the rights of tracing and following. More puzzlingly, any fair minded person must accept that there are serious arguments both ways, as is evident from the quality of the participants in the debate and the points they have made in favour of their respective views. In other words, it is an issue on which there is no “right” answer. Yet, although there has been no record of the issue resulting in actual physical violence (at least as far as I am aware), the dispute over proprietary interests in bribes does seem in some ways to have been the modern equitable equivalent of the fourth century dispute between the followers of Athanasius and the followers of Arius as to whether or not God the Father and God the Son were of the same substance. That issue was of course resolved at the Council of Nicaea in 325 AD under the beady eye of the Emperor Constantine. It has taken rather longer for the proprietary bribe issue to be resolved in the UK – and I may turn out to be too optimistic and too arrogant in thinking that the *FHR European* decision has resolved the issue, and indeed the issue supposedly resolved at Nicaea rumbled on for four further centuries³⁸.

³⁵ *Ibid*, at p 62

³⁶ [2014] Ch 1, para 61

³⁷ Named after William Stanley Sayre (1905-1972); The *Wall Street Journal* of 20.12.73 quoted Sayre as saying: "Academic politics is the most vicious and bitter form of politics, because the stakes are so low."

³⁸ And indeed it seems never to have died, and even apparently surfaced in 17th century England.

18. There is little doubt that the decline of religion over the past few decades has resulted in a growth of alternative convictions, which suggests that many human brains are conditioned genetically or environmentally to require some faith system or the like to which to cling. Of course, it has long been true that fervour and credo have not been limited to religious belief: one only have to look at more than a century of communists and committed tea-party capitalists to appreciate that. Similarly, for some people environmental issues have become articles of faith, appearing to some commentators to be a modern version of millenarianism and to other commentators to be akin to holocaust denial. And why should legal articles of faith and codes not replace their religious counterparts among some legal academics?

19. In fact, I am not at all sure that the faith-based approach to legal principles is an early 21st century, or even a late 20th century, phenomenon. Indeed, if one refers to judgments, I think that such an approach is far more redolent of the 19th century than it is of the current era. Thus, I think that the Victorian judges tended to give their views in a lapidary fashion, often stating with sublime and enviable confidence and brevity the legal principle upon which their particular decision turned, without bothering to refer to much, or any, previous authority, or to discuss the arguments in any detail. The various 19th century cases I have referred to in connection with the *FHR European* case provide very good evidence of that. Many people, including lawyers and judges, feel and express envy and respect about the brevity with which Victorian judges expressed themselves on legal issues – so often in a single, short, uncompromising paragraph - when compared with the many pages of dense case-ridden analysis of which most modern judges are guilty. Our judgments do tend to be too long and we do have much to learn from our Victorian judicial forebears. Their confident pronouncements as to the law suggests the same degree of self-confidence as is indicated by their bewhiskered haughty appearance in countless *Spy* and *Vanity Fair* cartoons. However, as the discussion on the history of the issue in the *FHR European* case shows, the confidence was by no means always justified, and, I would suggest, if those Judges had sometimes been a little more humble and a little more ready to consider previous cases and to spell out their reasoning, their judgments would have been more impressive and more consistent.

20. The great Jessel (who was on the right side in the *FHR European* debate, as is evidenced by his judgment in *Pearson's Case*) could go badly wrong when he made his *ex cathedra* statements. An obvious example is in *Henty v Schroder*³⁹, decided in 1879, when Sir George said that a vendor “could not at the same time obtain an order to have the contract rescinded and claim damages against the defendant for breach of the agreement”. It was a very brief and confident statement of the law, unsupported by any reasoning or any authority. In fact, as Lord Wilberforce subsequently pointed out, it was in fact inconsistent with two earlier decisions⁴⁰. It was nonetheless followed and applied for the next 100 years including by the English Court of Appeal in a case in 1975, *Capital and Suburban Properties Ltd v Snycher*⁴¹. Three years later, the House of Lords in *Johnson v Agnew*⁴² gave Sir George’s dictum that a vendor could not obtain both orders its quietus, essentially on the ground as Lord Wilberforce put it of “Why ever not?”. In his speech, he described the state of the authority on the point as “starting from a judgment for which no reasons are given, and which may rest upon any one of several foundations, of which one is unsound and another obsolete, a wavering chain of precedent has been built up, relying upon that foundation, which is itself unsound”. This is as good a description of the main thrust of my speech today as one can get. And it is worth quoting the next sentence of Lord Wilberforce’s speech: “Systems built upon precedent unfortunately often develop in this way and it is sometimes the case that the resultant doctrine becomes too firmly cemented to be dislodged.”

21. That sort of problem helps justify the modern judicial approach of carefully considering the justification for an alleged principle and the state of the authorities in relation to that principle before deciding whether to adopt, reject, or modify it. It also underlines the importance of national judges taking advantage of judicial developments and analysis in other common law jurisdictions from those in which we sit. The wrong turnings taken by judges in the past represent but one reason why the 21st century common law world judiciary needs to look at and learn from other common law jurisdictions. Not only do common law jurisdictions have much to learn from each other,

³⁹ (1879) 12 Ch D 666

⁴⁰ *Sweet v Meredith* (1863) 4 Giff 297 and *Watson v Cox* (1873) LR 15 Eq 219

⁴¹ [1976] 1 Ch 319

⁴² [1980] AC 367

but in an increasingly global and competitive world, where most legal systems are civilian, the common law jurisdictions need to ensure a degree of coherence and consistency in their case-law in order to present a credible and effective legal system. In the *FHR European* case, the Supreme Court said this⁴³ “As overseas countries secede from the jurisdiction of the Privy Council, it is inevitable that inconsistencies in the common law will develop between different jurisdictions. However, it seems to us highly desirable for all those jurisdictions to learn from each other, and at least to lean in favour of harmonising the development of the common law round the world.”

22. Another aspect of modern life which I think helps ensure that Judges think a bit more carefully about their judgments, both the reasoning and the conclusions, is the plethora of high quality legal academic writing. In the nineteenth century, there were of course, some outstanding legal scholars, but they were few in number, restrained in their publication and largely ignored by judges (at least until they were well and truly dead – hence the ponderously humorous description of a living scholar’s work as being “fortunately” not an authority). The extent to which academic legal articles are cited to and by judges has grown exponentially over the forty-five years since I started practice at the bar, and I believe that it is a thoroughly beneficial development. Some topics are particularly popular among academics, notably unjust enrichment, and during the past year we have had a case on that topic⁴⁴. Like the issue in *FHR European*, it has resulted in much quasi-theological debate.

23. Another area of intense debate has been generated by the decision nearly twenty years ago of the House of Lords in *Target Holdings*⁴⁵, which concerned the measure of compensation to be paid by a solicitor who used his client’s money to complete a transaction different from that he was instructed to complete – in that case, he failed to get a charge over property to secure the loan the banker client was making. I do not propose to say much about this because, as I have mentioned, we are reconsidering the issue in a case called *AIB Group (UK) Ltd v Mark Redler & Co*⁴⁶. However, it is another

⁴³ Para 45

⁴⁴ *Benedetti v Saviris* [2013] UKSC 50, [2013] 3 WLR 351

⁴⁵ See footnote 15

⁴⁶ In the Court of Appeal, [2013] EWCA Civ 45

example of a topic and a case which has given rise to much fervent academic argument – including from the ubiquitous Peter Millett – and some serious Australian and New Zealand decisions⁴⁷. Indeed, the comments of Lord Justice Millett (as he then was) in his 1998 article in the *Law Quarterly Review*⁴⁸ on Lord Browne-Wilkinson’s judgment in *Target* provide yet another demonstration of the uncertain, or at least unclear, state of equity. If one great Chancery giant and Law Lord refers to aspects of a very important judgment on a trust issue by another great Chancery giant and Law Lord as “disquieting”, “disappointing” and “misleading”, where does that leave us lesser mortals, and where does it leave equity?

24. Meanwhile, let me revert to another example of judicial wrong-turning in equity, which became apparent and required resolving in a recent Supreme Court case. I have in mind the UK Supreme Court’s recent decision in *Williams v Central Bank of Nigeria*⁴⁹. Dr Williams claimed that he had entrusted money to a solicitor and claimed that the bank had knowingly received some of those monies and/or dishonestly assisted the solicitor in taking those monies. The bank contended that Dr Williams had brought his claim too late, relying on the Limitation Act 1980. Dr Williams contended that the statutory 6 year limitation period did not apply as his claim fell within section 21(1) of that Act, arguing that it was a claim “by a beneficiary under a trust ... to recover from the trustee trust property”. The issue was thus whether a knowing recipient of trust monies or a dishonest assister in respect of a breach of trust was a “trustee”. There was early 19th century authority to support the notion that such a person was not a trustee. In a famous formulation, Lord Redesdale the Lord Chancellor of Ireland in a case⁵⁰ which had been argued round his sickbed said in 1806 that “a person who is in possession by virtue of that fraud, is not, in the ordinary sense of the word, a trustee, but is to be constituted a trustee by a decree of a court of equity, founded on the fraud; and his possession in the meantime is adverse to the title of the person who impeaches the transaction on the ground of fraud.”

⁴⁷ In particular, *Yonyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15; 212 CLR 484

⁴⁸ *Equity’s Place in the Law of Commerce* (1998) 114 LQR 214, 224-226

⁴⁹ [2014] UKSC 10, [2014] 2 WLR 355

⁵⁰ *Hovenden v Lord Annesley* (1806) 2 Sch & Lef 607

25. As Lord Sumption put it in *Williams*⁵¹, “Courts of equity, however, later lost sight of the underlying principle and for much of the 19th century continued to deal with the issue on a confusing and inconsistent basis, generally without analysis or reference to earlier authority”. And then in the early 1890s, along came *Soar v Ashwell*⁵², where Lord Esher MR and Bowen and Kay LJJ appeared to hold that dishonest assister or knowing recipient were trustees, or at least were to be treated as trustees. That approach was followed in a number of subsequent cases between 1897 and 1932 where English courts, including distinguished Chancery Judges⁵³, had to consider the effect of limitation legislation which did not apply to beneficiaries’ claims against trustees⁵⁴. However, the Privy Council in a couple of cases in the early 1920s appeared to take a different view, and followed the opposite, *Redesdale*, line⁵⁵. The English courts nonetheless seem to have assumed that the law as laid down in *Soar v Ashwell* represented the law until the seminal judgment of Lord Justice Millett (yes, it’s that man again) in 1999 in *Paragon Finance plc v DB Thackerar & Co*⁵⁶. And finally, earlier this year, in *Williams*, we decided that Millett LJ was right and that the law had taken a wrong turning in the 1890s with *Soar v Ashwell* - or at least in the way in which *Soar v Ashwell* had been interpreted by later judges.

26. The patent case we decided last year, *Virgin Atlantic*, provides another example of the Supreme Court correcting a century of error after the law on an equitable topic had been laid down wrongly by the Court of Appeal. In the 1908 case of *Poulton v Adjustable Cover and Boiler Block Co*⁵⁷, the Court of Appeal, consisting of an enthusiastic Vaughan Williams LJ and Fletcher Moulton and a somewhat more hesitant Buckley LJJ, upheld Parker J’s decision that a patentee was entitled to pursue his judgment for damages for patent infringement against a defendant who had unsuccessfully challenged the validity of the patent, even though the patent had been revoked in subsequent proceedings. Much more recently, in 2004, *Poulton* was followed by Peter Gibson LJ and Sir Martin Nourse

⁵¹ [2014] 2 WLR 355, para 16

⁵² [1893] 2 QB 390

⁵³ Vaughan Williams J, Romer J and Maugham J

⁵⁴ *In re Gallard* [1897] 2 QB 8; *Heynes v Dixon* [1900] 2 Ch 561; *In re Eyre-Williams* [1923] 2 Ch 533; *In re Mason* [1928] 1 Ch 385; *In re Blake* [1932] Ch 54.

⁵⁵ *Taylor v Davies* [1920] AC 636 and *Clarkson v Davies* [1923] AC 100,

⁵⁶ [1999] 1 All ER 400

⁵⁷ [1908] 2 Ch 430

in the Court of Appeal in *Coflexip SA v Stolt Offshore MS Ltd (No 2)*⁵⁸, but Neuberger LJ dissented. In *Virgin Atlantic*, we held that both *Poulter* and *Coflexip* had been wrongly decided.

27. The wrong turning which the Court of Appeal took in 1908 in *Poulton* was based on argument in court, and reasoning in judgments given, within a single day, which was a Friday. I had wondered whether there was a tendency to give wrong *ex tempore* judgments in the Court of Appeal on a Friday, but the evidence is not very supportive. *Heiron* was argued and decided on a Thursday, although it was in August, so the Judges may have been wanting to get away for their summer vacation; *Lister* was argued on a Saturday, and decided the following Monday. A well-known wrong decision of the Court of Appeal which was, however, argued and decided on a single Friday was *Stacey v Hill*, which was a 1901 decision. When a tenant goes into liquidation or an individual tenant goes bankrupt, a liquidator or trustee in bankruptcy has long had the statutory right to disclaim the lease. The purpose is to put an end to the tenant's continuing liability on terms that the landlord can prove for his loss as a result of the disclaimed lease coming to an end. But what happens when the tenant's liabilities under the lease are guaranteed by a surety? As long ago as 1817⁵⁹, the courts were holding that a surety remained liable notwithstanding the disclaimer, on the basis that "the very object of taking sureties is to provide against the insolvency of the principal". As the insolvency legislation became more sophisticated, in a number of 19th century cases between 1872 and 1884⁶⁰, courts held that the disclaimer only operated between landlord and tenant, but not as between landlord and surety. In one of those cases in 1881 Sir George Jessel MR⁶¹ described the view that a surety is released on disclaimer as "monstrous" and "absurd", and James LJ had the same view.

28. Yet in *Stacey v Hill*⁶², another strong Court of Appeal (AL Smith MR, and Romer and Henn Collins LJJ – a present and future MR and a Chancery giant and future Law

⁵⁸ [2004] FSR 34

⁵⁹ *Inglis v Macdougall* (1817) 1 J. B. Moore C. P. Rep. 196

⁶⁰ *Smyth v. North* (1872) L.R. 7 Ex. 242, *Ex parte Walton*; *In re Levy* (1881) 17 Ch. D. 746, *Harding v. Preece* (1882) 9 Q.B.D. 281 and *Hill v. East and West India Dock Co.* (1884) 9 App. Cas. 448

⁶¹ *Ex p Walton*; *In re Levy* (1881) 17 Ch D 746

⁶² [1901] I Q.B. 660

Lord) came to a unanimous conclusion to the contrary. And they did so on the basis of what Lord Nicholls later referred in 1997⁶³ to as “[f]our different grounds” of which “[n]one is satisfactory”. Yet that highly dubious decision stood for nearly a century, and led to a highly unsatisfactory attempts to get round it – eg by the court refusing permission to liquidators to disclaim leases⁶⁴ (which was plainly unsatisfactory as it left the liquidation in abeyance and would not work now when disclaimers are often permissible without permission). Eventually, the House of Lords overruled the decision in *Stacey* in the *Hindcastle* case⁶⁵.

29. More recently, in another of our recent decisions which I mentioned, *Coventry v Lawrence*⁶⁶, we had to address the fact that since the late 1890s there had been two strands of cases dealing with the issue whether the court should grant damages in lieu of an injunction. Most of those cases involved a defendant who had developed his land in such a way as to interfere with the plaintiff’s right to light. In the famous *Shelfer* case⁶⁷, a strong Court of Appeal suggested that the public benefit of the development was irrelevant (Lindley LJ) and that an injunction should only be refused if, inter alia, the injury to the plaintiff was “small” (AL Smith LJ). This approach was followed in a number of subsequently reported Court of Appeal cases on the topic, including two in the past ten years⁶⁸. However, in two other decisions in 1905 and 1935⁶⁹, differently constituted Courts of Appeal suggested that the test was much more open-textured than that, a view which received some support from observations in a decision of the House of Lords in 1904⁷⁰, which seemed to go rather unnoticed in the Court of Appeal for the ensuing 110 years. We held that the latter approach was correct, which had the advantage of flexibility but the disadvantage of uncertainty.

30. The tension between flexibility and certainty is inherent in any jurisdiction, but, as Lord Wilberforce indicated, perhaps it is greatest in a common law system, where judges

⁶³ *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] AC 70

⁶⁴ Eg per Maugham J in *In re Katherine et Cie Ltd*. [1932] 1 Ch. 70

⁶⁵ See footnote 63

⁶⁶ [2014] UKSC 13, [214] 2 WLR 433

⁶⁷ *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 28

⁶⁸ *Slack v Leeds Industrial Co-operative Society Ltd* [1924] 2 Ch 475, *Miller v Jackson* [1977] 1 QB 966, *Regan v Paul Properties DPF No 1 Ltd* [2007] Ch 135 and *Watson v Croft Promo-Sport Ltd* [2009] EWCA Civ [2009] 3 All ER 249

⁶⁹ *Kine v Jolly* [1905] 1 Ch 480, *Fishenden v Higgs & Hill Ltd* (1935) 153 LT 128

⁷⁰ *Colls v Home & Colonial Store Ltd* [1904] AC 179

often make the law and are therefore particularly likely to be tempted to fashion or refashion legal principles to achieve justice in a particular case. That temptation is particularly hard to resist when a judge is exercising an equitable jurisdiction, given that, as already mentioned, equity has its roots in the desire to mitigate the rigidity and harshness of the common law. However, as I have also mentioned, one of the principal responsibilities of a judge today, when the cost of litigation is so ruinously high, is to ensure that the law is not merely just, but that it is as clear, as simple and as accessible as it can be. Indeed, if, which I certainly do not intend, I had to provide a mission statement for the UK Supreme Court, it would be to render the law as clear and simple as possible. It can be positively dangerous for the proper development of the law if judges strive to reach a fair result in every case they try. Not only is fairness often in the eye of the beholder, but changing or distorting the law to get what seems to be the right result in a particular case has three significant risks. First, and most trivially, where the judge is not in the final appeal court, the party the judge has tried to help may actually be far worse off as an appeal court may reverse the decision, so that party has to pay two lots of costs. More broadly, the law is left in a state of uncertainty, and what produces a just result in one case may produce unjust results in other cases. What we judges have to remember is that we are deciding the law by reference to one case, but it is no more important than each of the countless other actual or potential cases which raise a similar point.

31. The notion that equity was and is flexible is understandable given that it was invoked and developed to mitigate the rigours and technicalities of the common law. However, having been all over the place, it was of course rationalised and given a degree of consistency by the great Lord Nottingham, the Lord Chancellor from 1675 to 1682, who was, according to Blackstone, “*emphatically called ‘the father of equity’*”⁷¹. He took equity by the scruff of the neck and gave it coherence – or so we were all taught. Whether it is as coherent as we all had thought must be a matter of debate.

32. However, before I end, I ought to correct any impression that it is only the Court of Appeal judges who go wrong in equity, by giving two examples of judicial

⁷¹ *Blackstone Com Bk III Ch 4*, p 55

“misspeakings” in the House of Lords. In 1891, Lord Halsbury LC in a House of Lords case⁷² must have caused consternation among Judges and barristers at Lincoln’s Inn when he said that “if it is intended to have a resulting trust, the ordinary and familiar mode of doing that is by saying so on the face of the instrument”. That is an absurd statement. A law student in his or her first year who wrote that statement would be told to give up the law and pursue some other subject to which he or she was more suited.

33. Not long after I started practice, Lord Diplock gave the leading speech in a House of Lords case, *United Scientific*⁷³ on contractual time limits and the effect of the fusion of equity and the common law in the famous legislation of the 1870s. Almost all judges and practising lawyers in Lincoln’s Inn marvelled at his learned, erudite and apparently authoritative, analysis of the law in this area. Sometime later, I had cause to consult the fourth edition of Meagher Gummow & Lehane (sadly published after John Lehane’s death, although he substantially contributed to it with “heroic courage” according to Dyson Heydon⁷⁴). As I idly flicked through the preface, it was with a mixture of shock and glee that I read the authors’ description of Lord Diplock’s speech as being “the low water-mark of modern English jurisprudence”. Meagher, in his judicial capacity, returned to the attack, describing Lord Diplock’s analysis as “so obviously erroneous as to be risible”⁷⁵. I am afraid that I could not resist quoting those observations in a case in the English Court of Appeal⁷⁶, although I accepted that we were bound by Lord Diplock’s analysis, and indeed Meagher J accepted that the ultimate conclusion was right.

34. With all these distinguished judges from Lord Lindley to Lord Diplock getting their equitable wires crossed, I will leave the last word with Lord Bowen, another great judge who died sadly young at 59, like John Lehane and apparently the originator of the man in the Clapham omnibus⁷⁷, albeit one of the culprits in the *Heiron-Lister* debacle, and

⁷² *Smith v Cooke* [1891] 2 AC 237,239

⁷³ *United Scientific Industries Ltd v Burnley Borough Council* [1978] AC 904

⁷⁴ See footnote 2

⁷⁵ *G R Mailman & Associates Pty -v- Wormald (Australia) Pty Limited* (1991) 24 NSWLR 80 at 99D-E

⁷⁶ *Lancecrest Ltd v Asinaju* [2005] EWCA Civ 117, paras 15-16

⁷⁷ According to Henn Collins MR in *McQuire v. Western Morning News* ([1903] 2 KB 100, but possibly originated by Walter Bagehot, who referred to “the bald-headed man at the back of the omnibus” in his famous *English Constitution* (1867)

in *Soar v Ashwell*. He observed in one case that “when I hear of an ‘equity’ ..., I am reminded of a blind man in a dark room, looking for a black hat, which isn’t there”⁷⁸.

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Sydney

4 August 2014

⁷⁸ According to Goddard LJ in *Mills v Stanway Coaches Ltd* [1940] 2 KB 334, 349