THE 2009 WA LEE LECTURE IN EQUITY: THE CONSCIENCE OF EQUITY*

P A KEANE†

In last year's WA Lee Lecture, Justice Michael Kirby, in his paper Equity's Australian Isolationism, criticised equity jurisprudence in Australia for its failure to follow the Canadian example in unifying the doctrines of equity and the rules of the common law particularly in relation to aspects of the fiduciary obligation and the availability of punitive damages.

It is submitted that an appreciation of the fundamental values referred to as the conscience of equity affords good reason to resist the unifying tendencies apparent in the Canadian jurisprudence.

I INTRODUCTION

I am honoured to have been asked to deliver this year's WA Lee Lecture. Tony Lee has been, for four decades, a highly-regarded and much-loved teacher of equity to generations of lawyers in this State. In the 1970s Tony taught me Equity and later Succession; and in the early 1990s I had the privilege of serving with him on the Queensland Law Reform Commission where he was a bottomless well of erudition.

Last year's lecture in this series in honour of Tony Lee was given by Justice Michael Kirby.[1] His Honour's thesis was that to the extent that it is still not generally accepted in Australia that the doctrines of equity have mingled generally with the rules of the common law, that is only because that desirable outcome has been obstructed by what his Honour described as the isolationism of some Australian equity scholars and judges. This isolationism was said to stand in the way of the development of a single coherent body of legal principle.

Kirby J argued that the development of equity in Australia has been blinkered and inconsistent with the underlying principles of equity by reason of this isolationism, and that Australian jurisprudence should follow the lead of the Supreme Court of Canada in

---

* A paper presented at the 2009 WA Lee Lecture in Equity on Monday, 2 November 2009. This is an edited version of a paper previously published: Keane, P A 'The 2009 WA Lee Lecture in Equity: The conscience of equite' (2010) 84 ALJ 92 *Australian Law Journal 92.*

† Chief Justice, Federal Court of Australia.

1 Justice M Kirby, 'Equity's Australian Isolationism' (2008) 8 *Queensland University of Technology Law and Justice Journal* 444.

DOI 10.5204/qutlr.v10i1.11

mixing and matching equitable doctrines and legal rules in order to achieve more perfect justice.

Kirby J's lecture was, rightly, received with great acclaim. I know that Tony Lee enjoyed it immensely.

I hope that Tony won't mind if tonight we carry on the discussion and that I introduce a note of scepticism. I suggest that to see differences between fundamental equitable principles and the rules of the common law which stand in the way of a unified theory is not to take a blinkered view but to recognise some things which seem to have vanished from sight in the Canadian jurisprudence.

II SPECIFIC ISSUES

Kirby J's paper drew on the paper delivered at Oxford in March 2001 by Professor Andrew Burrows.[2] Professor Burrows made the point that, because there are some categories of cases where common law and equity may co-exist coherently while there are other categories where they may not, we need to get down to specifics in order to distinguish one category from the other, in any meaningful way.

Kirby J referred to four specific examples of his complaint, first, to the refusal of the High Court in *Breen v Williams*[3] to hold that the fiduciary obligation of a doctor to his patient encompassed the provision of the doctor's notes of the patient's previous treatment, and secondly, to the failure of the High Court to deploy the concept of fiduciary obligation, as have Canadian courts, as a means of vindicating the claims of indigenous occupants of land in Australia.

I pause to say that there can be no denying that Canadian jurisprudence has embraced with enthusiasm the notion of fiduciary duty. I am told that Sir Anthony Mason has said that in Canada there are three types of persons: those who have been held to be fiduciaries; those who are about to become fiduciaries; and judges.

Kirby J's third specific complaint concerned the failure of Australian courts to follow the Canadian lead in awarding exemplary damages for breach of equitable obligations.

Kirby J's fourth specific complaint concerned the High Court's refusal in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[4] to accede to the view that the liability for receipt of trust property should now be based strictly on a restitutionary approach under which the liability of the recipient may be established without the need for notice of the breach of trust to the recipient. This is not a particularly good example of the superiority of the Canadian jurisprudence. In relation to recipient liability, the Supreme Court of Canada in *Citadel General Assurance Co v Lloyds' Bank Canada*,[5] a case decided 10 years before *Farah Constructions*, explicitly rejected a strict restitutionary approach and insisted that dishonesty on the part of a third party recipient of trust property is essential to liability to the beneficial owner.

---

2 A Burrows, 'We Do This At Common Law But That In Equity' (2002) 22 *Oxford Journal of Legal Studies* 1.

3 (1996) 186 CLR 71.

4 (2007) 230 CLR 89, 144–59, [120]–[58].

5 [1997] 3 SCR 805.

I was inspired to pursue my theme, not by a concern to defend the authors of Meagher, Gummow and Lehane – that would be impertinent – but by Kirby J's confidence that, in the fullness of time, the soundness of his views would be vindicated by his disciples, of whom there are many, amongst today's law students. Whether the particular outcomes he supports in his lecture are to be welcomed and whether they might better be achieved by legislation, I express no view. I seek only to say that the essential values and principles of equity do not support those outcomes.

III THE BIG PICTURE

As I say, I am not concerned with whether the Canadian outcomes are to be preferred in terms of broad notions of justice: I am concerned rather with whether the Canadian approach is driven by a more faithful adherence to the essential principles of equity than is exhibited by Australian courts.

To this end I want to try to present the differences as part of a big picture. And the big picture is of human selfishness, and the extent, and standards by which, individual self-interest, especially in trade and commerce, is to be restrained by the courts.

We are a rights-conscious society: the essence of a right is the entitlement to have our own way and to have others accept that entitlement. When we look at this big picture we can, I think, more readily see that there are reasons for differences between equitable doctrines and common law rules especially in relation to the regulation of business.

I will begin with a brief reflection upon the medieval origins of equitable doctrines in the Court of Chancery. I hasten to acknowledge that I respect a central feature of the argument of Kirby J which was, of course, that the past should not control the future. (I am also particularly mindful that Justice Michael McHugh once described Roddy Meagher, one of the authors of Meagher, Gummow and Lehane, as one of the finest minds of the 16th century.)

But, after all, Kirby J did invoke Sir Anthony Mason's view that equity's 'ecclesiastical natural law foundations' is one feature which equips equity better than the common law 'to meet the needs of the type of liberal democratic society which has evolved in the twentieth century.'[6]

Sir Anthony Mason also referred in this connection to equity's concern with 'standards of conscience, fairness, and equality … as well as its discretionary approach to the grant of relief.'[7] We cannot, without some degree of inconsistency and contradiction, accept the starting point which establishes equity's mission and method, and deny the conclusions which flow from that starting point.

I suggest that from a reflection upon the 'natural law ecclesiastical foundations of equity' three modern resonations emerge: equity operates by way of exception to the legal order of the realm, equity is more concerned to restrain the exercise of rights than to promote them, and the notion of 'conscience', which is of central importance to its mission, is not about the state of mind of the defendant.

---

6 Sir A Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238, 239.

7 Ibid.

I will then turn to address the specific problems addressed by Kirby J. In relation to them, I suggest that:

(a) as to fiduciary obligation, the conscience of equity does not impose the heavy burdens of selflessness demanded of a fiduciary upon a person who has not voluntarily entered into a relationship which involves those burdens;
(b) so far as fiduciary obligation as a source of native title is concerned, Canadian legislation created the possibility of a fiduciary obligation on the Crown, whereas radically different legislative regimes in Australia denied that possibility;
(c) as to the recovery of exemplary damages, the conscience of equity does not support windfalls for plaintiffs and it is not in the service of the demands of public policy that a defendant be punished as a deterrent; and
(d) as to liability for receipt of trust property, if liability for receipt of trust property is to be imposed on a stranger for the benefit of a plaintiff who has chosen to deal through a fiduciary, actual dishonesty on the part of the stranger is necessary to justify equitable intervention to relieve the plaintiff.

IV THE NATURAL LAW ECCLESIASTICAL FOUNDATIONS

The institution of the trust developed in England as a result of the work of the clerics who, until the Reformation, constituted the Chancellors and the Masters of Chancery.[8] It was only under the Tudors that Chancery was transformed into the High Court of Chancery.

The mindset of the late medieval and early modern clerics who established equity's mission was formed within an intellectual tradition, articulated most authoritatively by Thomas Aquinas, which accorded primacy to the idea of the person as opposed to the individual.[9] Within this tradition the emphasis was upon the community as a society of persons in relationship with each other and, of course, with God, rather than a multitude of atoms bound together only by prudent bargains struck at arm's length. This tradition was concerned with the social responsibilities of individuals, not their rights.

When we speak of Thomas Aquinas, it is worth reminding ourselves that Aquinas looked to Aristotle, referring to him simply as 'the Philosopher'. Aristotle regarded an even-handed willingness to refrain from insisting upon the full measure of one's legal rights as a very great social virtue. He called this virtue 'epieikeia'. In Latin it was 'aequitas' and in the slower Anglo-Saxon tongue 'equity'. It would be surprising if a concept that entered the history of ideas as an idea of virtuous self-restraint should have developed into a driver of the expansion of rights.

We know that not long after the Conquest, Chancery had taken it upon itself to ensure that trustees conscientiously performed their duties. Oliver Wendell Holmes thought that the trust as an institution of the law of England had its origins in the customs of the Germanic tribes.[10] However that may be, we know that the use, or the trust, was being

8 W S Holdsworth, *A History of English Law: Vol IV* (Methuen & Co Ltd, 1924) 276–83.
9 H J Berman, 'The Christian Sources of General Contract Law' in J Witte Jr and F S Alexander (eds), *Christianity and Law: An Introduction* (2009) 125, 133–4.
10 Holdsworth, above n 6, 410–11.

deployed in England at the time of the Crusades to protect the heirs of those who took the Cross against the depredations of those who stayed home.[11]

Warriors travelling to the Crusades needed to be able to ensure that their lands, and their children's inheritance, would be defended by trustworthy persons against those who would supplant them by force. In the kleptocracy which was Norman England, these were heavy burdens indeed. Chancery insisted that trustees resist the ordinary human temptation to self-interested behaviour in discharging their heavy burdens.[12]

The principal concern of the common law judges, from Bracton onwards, was with the nascent conception of sovereignty and the exercise of rights by the government and the governed.[13] The conscience of equity inherited from Chancery is a collection of standards of conduct which reflect different ethical considerations from those which inform common law rules of tort and contract. The common law dealt, and still deals in, rights which can be enforced against the world. Common law remedies were available as of right: Magna Carta promised no less. In this legal landscape, Chancery's intervention was necessarily exceptional.

The King's judges who administered the common law were principally focused upon the external aspects of land ownership. That is because it was the person who was seised of the land from whom feudal service, including, importantly, military service, was expected. The notion that a person could have the benefit of ownership of land without the burdens of feudal service was inconsistent with, and indeed potentially subversive of, an essential aspect of the structure of the nascent state. It was the opposition of the common lawyers to the subversive effects of the trust which led ultimately to the Statute of Uses in 1536.[14]

It is also worth noting that the clerics who staffed the medieval Chancery, unlike the judges of the courts of common law, were not dependent upon the jury to supply it with the factual basis for the decision of a case. Until the time of Francis Bacon, Chancery followed a practice of examining witnesses to inform the conscience of the court. This practice may have derived from continental procedures: that would hardly be surprising

---

11 A case discussed in Bracton's Note Book for the year 1224 involved one Robert who, before going to the Holy Land, committed land he held to his brother Wydo *ad opus puerorum suorum*, in other words to the use of his sons. From this, and other notes like it, we get a sense, both of the historical reasons for the development of such an institution, and for the heavy burdens which trusteeship cast upon a trustee.

12 The efforts of the clergy who staffed the Chancery in the development of the trust as a device for separating legal ownership of and from its beneficial ownership were not entirely disinterested: the device of the trust also allowed mendicant orders, such as the Franciscans, to hold the benefit of land consistently with the vows of poverty taken by individual members of the order. The idea that moral rectitude and legality of conduct were not necessarily co-extensive was very familiar to those responsible for the foundations of equity. In the 13th century, William of Occam, the English Franciscan (who invented the famous razor), spent much intellectual energy and ink defending the poverty of the Franciscans against Pope John XXII. In his *Opus nonaginta dierum* (W of Ockham, 'Opus Nonaginta Dierum' in J G Sikes and H S Offler (eds), *Opera Politica II* (1963) 375), William argued that conduct could be morally right without having any place within the systems of legal justice. An act could be regarded as just in a moral sense, but neither just nor unjust in a legal sense. Moral justice and legal right were quite separate concepts. This distinction reflects a clear appreciation of the distinctions between natural and positive ideas of justice and between the Chancery and the common law, between private conscience and public policy.

13 Holdsworth, above n 6, 279.

14 A W Scott Jr, *Scott on Trusts: Vol I* (Little, Brown), 3rd ed, 1967) 7–21.

because in both cases procedures of the confessional were part of their professional lives: resort to examination of the parties in order to get at the truth of a dispute and to reconcile them with the conscience of the court did not involve a creative leap.

Chancery was flexible. As reconciliation after sin could be made conditional upon the doing of penance, so relief in equity could be made conditional on the plaintiff conforming to the requirements of conscience.

Holdsworth says, the 'power and jurisdiction [of Chancery] increased as the rules of the common law grew more fixed; and the result was that the strictly medieval conception of equity had a longer life in England than in any other country in Europe, and a history which was quite unique.'[15]

By the 15th century the Chancellors were sufficiently independent that they were prepared 'to satisfy the demands of conscience even though their action involved a dispensation with the rigid rules of law.'[16] Importantly, the clerical chancellors of this period did not act by reference to considerations of public policy but to 'the principles of scholastic philosophy, and to the rules of the civil and canon law which had given to those principles a technical shape and a practical application to the solution of legal problems.'[17]

Of course, too much should not be made of the influence of medieval Catholic moral philosophy on the Chancellors and their clerical staff. Chancery also drew upon canon law, mercantile law and had the benefit of argument from the common lawyers who argued cases in Chancery.[18] It has been a long time since an English Lord Chancellor has cited Thomas Aquinas. Professor Birks was probably right to say that 'from the time of Lord Nottingham [1673–1682] if not before, the value which served as equity's guiding light, was legal certainty.'[19] But the intellectual inheritance of Chancery had modern ramifications in terms of the big picture.

When equity did intervene to prevent unconscientious conduct, it was not concerned solely with the conduct of the defendant. Chancery required conscientious behaviour by plaintiffs as well. This point of view finds one modern expression in the maxim that the person who seeks equity must come with clean hands.[20]

V MODERN RESONATIONS

Three modern resonations of the legacy of Chancery are to be noted here. First, a desire to vindicate a legal right is not sufficient to engage the conscience of equity; indeed, when that conscience is engaged, it is often to restrain the exercise of legal rights. Secondly, the entitlement to equitable relief can be made to depend on the plaintiff conforming to standards of conscientious behaviour. Thirdly, Chancery sent no mission to the merchants to seek to regulate trade and commerce. It gave relief appropriate to

15 Holdsworth, above n 6, 279.
16 Ibid 276.
17 Ibid.
18 Berman, above n 7, 133.
19 P Birks, 'Equity, Conscience, and Unjust Enrichment' (1999) 23 *Melbourne University Law Review* 1, 22.
20 *Bridgewater v Leahy* (1998) 194 CLR 457, 494, [125].

protect the integrity of fiduciary relationships where it found them, but, until the Canadian Awakening, it did not seek to construct them.

VI ENGAGING THE CONSCIENCE OF EQUITY

In 1853 in *Clough v Ratcliffe*,[21] Knight-Bruce VC famously said: 'Nakedly to declare a right, without doing or directing anything else relating to the right, does not, I conceive, belong to the functions of this Court.'

This is a statement of the long established attitude of equity, not merely a reflection of pre-*Judicature Act* practice and procedure. The point is not merely that infringement of a legal right did not of itself lead to the intervention of equity. The plaintiff had to be able to stake a claim on the conscience of equity; and merely having one's legal rights infringed would not do.

A strong illustration of this point is provided by the cases which made it clear that equity would not allow a borrower of moneys to take advantage of money lending statutes which made certain loans illegal for the protection of the borrower unless the borrower was willing to 'submit to the repayment of the moneys borrowed remaining unpaid'.[22]

Even where the money lending legislation rendered the loan agreement and securities void, equity would not grant relief to a borrower – not even a declaration of invalidity – unless the borrower was willing to act in good conscience by offering to repay the moneys borrowed. The borrower might have a legal right under the statute to be relieved of the loan but the assistance of a court of equity would only be available if the borrower was prepared to make restitution of the loan moneys.

As Sir Owen Dixon explained in *Mayfair Trading Co Pty Ltd v Dreyer*,[23] the ability and willingness of a plaintiff to restore the defendant as a pre-condition of equitable relief to give effect to a legal right was one of the 'basal considerations determining in a court of equity the plaintiff's equitable title to relief'.[24] The plaintiff's rights, and the public policy reflected in the legislation which conferred those rights, simply were not sufficient to engage the conscience of equity.[25] It was only when the legislation made it clear that the borrower should be entitled to relief without doing equity that equity's insistence on conscientious behaviour by the borrower was overcome.

In *Langman v Handover*,[26] Dixon and Rich JJ identified this insistence on mutuality and fair dealing as expressed in the maxim that a person who seeks equity must do equity. Their Honours said:[27]

---

21 (1853) 63 ER 1016, 1023. See also *Bromley v Holland* (1800) 31 ER 766, 769–70.

22 *Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR 428, 452. See also *Hanson v Keating* (1844) 67 ER 537; *Jervis v Berridge* (1873) LR 8 Ch App 351, 358; *Lodge v National Union Investment Co Ltd* [1907] 1 Ch 300; *Langman v Handover* (1929) 43 CLR 334, 345, 356.

23 (1958) 101 CLR 428, 452–6.

24 *Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR 428, 454.

25 Compare with *Bridgewater v Leahy* (1998) 194 CLR 457, 494, [125].

26 (1929) 43 CLR 334, 353–4.

27 Ibid (citations footnoted in original).

> In the important judgment which Wigram VC gave upon the maxim that he who seeks equity must do equity, in *Hanson v Keating* ((1844) 4 Ha 1; 67 ER 537), after instancing the necessity imposed upon a plaintiff in a bill for an account, of submitting himself to account in the same matter, and in a bill for specific performance, of submitting to perform the contract, he proceeds ((1844) 4 Ha, at pp 5, 6; 67 ER 537) :– 'In this, as in the former case, the Court will execute the matter which is the subject of the suit wholly, and not partially. So, if a bill be filed by the obligor in an usurious bond, to be relieved against it, the Court, in a proper case, will cancel the bond, but only upon terms of the obligor refunding to the obligee the money actually advanced. The reasoning is analogous to that in the previous cases. The equity of the obligor is to have the entire transaction rescinded. The Court will do this, so as to remit both parties to their original positions: it will not relieve the obligor from his liability, leaving him in the possession of the fruits of the illegal transaction he complains of.' In such cases the equity is founded, not upon the necessity of protecting the party's legal rights, but upon his willingness to resign them in order that he may be restored to the position he occupied before he embarked upon the transaction which turns out to be unlawful.

Another illustration of this point is afforded by equity's long-standing unwillingness to grant specific performance of a contract of personal service. At the practical level, this reluctance was explained to be based on perceived difficulties in supervision of the court's orders. At the deeper level of principle, it was grounded in a concern about the unfairness, in terms of mutuality, of compelling an employer to continue the employment of a person in whom the employer had lost confidence.[28] Justice would best be served in such a case by leaving the parties to their remedies in damages at law.

And in the area of estoppel, in *The Commonwealth v Verwayen*,[29] Deane J recognised that an attempt by a plaintiff to set up an estoppel by conduct might itself be 'unconscientious' because that remedy would be disproportionate to any detriment which the plaintiff might suffer if the estoppel were rejected. Such a result could, his Honour said, be defeated by attention to the plaintiff's position. Deane J supposed:

> a case in which the party claiming the benefit of an estoppel precluding [the defendant's] denial of [the plaintiff's] ownership of a million dollar block of land owned by [the defendant] would sustain no detriment beyond the loss of one hundred dollars spent on the erection of a shed if a departure from the assumed state of affairs were allowed (cf, eg, *Ramsden v Dyson* (1866) LR 1 HL 129 at 140 – 141; *Sheridan v Barrett* (1879) 4 LR Ir 223 at 229 – 230).[30]

Deane J suggested that in this hypothetical case, 'the payment of, or a binding undertaking to pay, adequate compensation would preclude a finding of estoppel by conduct.'[31]

VII THE CONSCIENCE OF EQUITY

The late Professor Birks was sceptical as to whether the modern law of equity can be said to owe anything of significance to the views of 14th century Roman Catholicism as

---

28 *Visscher v Giudice* (2009) 258 ALR 651, [54].

29 (1990) 170 CLR 394, 441.

30 Ibid.

31 I am indebted to the discussion of this problem by Mr J D McKenna SC of the Queensland Bar: J McKenna SC, 'Remedies in Estoppel' in A Rahemtula (ed), *Justice According to Law: A Festchrift for the Honourable Mr Justice BH McPherson CBE* (2006) 167, 195–201.

taught by Thomas Aquinas.[32] But Professor Birks regarded as radically unacceptable the notion that the idea of conscience should now develop by the application of intuitive and subjective understandings of the difference between good and evil.[33]

Professor Birks may have had in mind the following passage from the reasons of McLachlin J (as her Ladyship then was) in *Soulos v Korkontzilas*:[34]

> A judge faced with a claim for a constructive trust will have regard not merely to what might seem 'fair' in a general sense, but to other situations where courts have found a constructive trust. The goal is but a reasoned, incremental development of the law on a case-by-case basis.

It is, I think, possible to accept that the standards enforced by equity have evolved since the 14th century without acceding to the view that the conscience of equity is no more than the subjective view of the individual judge as to what is fair or reasonable in any given case. The remedial tail of the constructive trust should not wag the doctrinal dog of good conscience. And most importantly the constructive trust may be a construct of the courts but the relationship which involves these burdens must be voluntarily assumed in fact.

In *Pomeroy*, (with *Scott on Trusts*, surely the greatest American textbook on equity), it is explained that the:

> 'conscience' which is an element of the equitable jurisdiction came to be regarded, and has so continued to the present day, as a metaphorical term, designating the common standard of civil right and expediency combined, based on general principles and limited by established doctrines, to which the court appeals and by which it tests the conduct and rights of suitors – a judicial and not a personal conscience.[35]

In this conception, the conscience of equity is a repository of values and standards whereby the conduct of suitors is tested. It is not concerned simply with whether the conduct of a defendant is reasonable or fair.

VIII EQUITABLE INTERVENTION IN COMMERCE IS EXCEPTIONAL

Chancery never set out to provide general regulation of dealings in the market place, being more concerned with real property. Chancery did not set out to correct the clear eyed and hard hearted perception of the common law that loss suffered in trade or commerce 'is often no more than one of the ordinary consequences of participation in a market economy.'[36]

The common law regards the aggressive pursuit by a trader of his or her commercial interests as legitimate so long as it is conducted honestly and with reasonable care for those at risk of harm if reasonable care is not shown. In a market economy 'rivalry

---

32 Birks, above n 17, 20–1.

33 Compare with *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 180, 185–6; *Soulos v Korkontzilas* [1997] 2 SCR 217, [26]–[35].

34 [1997] 2 SCR 217, [35].

35 J Norton Pomeroy and S W Symons (eds), *A Treatise on Equity Jurisprudence, Vol I* (The Lawyers Cooperative Publishing Company, 5th ed, 1941) 94, [57].

36 *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 299.

between participants is an essential and defining feature: rivalry in which each participant seeks to maximise its profit and market share at the expense of all other participants in that market.'[37]

In our law of contract, the right of self-interested action, even when it operates unreasonably or unfairly at the expense of others, is embodied in the 'traditional common law approach' conveyed by the maxim *caveat emptor*.[38]

In trade or commerce a relationship in which one is obliged to disregard one's own material interests for the benefit of another person is obviously exceptional. This is the standard of behaviour which equity required of a fiduciary. And there was no reason to insist on adherence to that standard save where there was voluntarily assumption of the responsibility for the interests of another which brought with it the extraordinary obligation of selflessness.

IX DIFFERENT INTERESTS AND ETHICAL STANDARDS

We can readily recognise radical differences between the standard of absolute loyalty required of a fiduciary and the standard of reasonable care in negligence and reasonableness in the law of contract.[39] These differences ought to provide a warning to resist the human urge to see patterns which suggest an underlying unity of concepts. To elide these differences in pursuit of a common standard of fair and reasonable behaviour is to fail to recognise that the rules of equity and the common law reflect radically different views of the legitimacy of human selfishness and of occasions for its control.

In some respects the duty owed by a fiduciary to the beneficiary of that duty is more onerous than the common law duty to take reasonable care, and in some respects it is less rigorous. In one sense, the strictness of the fiduciary obligation surpasses that involved in the concept of reasonable care. The great cases of *Keech v Sandford*,[40] *Regal (Hastings) Ltd v Gulliver*,[41] and *Boardman v Phipps*[42] establish that a fiduciary must disgorge a profit made from the sale of property acquired by reason of an opportunity which arose in the course of the fiduciary relationship even though the beneficiary could not or would not have taken up the opportunity. In none of these cases could it sensibly be said that the fiduciary failed to avoid causing harm to the beneficiary much less that the fiduciary had failed to exercise reasonable care to do so.

A person who owes a duty of care in negligence is obliged to do only what is reasonable not to harm the other, and he or she is entitled to give effect to his or her own selfish interests in that regard; indeed, the determination of what is reasonable in the context of tort law can only be made by taking into account the cost to the person of the steps necessary to ameliorate the risk of harm to the other and deciding whether the risk is such that the incurring of the expense is reasonably warranted.

---

37 Ibid.

38 *Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd (In Liq)* [2002] ATPR 41-864, 44,800.

39 *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666; *Mackay v Dick* (1881) 6 App Cas 251, 263; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 607.

40 (1726) 25 ER 223.

41 [1967] 2 AC 134N.

42 [1967] 2 AC 46, 109.

A classic example of a fiduciary relationship is that between employer and employee. It is the employee who owes the fiduciary obligation to the employer. That is because it is the employee who deals with third parties and with the employer's assets on behalf of the employer. The employee voluntarily agrees to subordinate his or her interests to those of his or her employer in representing the employer to third parties. But it has never been thought that the fiduciary obligation is owed both ways. The duty which the employer owes the employee is one to take reasonable care to avoid causing the employee harm. It is imposed on the employer as part of the social cost of doing business. As Lord Atkin said in *Donoghue v Stevenson*:[43] 'liability for negligence … is … based upon a general public sentiment of moral wrongdoing for which the offender must pay.'

The employer's obligation extends only so far as the foreseeable risk of harm extends. Altruism has very little to do with the duty to take reasonable care imposed by the law of tort. In sharp contrast, the fiduciary obligation leaves no room for any sort of self-interested calculation so far as the subject matter of the obligation is concerned: the fiduciary is absolutely required to deny his own interests in favour of the person for whose benefit he must act. And in equity, it is the insistence upon mutuality of conscientious behaviour by claimants, rather than the common law notion of foreseeability, which serves as the principal brake upon what would otherwise be an ever expanding proliferation of liabilities.

The fiduciary obligation is absolute, subject to the knowing consent of the beneficiary, because nothing less is regarded as a sufficient protection for the interests of the beneficiary against the powerful temptations of self-interest.

The fiduciary obligation is a special exception to the acceptance of selfishness as a fact of life. The common law recognises the legitimacy of selfish behaviour so long as it is honest and reasonable. Equity was not so liberal where it found a fiduciary relationship; but its intervention was exceptional.

The burdens of the obligation of self-abnegation upon a trustee are heavy. Why would it be thought to accord with conscience to impose those burdens upon a person who had not freely and deliberately accepted them?

Another way of looking at it is to say that it would be a violation of mutuality in a relationship and contrary to the conscience of equity for the *soi-disant* beneficiary of a fiduciary duty to assert an entitlement to the benefit of an objection of self-abnegation against a person who has not willingly accepted the corresponding burden.

While the obligation is absolute, the strict claims of conscience are confined to a voluntary undertaking in respect of a particular subject matter. It is as much the law in England as it is in Australia that a fiduciary obligation can only exist with respect to a given right or interest.[44] In practical terms, the less weight one gives to this consideration, the more the grant of remedies *in rem*, such as a constructive trust over property, is apt to create commercial uncertainty and to cut across the rateable

---

43 [1932] AC 562, 580.

44 *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 409; *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126, 1129–30; *In re Goldcorp Exchange Ltd* [1995] 1 AC 74, 98.

distribution of assets in bankruptcy and corporate insolvency. The circumstances in which the rateable distribution of a debtor's assets to its creditors can be trumped by the imposition of a constructive trust should be extended only for compelling reasons which will not expose the courts to the reproach that they are increasing the hazards of carrying on an honest business.

If there is no relationship between people engaged in commerce beyond common participation in the market, there is no occasion for the enforcement of rules appropriate to a relationship of voluntary self-abnegation.[45]

If one loses sight of these differences, coherence and certainty suffer.

In the Supreme Court of Canada in *LAC Minerals Ltd v International Corona Resources Ltd*, it was said:[46]

> There are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship. In specific circumstances and in specific relationships, courts have no difficulty in imposing fiduciary obligations, but at a more fundamental level, the principle on which that obligation is based is unclear. Indeed, the term 'fiduciary' has been described as 'one of the most ill-defined, if not altogether misleading terms in our law'.

I make two comments on this passage. First, the conceptual uncertainty as to what is meant by a fiduciary relationship is resolved to a large extent if one accepts that the fiduciary obligation is indeed an incident of a relationship of dependency which the parties have, in fact, voluntarily brought into existence: it is not an obligation which is deemed to exist because it is thought to be fair or reasonable in all the circumstances.

---

45 Some in the USA assert (*Jordan v Duff* and *Phelps Inc*, 815 F 2d 429 (7th Cir, 1987), cert dismissed 485 US 901 (1988)) that fiduciary obligations subsist between majority and minority shareholders in a company. This view leads to results which are distinctly counter-intuitive. In these cases the majority shareholders have acquired valuable rights of property, usually at considerable expense to themselves, in accordance with the terms of the constitution of the corporation. The minority shareholders acquired their shares on the same footing. The members of the majority and minority as shareholders act in their own interests as such at arm's length from each other. In their contest for the bigger slice of the corporate pie, the act is in reliance, not upon mutual trust and confidence, but upon the rights conferred by the constitution of the corporation. It is the corporate constitution which establishes the rights which each shareholder acquires as such, for example, in relation to voting in meetings of the corporations. To impose on the majority an obligation to act in the interests of the minority and contrary to their own interests is, as a matter of commerce, absurd. Conscience does not require this level of self-sacrifice. If a minority shareholder can oblige a majority shareholder to act as such in the interests of the minority shareholder, the value of the investment involved in becoming a majority shareholder would be diluted. Asserting one's privileged position under the corporate constitution is not against conscience because no-one could have expected that one was disposed to sacrifice the benefits that one has paid for in the interests of someone else who has not paid for those benefits but who, on the contrary, looms as a rival for control of the company. It will be understood, of course, that I am not here talking about the exercise of powers by directors: they are, of course, under fiduciary obligations to consult only the interests of the company in the exercise of their powers. But shareholders are not. The corporate constitution may limit the scope for selfish conduct by shareholders, but these contractual limitations are imposed by contract as a necessary reflection of the fundamental understanding of all involved that each shareholder can fairly be expected to exercise his or her rights as such exclusively for his or her own benefit.

46 [1989] 2 SCR 574, [24].

To regard a fiduciary obligation as something to be imposed where it is thought fair and reasonable to do so,[47] rather than a consequence of a voluntary acceptance of a relationship involving self-abnegation in respect of a particular subject matter, is not to develop equitable principle but to break radically with it.

Secondly, this passage serves to remind us to the need to be careful about the terms in which we discuss a particular legal problem. When Canadian or American lawyers discuss issues other than the fiduciary obligation of loyalty, such as, for example, the obligation of good faith as between parties to a contract, they still tend to use the terminology of fiduciary duty. These differences of terminology can be confusing: the attachment of the label 'fiduciary' to the contractual obligation of good faith adds nothing of substance to the implied term of contract, long recognised in Anglo-Australian law, that every contract obliges each party to do all things reasonably necessary to ensure that the other party obtains the benefit of its bargain.[48] And it is also undesirable that these differences in terminology can give rise to questions such as whether equitable remedies, such as the constructive trust, should be available for breach of contract.

X BREEN V WILLIAMS

In his 2008 Lecture, Kirby J singled out for special criticism the decision of the High Court in *Breen v Williams*[49] in which it was held, contrary to his Honour's dissenting view in the New South Wales Court of Appeal, that a doctor was not duty-bound to give a patient access to records created by the doctor. The High Court declined to follow the decision of the Supreme Court of Canada in *McInerney v MacDonald*[50] that a patient is entitled to reasonable access to examine and copy the doctor's records.

In *McInerney v MacDonald*,[51] La Forest J delivered the judgment of the court. His Lordship's reasons are not susceptible to summary statement. There are a number of propositions which lead to the conclusion. These include the proposition that 'when a patient releases personal information in the context of the doctor-patient relationship, he or she does so with the legitimate expectation that these duties will be respected.'[52] The duties in question were said to be 'the duty of the doctor to act with utmost good faith and loyalty, and to hold information received from or about a patient in confidence'.

La Forest J relied upon a line of United States cases[53] as indicating that a doctor owes his or her patient a duty 'to act with the utmost good faith and loyalty',[54] and went on to hold that 'the fiduciary qualities of the relationship extend the physician's duty … to include the obligation to grant access to the information the doctor uses in administering treatment.'[55]

---

47 Compare with *Soulos v Korkontzilas* [1997] 2 SCR 217, [26]–[44].

48 *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 605–6.

49 (1996) 186 CLR 71.

50 [1992] 2 SCR 138, 150.

51 Ibid.

52 Ibid [20].

53 Compare with *Emmett v Eastern Dispensary and Casualty Hospital*, 396 F 2d 931 (DC Cir, 1967); *Cannell v Medical and Surgical Clinic*, 315 NE 2d 278 (Ill, 1974).

54 *McInerney v MacDonald* [1992] 2 SCR 138, 148–9.

55 Ibid 150.

It was also said that 'the fiduciary duty to provide access to medical records is ultimately grounded in the nature of the patient's interest in his or her records … The confiding of the information to the physician for medical purposes gives rise to an expectation that the patient's interest in and control of the information will continue.'[56]

The conclusion was that 'in the ordinary case, these records should be disclosed upon the request of the patient unless there is a significant likelihood of a substantial adverse effect on the physical, mental or emotional health of the patient or harm to a third party.'[57] As to how and by whom this balancing exercise is to be performed, La Forest J went on to say that: 'This general rule of access is subject to the superintending jurisdiction of the court.'[58] The idea that one cannot know the content of the conscience of equity in advance of a decision of the court suggests that we are in the realm of subjective assessment rather than principles and standards.

This reasoning draws upon a range of concepts such as confidentiality but the conclusion is essentially founded on the concept of legitimate expectations, the extent of which is to be determined on an ad hoc basis by the court. It has to be this way, of course, because what is encompassed by legitimate expectation can only be known when the court declares that the expectation is indeed legitimate.

At work here is the unifying tendency to treat the conscience of equity as equivalent to what is fair or reasonable in a particular case. This unifying tendency can operate only if one puts to one side considerations of mutuality which require a fiduciary to sacrifice his or her own interests only insofar as he or she has voluntarily assumed that burden. The demand might be reasonable, but that doesn't make it equitable of the plaintiff to make it.

The issue in question in *McInerney v MacDonald* was not whether the patient was entitled to information about the patient's condition but whether the patient was entitled to the doctor's records concerning the patient. Those records were made by the doctor. The doctor was not acting as the patient's confidential secretary to keep a record of the patient's thoughts. The patient had not bargained to be given the records on request. They are, as La Forest J recognised, the property of the doctor.[59] The doctor was not seeking to put the records to some use to the detriment of the patient which might engage the conscience of equity.[60] It was the patient who was asserting a claim upon the doctor's property, and upholding that claim was at odds with equity's fundamental respect for property rights. So what was it that engaged the conscience of equity to trump the doctor's property rights?

It should also be borne in mind that a doctor's records will not consist only of information provided by the patient. They can be expected to contain comments by the doctor about the patient, or statements by others about the patient. These comments may be necessary for the exercise of reasonable skill and care in the provision of professional advice and treatment about the patient, but by no stretch of the imagination can they be described as 'belonging to the patient'. Both the doctor and his or her sources of

56 Ibid [22].
57 Ibid [36].
58 Ibid [39].
59 Ibid [14], [38].
60 Compare with *W v Egdell* [1990] Ch 359, 389, 415, 419; *Breen v Williams* (1996) 186 CLR 71, 111.

information may have legitimate interests in preserving confidentiality between them, especially in respect of information which might confuse or alarm the patient or even give rise to claims by the patient against others,[61] for reasons entirely unconnected with the quality of the medical treatment or advice given to the patient.

Thirdly, information is not property. As Lord Upjohn said in *Boardman v Phipps*:[62] 'It is normally open to all who have eyes to read and ears to hear.' In *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)*,[63] Deane J (definitely not an equity isolationist) said that the rational basis of equity's jurisdiction to protect information 'does not lie in proprietary right. It lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained.' The question is whether the circumstances of the acquisition of information are such as to attract an obligation to deal with it in a particular way.

It tends to skew the relationship by imposing on the doctor an obligation to provide his or her own records to his or her patient for purposes entirely unconnected with the provision of medical treatment or advice. Is it really in accordance with good conscience on the part of the patient to require access to records of a doctor's enquiry of others to enable the patient to bring an action for defamation against them? Is such an idea likely to be conducive to cooperation by third parties with the doctor whose concern is only to heal the sick?

These questions might be thought to raise questions of principle and policy sufficient to justify the reluctance of courts in Australia and England to impute to a doctor a willingness to assume an obligation to imperil himself, or others, where the doctor has not agreed to, and has not been paid to, subordinate his or her interests in this way.

Ironically, La Forest J, in his later judgment in *Hodgkinson v Simms*,[64] recognised that, while claims related to undue influence, unequal bargaining power, duty of care and fiduciary duty will often arise 'side by side', the focus of the fiduciary principle is to 'monitor the abuse of a loyalty reposed'. But in *McInerney v MacDonald*,[65] there was no abuse of an obligation of loyalty on the part of the doctor. He was not seeking to deal with his own property to the disadvantage of his former client. There was no more than a refusal to provide the doctor's records for purposes other than the patient's ongoing medical treatment. There was no 'equity' which, as a matter of conscience, was apt to trump the doctor's legal rights to undisturbed possession of his own property? The plaintiff required the information for no better reason than to be informed about her previous treatment. The 'equity' she asserted consisted of mere curiosity at best. At worst, it was a fishing expedition for grounds to sue her former doctor, or someone else.[66] One cannot help thinking that her case ought to have been for pre-pleading discovery in aid of an action for negligence.

---

61 Compare with *Sidaway v Board of Governors of Bethlem Royal Hospital & Maudsley Hospital Board* [1985] AC 871, 904.

62 [1967] 2 AC 46, 127.

63 (1984) 156 CLR 414, 438.

64 [1994] 3 SCR 377, 406.

65 [1992] 2 SCR 138.

66 Compare with *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709; *Schreuder v Murray (No 2)* [2009] WASCA 145.

In summary, I suggest that this divergence between Canadian and Australian case law is to be understood on the basis that the Canadian approach reflects the sloughing-off of constraints which are fundamental to equity's historic mission.

XI THE FIDUCIARY OBLIGATION AND NATIVE TITLE

Kirby J in last year's lecture expressed regret that what he described as the 'isolationist' perspective of equity lawyers in Australia had the consequence that 'the earlier injustices to the traditional property interests of indigenous communities in Australia [were not] more quickly repaired.' Kirby J referred to the circumstance that, in Canada, 'reasoning by analogy from the other more confined and propertied relationships, a doctrine was fashioned that accepted that the Crown owed indigenous peoples fiduciary obligations.'

With all respect to his Honour, it was not the blinkered view of Australian equity lawyers which obscured recognition of native title, but the insertion of the local legislature between the Crown and indigenous people.

Generally speaking, fiduciary obligations arise from a relationship existing voluntarily between the parties, one of whom has undertaken to act in a transaction on behalf of the other. Statute can create the fiction that such a relationship exists between strangers. That is what happened in Canada so far as native title is concerned. It is not what happened in Queensland.

The provisions of s 30 and s 40 of the *Constitution Act of 1867* (Qld) ('the 1867 Act') empowered the local legislature to determine the basis on which land in the colony would be allocated.[67] These provisions gave the colonists, through the colonial legislature, the power to determine independently of Westminster the legal basis on which the settlement and occupation of land in the colony would proceed. The representatives of the colonists in their legislature could effectively ignore the concerns expressed by the Imperial government at Westminster, through such luminaries as Earl Grey, as to the displacement of the indigenous occupants of the land.

Prior to the establishment of the separate colony of Queensland, Earl Grey, Queen Victoria's Secretary of State, had made it clear in his despatches to Sir Charles Fitzroy, the then Governor of New South Wales, that indigenous occupants of land opened up by settlement for pastoral purposes were not to be excluded from the land. In Earl Grey's despatch of 11 February 1848, his Lordship said of the occupation of land by settlers for pastoral purposes:

> I think it essential that it should generally be understood that leases granted for this purpose give the grantees only an exclusive right of pasturage for their cattle, and of

[67] *Constitution Act of 1867* (Qld) s 30 provided relevantly: 'it shall be lawful for the Legislature of this colony to make laws for regulating the sale letting disposal and occupation of the waste lands of the Crown within the said colony.' As to the meaning of the phrase 'waste lands of the Crown', see *Attorney-General for New South Wales v Williams* [1915] AC 573. *Constitution Act of 1867* (Qld) s 40 provided relevantly: 'The entire management and control of the waste lands belonging to the Crown in the said Colony of Queensland and also the appropriation of the gross proceeds of the sales of such lands and all other proceeds and revenues of the same from whatever source arising within the said colony including all royalties mines and minerals shall be vested in the Legislature of the said colony.'

> cultivating such land as they may require within the large limits thus assigned to them, but that these Leases are not intended to deprive the Natives of their former right to hunt over these Districts, or to wander over them in search of subsistence, in the manner to which they have been heretofore accustomed, from the spontaneous produce of the soil except over land actually cultivated (or fenced) in for that purpose.[68]

In Earl Grey's despatch of 6 August 1849 to Governor Fitzroy, his Lordship again emphasised that the Crown's intention in granting rights of occupation of pastoral runs to settlers was 'to give only the exclusive right of pasturage in the runs, not the exclusive occupation of the Land, as against Natives using it for their ordinary purposes.'

The intention of the Imperial government at Westminster reflected not only an element of humanity and common decency; it was of a piece with a policy of enlightened self-interest in seeking to ensure the peaceful expansion of British 'imperium', which could not be achieved if settlers were allowed to leave indigenous populations with no choice other than that of being 'hunted into the sea' or of armed resistance.[69]

The *Australian Constitutions Act 1842* (Imp) provided for some of the rudiments of self-government in New South Wales, but the disposition of Crown lands in the colony, and the revenue raised thereby, were kept beyond the reach of the legislative representatives of the colonists. The disposition of the 'waste lands of the Crown' remained in the executive control of the Crown.[70] That position was confirmed in 1847 by Sir Alfred Stephen, the Chief Justice of New South Wales in *Attorney-General v Brown*.[71] And the revenue raised from the disposal of the waste lands of the Crown enabled the executive government to fund the administration of government in the colonies.[72]

Section 30 of the 1867 Act reflected the decision by the Imperial Parliament at Westminster in s 2 of the *New South Wales Constitution Act 1855* (Imp) to vest in the representative legislature in the colony both the control over the disposition of the waste lands of the Crown and the disposition of the proceeds of such dispositions.

The effect of ss 30 and 40 of the 1867 Act in Queensland was to ensure that the settlers through their representatives in the colonial legislature could fix the terms on which the waste lands of the Crown could be made available for settlement and the uses to which the revenues so raised might be put. In this way the local settlers were given exclusive power to pursue the internal development of the new colony and to fix governmental priorities in terms of the expenditure of public moneys. The vesting of these powers in the local legislature marked the real birth of Queensland as a political entity with the substantial responsibility for the peace, order and good government of the people of the colony. It also boded ill for the indigenous occupants of the colony.

---

68 *Mabo v Queensland (No 2) (1992),* Despatch No 24 Earl Grey to Fitz Roy dated 11 February 1848 [HRA, (1925), i.26.223, at 225].

69 Compare with 'Annual Report of the Northern Protector of Aboriginals for 1900' in *Queensland Votes and Proceedings: Vol 4* (Government Printer, 1901) 1329–37.

70 E Campbell, 'Crown Land Grants: Form and Validity' (1966) 40 *Australian Law Journal* 35.

71 (1847) 2 SCR (NSW) App 30.

72 *In re Natural Resources (Saskatchewan)* [1932] AC 28, 38; *Wik Peoples v Queensland* (1996) 187 CLR 1, 172–3.

The representatives of the settlers did not continue the policy of humane and enlightened self-interest towards the indigenous people of the colony which had previously been advocated by Earl Grey. It was not until the decision of the High Court in *Mabo v Queensland (No 2)*[73] that the rights of occupation of the indigenous inhabitants were recognised.

The vesting of responsibility for land distribution in the local legislature meant that the notion of a fiduciary relationship between the Crown and indigenous peoples as a basis for a theory of native title reflected in the decision of the Supreme Court of Canada in *Guerin v The Queen*[74] had no scope for operation in the colony. The critical significance of the circumstance that the Crown's power to dispose of land subject to indigenous occupation within the colony was displaced in favour of the local legislature can be seen when one considers the reasons for decision in *Guerin v The Queen*[75] by Dickson, Beetz, Chouinard and Lamer JJ. These reasons were delivered by Dickson J.

His Lordship summarised the basis for regarding the Crown as subject to a fiduciary obligation to Indian bands in the following terms:[76]

> the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.
>
> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.
>
> An Indian Band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the Band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763. It is still recognized in the surrender provisions of the *Indian Act*. The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.

Their Honours said of the Royal Proclamation of 1763:[77]

> The Royal Proclamation of 1763 reserved 'under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid' (R.S.C. 1970, Appendices, p, 123, at 127).

---

73 (1992) 175 CLR 1.
74 [1984] 2 SCR 335, 376.
75 Ibid 375–88.
76 Ibid 376.
77 Ibid 377.

The terms of s 30 and s 40 of the 1867 Act stand in marked contrast to the royal proclamation of 1763. The majority in *Guerin v The Queen* recognised that the interest of the Indians 'in their lands is a pre-existing right not created by Royal Proclamation' or any other executive order or legislative provision, but emphasised that 'the personal and usufructuary right' of the Indians in lands traditionally occupied by them 'stemmed in part from constitutional arrangements peculiar to Canada'.[78]

In this regard, the Indian territory had been vested by s 109 of the 1867 *Constitution* in the Crown in right of the provinces subject to the interests of the Indians. Then their Honours went on to say:[79]

> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.

The basis on which the majority concluded that the Crown owed fiduciary obligations to Indian bands makes it clear that the fiduciary obligation depended upon the direct relationship between the Crown and Indian bands as against those who might seek to acquire lands in respect of which the Indians had a traditional personal right. Their Honours said:[80]

> The concept of fiduciary obligation originated long ago in the notion of breach of confidence, one of the original heads of jurisdiction in Chancery. In the present appeal its relevance is based on the requirement of a 'surrender' before Indian land can be alienated.
>
> The Royal Proclamation of 1763 provided that no private person could purchase from the Indians any lands that the Proclamation had reserved to them, and provided further that all purchases had to be by and in the name of the Crown, in a public assembly of the Indians held by the governor or commander-in-chief of the colony in which the lands in question lay. As Lord Watson pointed out in *St. Catherine's Milling, supra*, at p. 54, this policy with respect to the sale or transfer of the Indians' interest in land has been continuously maintained by the British Crown, by the governments of the colonies when they became responsible for the administration of Indian affairs, and, after 1867, by the federal government of Canada. Successive federal statutes, predecessors to the present *Indian Act*, have all provided for the general inalienability of Indian reserve land except upon surrender to the Crown, the relevant provisions in the present Act being ss. 37-41.

78 Ibid 379–80.
79 Ibid 382.
80 Ibid 383–4.

> The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited. This is made clear in the Royal Proclamation itself, which prefaces the provision making the Crown an intermediary with a declaration that 'great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians .... ' Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act.
>
> This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one. Professor Ernest Weinrib maintains in his article *The Fiduciary Obligation* (1975), 25 U.T.L.J. 1, at p. 7, that 'the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion.' Earlier, at p. 4, he puts the point in the following way:
>
> [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary, uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.
>
> [W]here by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

In Canada it was the power of the Crown, through the executive government, to affect native title in disposing of land to third parties which was identified by the Canadian Supreme Court as providing the conceptual basis for the existence of the fiduciary relationship between the Crown and indigenous peoples which might secure indigenous rights.[81] That possibility was foreclosed in Queensland by the terms of s 30 and s 40 of the 1867 Act, and the *Land Acts* made pursuant thereto.

There was never any basis on which the Canadian approach could have been applied in Australia, and in Queensland in particular. It is hardly surprising that the idea that a fiduciary relationship between the Crown and the indigenous occupants of land afforded a sound basis for the recognition of native title in Queensland commended itself to only one member of the High Court in *Mabo v Queensland (No 2).*[82]

In the pursuit of the development of the colony, 'new forms of land tenure' were devised by the legislature 'to meet the peculiar conditions and wants of the colony'.[83] Looking back from the historical vantage point of *Mabo v Queensland (No 2),* we can say that the representatives of the colonists of Queensland in the local legislature used the powers conferred by s 30 and s 40 of the 1867 Act to establish a legal framework for

---

81 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 202– 3.

82 Ibid 1.

83 AC Millard and GW Millard, *The Law of Real Property in New South Wales* (Law Book Company of Australasia, 1905) 5–6; compare with TP Fry, *Freehold and Leasehold Tenancies of Queensland Land* (University of Queensland, 1946) 29.

the colonial settlement and economic development of Queensland which reflected the colonists' ambition for the development of the productive capacity of the colony and the enhancement of the prosperity of its new settlers. This ambition they pursued through their legislature with a single-minded frontier mentality in which there was no concern for the indigenous inhabitants who were to be displaced. They acted upon the assumption that the forms of land tenure devised by them would operate according to their tenor, notwithstanding any disruption which would inevitably be caused to indigenous occupation of the land. It was an assumption which time would prove to be unfounded.[84]

XII EXEMPLARY DAMAGES

In his 2008 Lecture, Kirby J criticised the New South Wales Court of Appeal which decided by majority in *Harris v Digital Pulse Pty Ltd*[85] that exemplary damages were not available for breach of fiduciary duty. Kirby J commended the approach of Mason P, who dissented in that case, who saw a compelling analogy between the common law of tort and breaches of fiduciary duty and an underlying common principle which warranted the availability of punitive damages.[86]

With great respect to Kirby J and Mason P, I would suggest that there are powerful reasons for denying the availability of exemplary damages for breach of fiduciary duty. These reasons go beyond considerations of history and precedent.

In *Norberg v Wynrib*,[87] McLachlin J (as her Ladyship then was) supported an award of exemplary damages for breach of fiduciary duty reasoning by analogy with contract and tort. In Canada, exemplary damages are available for breach of contract, and the concept of fiduciary obligation has been closely associated with tort. In Australia, it has long been settled that exemplary damages are not available for breach of contract.[88] Accordingly, in Australia one cannot reason to the availability of exemplary damages via an analogy with the law of contract. And to the extent that, as we have seen, the essence of the fiduciary obligation is to act in the interests of another in consequence of the free acceptance of such an obligation, the analogy with contract is much more compelling than the analogy with tort.

And in any event, with great respect to McLachlin J, the difficulty of achieving a coherent synthesis between the rules of the law of tort, or contract for that matter, and the principles of fiduciary duty is reflected in her Ladyship's acknowledgment in *Norberg v Wynrib*[89] that:

> The foundation and ambit of the fiduciary obligation are conceptually distinct from the foundation and ambit of contract and tort. Sometimes the doctrines may overlap in their application, but that does not destroy their conceptual and functional uniqueness.

---

84 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
85 (2003) 56 NSWLR 298.
86 Ibid 335–6, [195].
87 [1992] 2 SCR 226, 298.
88 *Butler v Fairclough* (1917) 23 CLR 78, 89; *Whitfield v De Lauret and Co Ltd* (1920) 29 CLR 71, 81; *Gray v Motor Accident Commission* (1998) 196 CLR 1, 6–7.
89 [1992] 2 SCR 226, 272.

The Chancery conscience is against the idea of inflicting punishment for its own sake.[90] As Kirby J said in *Maguire v Makaronis*:[91] 'The purpose of equity's relief is not punishment.' It is that antipathy which, for example, is reflected in equity's longstanding opposition to the enforcement of penal bonds,[92] and its insistence that an erring fiduciary should receive a proper allowance for his or her expenses where he or she is obliged to give an account of profits.[93]

That the punishment of miscreants may be good public policy is beside the point. Subject to statute, equity is not concerned with the enforcement of public policy but with the restoration of the parties to the position that should have obtained between them had the requirements of conscience been observed.

As Spigelman CJ explained in *Harris v Digital Pulse Pty Ltd*:[94] 'Equity is concerned with the conscience of both parties' and in balancing what is just between the parties, it 'is oppressive to impose burdens on a defaulting fiduciary which go beyond any benefit that he or she has received or any detriment suffered by the beneficiary' while 'it is not just for a beneficiary to receive a benefit in the nature of a windfall not reflecting any detriment suffered or benefit which the beneficiary ought to have received.'

One can test the consistency of an award of exemplary damages with fundamental equitable principle by considering whether a court would enforce a contract containing an express provision for the making of a punitive payment in the case of breach. There can be no doubt that such a contractual provision would not be enforced.[95] Before the passing of the *Judicature Act*, a court of equity would have restrained an action at law to enforce such a provision.

In his dissenting judgment in *Harris v Digital Pulse Pty Ltd*,[96] Mason P argued in support of the view that 'equity readily trumpets its punitive/deterrent intent' when it strips a miscreant fiduciary of profits. But to say this is, with respect, to mistake the purpose of equitable doctrines and the facts which engage them with their incidental effects.

XIII FARAH CONSTRUCTIONS PTY LTD V SAY-DEE PTY LTD

The Supreme Court of Canada in *Citadel General Assurance Co v Lloyds' Bank Canada*[97] took the same line as the High Court of Australia in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* in insisting upon an element of dishonesty if a recipient of trust property is to be held liable for that receipt.

---

90 *Vyse v Foster* (1872) LR 8 Ch App 309, 333; *Spence v Crawford* [1939] 3 All ER 271, 289; *Palmer v Monk* (1961) 80 WN (NSW) 107, 110; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 109–10; *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46, 56.

91 (1997) 188 CLR 449, 496.

92 *Bridge v Campbell Discount Co Ltd* [1962] AC 600, 632.

93 *Dart Industries Inc v Decor Corporation Pty Ltd* (1993) 179 CLR 101, 111, 114, 115, 123; *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 557–62.

94 (2003) 56 NSWLR 298, 311–12, [52]–[61].

95 Compare with *Jobson v Johnson* [1989] 1 WLR 1026, 1040.

96 (2003) 56 NSWLR 298, 330–3, [160]–[78].

97 [1997] 3 SCR 805.

I propose to confine my discussion of the decision in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* to the criticism by Kirby J of the evident reluctance of the High Court to accede to the restitutionary notion that liability for the receipt of trust property should be established without the need for knowledge on the part of the recipient of the breach of trust which has led to the receipt. It is the element of knowledge which makes recipient liability fault-based. There are good reasons in terms of the fundamental values of equity why the liability should be fault-based rather than absolute.

We are concerned here with the first limb of the famous statement by Lord Selborne LC in *Barnes v Addy*.[98] It is worth setting out what his Lordship said at some length because the passage shows the importance of the voluntary assumption of responsibility by the defendant. His Lordship said:

> Those who create a trust clothe the trustee with a legal power and control over trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees de son tort, or actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.

Lord Nicholls of Birkenhead has said that liability based on 'the mere fact of receipt' should be accepted because it recognises 'the endurance of property rights',[99] but the property rights of a beneficiary of a fiduciary relationship have never been more enduring than the willingness of courts to require the fiduciary to adhere to obligations voluntarily undertaken. Lord Parker of Waddington, widely acknowledged as one of the great equity judges of the 20th century, famously explained that equity, starting from the recognition of personal obligations in respect of property, gave remedies which had proprietary consequences.

Thus, equity's refusal to interfere with the rights of a purchaser of property in good faith without notice and for good consideration was marking out the boundary at which a plaintiff asserting an equitable claim could not, in conscience, be allowed to assert it. This rule embodies the fundamental concern of equity, not only with the conscience of the defendant, but with ensuring conscientious dealing by all parties.

Under the first limb in *Barnes v Addy*, strangers to a trust are not to be made constructive trustees unless they have made themselves trustees - *de son tort*, as it is said. In other words, they must have deliberately intermeddled with property in a way which would be regarded as legitimate only if they had lawfully assumed the responsibilities of trustee. That was the view of Stephen J with whom Barwick CJ agreed in *Consul Development Pty Ltd v DPC Estates Pty Ltd*.[100]

---

98 (1874) LR 9 Ch App 244, 251–2.

99 Lord Nicholls of Birkenhead, 'Knowing Receipt: The Need for a New Landmark' in W Cornish et al (eds), *Restitution, Past, Present and Future: Essays in Honour of Gareth Jones* (1998) 231, 239.

100 (1975) 132 CLR 373, 408.

In *Westdeutsche Landisbank Girozentrale v Islington London Borough Council*,[101] Lord Browne-Wilkinson rejected the possibility that a recipient of a legal interest in property could be fixed with the obligations of a trustee for the true owner while ignorant of the acts which might offend conscience.

Similarly, in the Queensland Court of Appeal in *Port of Brisbane Corporation v ANZ Securities Limited (No 2)*,[102] McPherson JA, with whom the other members of the Court agreed, held that it would be 'offensive to notions of equity and common sense to hold [a defendant] liable for a supposed breach of trust as trustee for [the plaintiff] at a time when it had never undertaken and was not aware that any such obligation existed'.[103]

Lord Goff of Chieveley, the doyen of restitution lawyers, recognised the strength of the view that the ethical concerns embodied in equitable doctrines may not be able to be shoehorned into the common law categories collected under the rubric of the law of restitution. In *Westdeutsche Landisbank Girozentrale v Islington London Borough Council*,[104] Lord Goff said:

> Ever since the law of restitution began, about the middle of this century, to be studied in depth, the role of equitable proprietary claims in the law of restitution has been found to be a matter of great difficulty. The legitimate ambition of restitution lawyers has been to establish a coherent law of restitution, founded upon the principle of unjust enrichment; and since certain equitable institutions, notably the constructive trust and the resulting trust, have been perceived to have the function of reversing unjust enrichment, they have sought to embrace those institutions within the law of restitution, if necessary moulding them to make them fit for that purpose. Equity lawyers, on the other hand, have displayed anxiety that in this process the equitable principles underlying these institutions may become illegitimately distorted; and though equity lawyers in this country are nowadays much more sympathetic than they have been in the past towards the need to develop a coherent law of restitution, and to identify the proper role of the trust within that rubric of the law, they remain concerned that the trust concept should not be distorted, and also that the practical consequences of its imposition should be fully appreciated. There is therefore some tension between the aims and perceptions of these two groups of lawyers, which has manifested itself in relation to the matters under consideration in the present case.

As Lionel Smith said in his article 'Unjust Enrichment, Property, and the Structure of Trusts':[105]

---

101 [1996] AC 669, 705.

102 [2003] 2 Qd R 661, 679.

103 This view involved a departure from the approach of the New South Wales Court of Appeal in the earlier case of *State Bank of New South Wales Ltd v Swiss Bank Corporation* ((1995) 39 NSWLR 350) where it was held that a recipient of property who could reasonably have undertaken enquiries to establish the true beneficial ownership of the property but did not, was held liable to make good the plaintiff's loss. McPherson JA (*Port of Brisbane Corporation v ANZ Securities Limited (No 2)* [2003] 2 Qd R 661, 674–5) relied upon the view expressed by Sir Frederick Jordan CJ in *Oxley v James* ((1938) 38 SR (NSW) 362, 375) that 'in commercial transactions … means of knowledge are not actual knowledge'. On this view, so long as a recipient acts in good faith and does not wilfully shut his or her eyes to matters which will reveal actual fraud or impropriety, there can be no liability to the beneficial owner in equity or in restitution.

104 [1996] AC 669, 685.

105 (2000) 116 *Law Quarterly Review* 412, 434.

> The strict liability approach would contemplate that a plaintiff need only allege that a bank received trust property, not that the bank knew or should have known of the trust; with no more than that, the bank would be required to prove its good faith as a defence or to account for what it has done with this money. In other words, there is no procedure which a bank, be it ever so honest, can adopt in order to ensure that it is not prima facie liable for the receipt of trust funds. Prima facie liability implies potentially extended periods of expense and uncertainty when litigation is pending; and of course it throws on the defendant the risk that even though the elements of some defence are present, they cannot be proved to the satisfaction of the trier of fact. Although there may be no difference in the classroom between fault-based liability and strict-liability with defences, there is a great difference in the courtroom.

Third parties who deal with fiduciaries deal with persons with the indicia of title to the asset in question, for example possession or control or registration. It is for the very reason that the equitable rights of the beneficiary in respect of the property are not apparent to third parties that equity accords protection to the bona fide purchaser for value against the claims of the beneficiary. A watering down of that protection will not come without cost.

In 1999 in *Barclays Bank plc v Boulter*,[106] the House of Lords held that it would be unreasonable to adopt a rule which would require banks to establish a defence in every case where a third party exercised undue influence on the bank's customer. Such an outcome is undesirable as a matter of policy: a rule which produced such a result would be described in economic terms as inefficient.

Much earlier, in *Manchester Trust v Furness*,[107] Lindley LJ said:

> as regards the extension of the equitable doctrines of constructive notice to commercial transactions, the Courts have always set their faces resolutely against it. The equitable doctrines of constructive notice are common enough in dealing with land and estates, with which the Court is familiar; but there have been repeated protests against the introduction into commercial transactions of anything like an extension of those doctrines, and the protest is founded on perfect good sense. In dealing with estates in land title is everything, and it can be leisurely investigated; in commercial transactions possession is everything, and there is no time to investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions we should be doing infinite mischief and paralyzing the trade of the country.

Moreover, to accept that an internal misapplication of company funds by the company's directors could result in a co-ordinate liability in the company's bank where the bank had no notice at all of the misapplication would be to delete the internal management rule from our company law.[108]

Of course, if a recipient still retained the funds when it received notice of the breach of fiduciary duty, it would be obliged to disgorge them, but that would be because it was a recipient of trust property with actual notice of the claim of the true owner.

---

106 [1999] 1 WLR 1919, 1925.
107 [1895] 2 QB 539, 545.
108 Compare with *BCCI (Overseas) Ltd v Akindele* [2001] Ch 437, 455–6.

The objection is not founded merely on economic or pragmatic considerations. It is contrary to equity's sense of social responsibility to allow a remedy to a plaintiff who has chosen to deal with strangers through an agent against a stranger who has acted honestly without notice of the agent's breach of trust. If a third party deals honestly with an errant fiduciary that third party should not find itself fixed with a liability co-ordinate with that of the defaulting fiduciary to the injured beneficiary: the third party has never accepted the obligation of self-denial to fiduciary or beneficiary.

Furthermore, within the category of unjust enrichment, the liability to disgorge the amount received is measured not by the defendant's promise – as is the case with breach of contract; nor by the extent of the plaintiff's injury – as is the case with tort; but by the extent of the defendant's unjust enrichment at the expense of the plaintiff. The pursuit of the unearned windfall cannot be squared with the requirements of conscience so far as the plaintiff is concerned.

XIV CONCLUSION

In relation to the specific problems of fiduciary obligations and exemplary damages, the Australian courts have shown a more faithful regard for the fundamental principles of equity than our Canadian counterparts.

The ethical values of individual restraint, mutuality and social responsibility at play within the framework bequeathed by Chancery differ from the individualism and the universalism of the common law. To regard equitable doctrines as modular, so that they may be mixed and matched with common law rules so as to expand the scope of the judicial branch of government's regulation of self-interested action is to fail to appreciate these differences.

It may also be said, in terms of the big picture, that it is a troubling feature of the unifying tendency that it seems to work only one way. There is a marked absence of examples of liabilities being avoided by the fusion of law and equity.[109] The proper development of the law does not mean an inevitable broadening and intensification of judicial intervention in the commercial life of the community. A question-mark must hang over any idea of an evolution which involves an ineluctable expansion in the liabilities imposed by the courts upon honest citizens.

Is it necessarily a good thing that arm's length transactions in the commercial life of the community should be subject to regulation in accordance with standards of behaviour devised for the regulation of relationships of trust and confidence which are distinctly not arm's length relationships? Is such a development a sound expression of the values of modern commercial life? Equity never set out to bring to heel what John Maynard Keynes described as 'the uncontrollable and disobedient psychology of the business world'.

Today's law students may well take a different view. They may, as judges or legislators, ultimately usher in the millennium which Kirby J envisages; and that may or may not be a good thing. But no-one should labour under the misapprehension that it will have much to do with the fundamental values and principles of equity.

[109] Compare with *Soulos v Korkontzilas* [1997] 2 SCR 217, [26]–[45].