

People and principle in the developing law

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It is a great honour to find myself addressing such a distinguished audience of international academics, and at my own university. My earliest introduction to the law some 50 years came here at Trinity College from the incomparable and much lamented Tony Weir. He gave a special summer vacation course for those (like me) transferring from other subjects. It will be no surprise to those of you who knew him, that we were forced even at that early stage to think for ourselves and to develop a healthy disrespect not only for the views of other textbook writers, but also for some of the pronouncements of our higher courts. Possibly, running before we could walk. And I am not sure it stood me in very good stead in the tripos exams. But it left me with some very valuable lessons for my later career in the law. It has also been a valuable corrective to any feelings of hubris in my time in the senior judiciary. (I was pleased recently to be able to mark his memory by bringing into one of my Supreme Court judgments a typically pithy and illuminating statement by him about “reasonableness” in the law of nuisance¹. I hope he would have approved.)

I am in any event a great believer in the value of interaction between judges and academics. This was a particularly enjoyable aspect of my time as chairman of the Law Commission (1998-2001), when I was lucky to work with leading academics. I have also spoken judicially on the value of such interchange in the Court of Appeal. I contrasted the modern curse of “unlimited accessibility to authorities, reported and unreported, and apparently unlimited resources for copying them” with the blessing of “up to date and authoritative textbooks on almost every relevant subject, in which the material cases have been sorted out and digested”; and the possibility in most disputed areas of the law of finding “a recent, informed academic treatment of the subject by a recognised authority, with a full discussion of the relevant cases”, which “can often provide

¹ "... the question is neither what is reasonable in the eyes of the defendant or even the claimant (for one cannot by being unduly sensitive, constrain one's neighbour's freedoms), but what objectively a normal person would find it reasonable to have to put up with" (Weir *An Introduction to Tort Law*, 2nd ed (2006), p 160): cited in *Coventry v Lawrence* [2014] AC 822 para 179

the best framework for the discussion in court, and a useful corrective to the necessarily partisan viewpoint of counsel.”²

I am a little surprised that I have not been more frequently quoted by the legal publishers, or indeed offered more free copies of their new editions.

It is perhaps a fair criticism of the senior judiciary in this country that we have not developed a very principled or consistent approach to our use of academic writings, still less to the use of comparative material from other jurisdictions. I believe the French do it differently. In a recent Privy Council appeal from Mauritius we were required to choose between two apparently conflicting decisions of the Court de Cassation on the meaning of force majeure in a claim for damage caused by a cyclone³. (Not a typical problem in this country.) We were shown an extract from Cees van Dam’s *European Tort Law* in which the author said:

“French doctrine plays an important role in analysing, explaining and interpreting the decisions of the Court de Cassation... French legal writers are, in fact, the high priests serving the legal mass, mediating between the highest judge and the people, their sermons teaching the congregation how to behave. This role explains why legal authors, mostly academics, generally stand in high esteem, not only in the legal world but also among the general public. This is comparable to the German situation, but somewhat different from the English approach where judges have descended from on high, have learned to speak in everyday language, and thus made academic legal mediation (seemingly) less necessary.”⁴

Flattering as is the comment, I find it hard to agree. We need the academics just as much as the French.

Perhaps the most distinctive feature of our role as judges, as compared to yours as academics, is that our primary function, at least in the lower courts, is to decide real disputes between real people. Theorising about legal principle is important but incidental to doing justice in the case before us. Thus the development of the law of contract owes much to Mrs Carlill and her great case in 1892 against the Carbolic Smoke Ball Company⁵. But we should also remember that she was real, and so presumably was her illness. Her touching faith in the curative properties of the

² *CEL Group Ltd. v Nedlloyd Lines UK Ltd. & Anor* [2003] EWCA Civ 1716 [2004] 1 Lloyd’s Rep 381, paras 25-6. See also to similar effect: *Highland Crusader Offshore Partners LP v Deutsche Bank AG* [2009] EWCA Civ 725 [2010] 1 WLR 1023 paras 124-6

³ *General Construction Ltd v Chue Wing & Co Ltd & Anor (Mauritius)* [2013] UKPC 30 Lord Mance’s judgment deserves to be better known – a masterly discussion of the inter-related principles of *irrésistibilité* and *imprévisibilité* in the light of French case-law and academic writings, with comparative references to US jurisprudence following Hurricane Katrina.

⁴ Cees van Dam *European Tort Law* 2nd Ed Oxford (2013) para 301-4 In Italy, curiously, the Civil Code forbids citation of legal authors in judgments: “in ogni caso deve essere omessa ogni citazione di autori giuridici” (art 118).

⁵ *Carlill v Carbolic Smoke Ball Co Ltd* [1893] 1 Q.B. 256

Carbolic Smoke Ball may have been naïve but she bought it in good faith and was entitled to her £100 reward. Her opponent, Mr Roe, the man behind the company, was also real and according to Wikipedia an astute businessman. He apparently turned the loss to his advantage by pointing out in his next advertisement that, of “the many thousand” Carbolic Smoke Balls sold on these advertisements, only three people had claimed the reward of £100, “thus proving conclusively that this invaluable remedy will prevent and cure the above mentioned diseases”. But Mrs Carlill had the last laugh. Mr Roe died of tuberculosis in 1899. She lived on till 1942 to the age of 96 (though one of the causes of death was apparently recorded as influenza).

One of my regrets as I have moved up the judicial hierarchy has been increasing detachment from the people behind the cases, and from hearing the witnesses. Perhaps too much principle and not enough people, I sometimes think. It was the combination of the two which made my time as a judge of the Chancery Division between 1994 and 2001 so enjoyable and stimulating. I came from a quite different background - practising at the Bar mainly in planning and local government law. Almost my only experience of the Chancery Division had been five years as a part-time junior counsel for the Inland Revenue in the early 80s. I had no practical experience of many subjects which were the everyday work of the division – such as company, trusts, insolvency, intellectual property and so on. It was also a very lively time for the development of the law in many of those areas. To me they were relatively uncharted territory. It was steep learning curve. But I was greatly assisted by the support of my judicial colleagues (including my Trinity co-fellow Robert Walker who was appointed at the same time, and to whose great contribution to this field I shall be returning) and the high quality of the advocates at the Chancery Bar, and of course the excellent textbooks on most of the subjects.

I thought I might use this lecture to look back on some cases which I heard in that period and which, through their treatment in the higher courts, have played a part in the subsequent development of the law. I find it interesting to revisit my assessment of the people concerned and the situations in which they found themselves. 20 years on, and with the guidance now available, would I have approached them in the same way and reached the same conclusions? And what lessons might they have for future revolutions in the law?

I have chosen three cases⁶ which have stuck in my mind as much for the people involved as for the treatment of the law in the higher courts. Let me introduce my three principal characters: Geoffrey Gillett, a Lincolnshire farming manager; Chief Labode Akindele, a wealthy Nigerian businessman; and Paul Leach, a high street solicitor from Godalming. A fairly disparate bunch.

⁶ *Gillett v Holt* [2001] Ch 210 CA (first instance [1998] 3 All ER 917), (ii) *BCCI (Overseas) v Akindele* [2001] Ch 437CA (first instance [1999] BCC 669) and (iii) *Twinsectra v Yardley* [2002] 2 AC 164

Perhaps their only unifying feature is that their cases in the end turned on issues in that difficult and still controversial area of the law in the overlap between dishonesty and unconscionability. You may also conclude that in each of them the judge's view on the evidence was probably more important than the complexities of the legal debate.

I will start with Mr Leach whose case as it turned out was probably the simplest in fact and law. I will take Mr Gillett last. He was the one for whom I felt most sympathy, but the only one I felt unable to help, although the Court of Appeal came to his rescue in the end.

Mr Leach

Mr Leach was a solicitor practising in Godalming in a one-man firm in his own name. One of his regular business clients was a Mr Yardley, for whom he acted on a transaction towards the end of 1992. The background included a rather dubious Nigerian venture, and some more normal UK property investments, in which Mr Yardley was involved. He wanted to borrow £1m from a company called Twinsectra. The loan was received on his behalf by another firm of solicitors (Sims), who did so in return for an undertaking by them that it would be retained by them until applied in the acquisition of property and that it would be used solely for that purpose. Mr Leach was aware of the Sims undertaking but had not given any undertaking himself. Contrary to the undertaking, Sims did not retain the money but, on being given an assurance by Mr Yardley that it would be applied for property transactions, paid it on his instructions to Mr Leach's client account. He in turn paid it to Mr Yardley, who used some £350,000 for purposes other than the acquisition of property. Twinsectra claimed repayment of that sum from Mr Leach on the basis that it had been paid out by Sims in breach of trust (a so-called *Quistclose* trust), and that he was liable for dishonestly assisting in that breach of trust under the principles stated by Lord Nicholls in the *Royal Brunei* case.⁷

I remember Mr Leach quite well. He was a competent local solicitor with a fairly ordinary practice. He would not knowingly have allowed himself to become personally involved in a dishonest or disreputable transaction. But I doubt if he knew much about *Quistclose* trusts, or had caught up with the principles in *Royal Brunei*. He was a little suspicious of the transaction, but Mr Yardley was an important client, and was offering some significant conveyancing work, at a time when such work was scarce. Not having given any undertaking himself, he treated the money as available to the order of Mr Yardley.

I acquitted him of dishonesty, and, though reversed in the Court of Appeal, was ultimately upheld by a majority in the House of Lords. Unfortunately, the terms in which I did so gave the

⁷ *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378

higher courts rather more difficulty than I would have hoped. The crucial passage of my judgment read:

“When asked to give the undertaking himself, he regarded it as a very unusual request, and one outside the normal course of a solicitor's practice. This did not lead him to advise Mr Yardley against it, but rather to distance himself from any responsibility for its terms. He told Mr Sims that they were a matter for him... I have to conclude that he simply shut his eyes to the problems. As far as he was concerned, it was a matter solely for Mr Sims to satisfy himself whether he could release the money to Mr Yardley's account.”

My reference to “shutting his eyes to the problem” rang alarm bells in the Court of Appeal. It was thought to be inconsistent with my finding that he was not dishonest. They had in mind of course Lord Nicholls's statement in *Royal Brunei* that an honest person does not “deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless”⁸.

The House of Lords was more understanding. Lord Hoffmann did not believe that I had fallen into “such an elementary error”, having quoted that very passage of Lord Nicholls earlier in my judgment. In this case there were “no relevant facts of which Mr Leach was unaware”:

“What I think the judge meant was that he took a blinkered approach to his professional duties as a solicitor, or buried his head in the sand (to invoke two different animal images). But neither of those would be dishonest.”⁹

I wish I had said that!

Unfortunately their efforts to rescue me from my unfortunate choice of language led to further difficulties. In the leading speech Lord Hutton thought that I had been applying what he called the “combined test” of dishonesty, including “an objective test and a subjective test”, requiring both that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people, “and that he himself realised that by those standards his conduct was dishonest”. (para 29) That version of the requirements of dishonesty did not go unremarked by the academics. Three years later in the Privy Council¹⁰ Lord Hoffmann acknowledged an “element of ambiguity” in Lord Hutton's words, which had encouraged some academics to think there had been a departure from the law as previously understood. They thought he was inviting inquiry “not

⁸ [1995] 2 AC at p 389F-G

⁹ [2002] 2 AC 164 at para 22

¹⁰ *Barlow Clowes International Ltd & Anor v Eurotrust International Ltd & Ors (Isle of Man)* [2005] UKPC 37; [2006] 1 WLR 1476.

merely into the defendant's mental state about the nature of the transaction in which he was participating but also into his views about generally acceptable standards of honesty". That, said Lord Hoffmann, was not what had been intended:

“The reference to ‘what he knows would offend normally accepted standards of honest conduct’ meant only that his knowledge of the transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct. It did not require that he should have had reflections about what those normally acceptable standards were.”

Mr Leach had been acquitted of dishonesty because he honestly believed that (in Lord Hoffmann’s words) “the undertaking did not, so to speak, run with the money and that, as between him and his client, he held it for his client unconditionally”. The House of Lords had held that “a solicitor who held this view of the law, even though he knew all the facts, was not by normal standards dishonest.”¹¹

I apologise for any confusion caused by my unfortunate choice of language. But I am not sorry to have helped in saving Mr Leach from a finding of dishonesty, which might have been very damaging to his practice.

Chief Akindele

I turn to Chief Akindele, a more distinctive figure. *BCCI v Akindele* was one of many cases arising from the collapse of the BCCI group of companies, revealing evidence of fraud by senior employees on a massive scale. Chief Akindele was prominent Nigerian businessman with wide international investments. He had been offered the opportunity to invest \$10m in an associated company of BCCI for two years with an assured annual return equivalent of 15%. This compared to the highest rate obtainable at the time on equivalent investments in the market, which on the evidence was not more than 9%. It emerged later that this agreement had been one part of a fraudulent scheme devised within BCCI to boost its apparent capital as seen by regulators and the public. It seemed clear that the payment of the excessive interest payment (amounting to some £6.6m) was in breach of trust as respects BCCI. The issue (at least as the case was argued before me) was whether the Chief was liable as a “knowing recipient”.

The law on knowing receipt was in a state of some flux at the time, one issue being the relevance of dishonesty and what precisely that meant. We had Peter Gibson J’s five-part

¹¹ *Ibid* paras 15-17

classification of dishonesty in the *Baden* case¹², and more recently Lord Nicholls' exposition of the concept of dishonest assistance in the *Royal Brunei*.¹³ Counsel for BCCI helpfully accepted that at first instance at least it was necessary for him to bring the case within the first three of the *Baden* categories: (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make. In my judgment I treated that as effectively the same as "dishonesty" as Lord Nicholls had explained it. By those tests I was satisfied that the Chief was not liable. I found him a credible witness.

He was a big man and a powerful personality. I can still remember the impression he made on the court when he went into the witness box. I was relieved to be the judge, rather than trying to cross-examine him. He brushed aside suggestions that he should have bothered himself with the detail of such a (to him) relatively straightforward and unimportant transaction, given the extent of his worldwide business interests. He was happy simply to be offered a guaranteed return of 15 per cent with the backing of an institution which at the time appeared to him, and most other people, to be wholly reliable and trustworthy. Although his decision to realise his investment in 1988 was partly driven by rumours of irregularities involving BCCI, he had no reason to question the status of the original agreement.

The Court of Appeal agreed with my conclusion but were not so happy with my somewhat simplistic approach to the law. In the course of a detailed review of the authorities Nourse LJ rejected the idea that dishonesty was a necessary ingredient of knowing receipt. He concluded that –

“just as there is now a single test of dishonesty for knowing assistance, so ought there to be a single test of knowledge for knowing receipt. The recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt.”

Fortunately for the Chief (and for me), he held that on the facts of the case dishonesty and unconscionability produced the same result. The additional knowledge available in 1987 was not a sufficient reason for questioning the propriety of a particular transaction entered into more than two years earlier, at a time when no one outside BCCI had reason to doubt the integrity of its management and in a form which the defendant had no reason to question. At the later date, when there were some suspicions, he was entitled to take steps to protect his own interest.

¹² *Baden v Societe Generale* [1993] 1 WLR 509 at pp. 575H-576A

¹³ *Royal Brunei Airlines Sdn Bhd v Tan Kok Ming* [1995] BCC 899

The court's reformulation of the test has not been without controversy. It was strongly criticised by Peter Birks in an essay in 2002 as a recourse to "obfuscatory language":

"Unconscionable gives no guidance. At one extreme it is unconscionable not to repay what you were not intended to receive. At the other extreme it is unconscionable to be dishonest. 'Unconscionable' indicating unanalysed disapprobation, thus embraces every position in the controversy."¹⁴

He observed that the Chief held onto his money on the basis of a test akin to constructive trust – he neither knew nor ought to have known of the improprieties going on inside BCCI. "In this inquiry" he says "'unconscionable' is no more than the fifth wheel on the coach".¹⁵

In similar vein, Andrew Burrows describes the term "unconscionability" as a "vague and malleable concept that serves to disguise the policy choice (between dishonesty and negligence) that the courts are making".¹⁶ Like Peter Birks he would prefer to follow a proposal by Lord Nicholls, writing extra-judicially in 1998,¹⁷ who made the case for "restitutionary liability, applicable regardless of fault but subject to a defence of change of position".

There was a further twist to the story in 2004 when Lord Nicholls speaking obiter in another case¹⁸ pointed out that *Akindede* was not really a case on knowing receipt at all. Questions of unconscionability did not enter it to it. The real question should have been whether the company was bound by the original contract under ordinary principles of company¹⁹ law, including the principle that outsiders dealing with a company in good faith are not affected by internal irregularities. If it was so bound, then there was nothing unconscionable in the Chief seeking to enforce his contract.

With hindsight I find that analysis rather convincing. However, I make no apology for having dealt with the case on the basis on which it was argued. Nor do I think would it have made much difference to the result. It was a good example of a case which, whatever the legal test, turned in the end on a narrow issue of fact. Did I believe the Chief's evidence that he knew

¹⁴ Birks and Pretto *Breach of Trust* Hart (2002) cap 7 "Receipt" by Peter Birks p 226. For an alternative view, see Mark Pawlowski *Unconscionability as a Unifying Concept in Equity* [2001] Denning Law Journal 79.

¹⁵ To the same effect, see more recently *Credit Agricole Corp and Investment Bank v Papadimitriou* [2015] UKPC 15 para 33 per Lord Sumption: "whether a person claims to be a bona fide purchaser of assets without notice of a prior interest in them, or disputes a claim to make him accountable as a constructive trustee on the footing of knowing receipt, the question what constitutes notice or knowledge is the same".

¹⁶ Burrows *Law of Restitution* 3rd Ed (2011) p 422

¹⁷ "Knowing Receipt: The Need for a New Landmark", in Cornish, Nolan, O'Sullivan and Virgo (eds.) *Restitution Past, Present and Future* (1998)

¹⁸ *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28 [2004] 1 WLR 1846 para 3ff

¹⁹ Including the rule in *Turquand's case* (*Royal British Bank v Turquand* (1856) 6 E&B 327) (and see now Companies Act 2006 s 40) that outsiders dealing in good faith with a company are not affected by internal irregularities.

nothing of what was going on within BCCI at the time he made the deal, and had no reason to do so? I did believe him, and so he was entitled to his money.

Mr Gillett

Mr Gillett's case was more complicated. He had worked from the 1960s for Mr Ken Holt, a wealthy Lincolnshire farmer, first as a teenage employee and later as manager and business associate. Mr Holt was a bachelor living on his own. He became very close to Mr Gillett and, after he married, to his wife and their children; he treated them as his family. He led them to believe that they would eventually take over the running of the farm and inherit it from him when he died. He made a will to that effect.

That all turned sour in the early 1990s when Mr Holt met a young local solicitor called Mr Wood. From the evidence I heard I found that Mr Holt's friendship with Mr Wood, developed into "something of an obsession". Mr Wood came to live with Mr Holt. The will was changed in his favour. Relations with Mr Gillett became increasingly difficult, and eventually he was dismissed following allegations of misconduct. In the event no evidence was called at trial to support those allegations. Indeed no evidence at all was called on Mr Holt's side, although as I noted in my judgment he and Mr Wood were sitting in court together throughout the hearing.

Mr Gillett claimed that the representations made to him over the years and the detriment he had suffered in reliance on them gave rise to a proprietary estoppel entitling him to an interest in the farm. Although I had great sympathy for Mr Gillett, my difficulty was to find a clear legal peg on which to hang his claim, at least on the authorities as they stood. It is true that he had been given a number of verbal assurances that he would inherit, but as he himself recognised they were no more than that. The last one recorded in my judgment (in 1975) was typical:

"Mr Gillett says that he asked Ken for something in writing to confirm that the Beeches Farm would be theirs. He was told 'that was not necessary as it was all going to be ours anyway'. Mr Gillett was disappointed but after discussing it with his wife and parents decided 'that Ken was a man of his word so I accepted his assurances'."

The law on proprietary estoppel was in a state of some uncertainty. In his favour was the leading authority at first-instance, a closely argued judgment of a distinguished deputy judge (Ted Nugee QC) *Re Basham (decd)*.²⁰ That drew in turn on a detailed discussion by Oliver J in *Taylor's*

²⁰ [1986] 1 WLR 1498

*Fashions*²¹ of the authorities going back to the “starting point” of *Ramsden v Dyson* (1866).²² But *Re Basham* had been criticised and not followed by Judge Weeks QC in another more recent first-instance case, *Taylor v Dickens* (1998)²³. That concerned an elderly lady who said that she would leave her estate to the gardener, but then changed her mind (without telling him) after he had stopped charging her for his help with gardening and odd jobs. His claim failed.

There seemed to be an “overriding principle” that the testator should be held to his representation “only if it would be unconscionable for him to go back on it”. But there was little guidance as to what that meant in practical terms. I was not persuaded that the test was met. In particular I did not think that the claimant’s subjective awareness or otherwise as to the possibility of revocation could be the vital factor. As I said:

“It would be odd if the plaintiff’s proprietary rights should be diminished merely because he was unfortunate enough to have a wife who (as in *Taylor v Dickens*) regularly reminded him ‘not to count his chickens before they were hatched’.”

Rather, I thought that “homely expression” was an apt statement of how, in normal circumstances, “any reasonable person would regard—and should be expected by the law to regard—a representation by a living person as to his intentions for his will”. The right to change one’s will, even at the expense of those with strong moral claims, was a well-understood feature of our law, and an inevitable risk faced by anyone relying on assurances of that kind.

I also had problems with the question of “detriment” which was agreed to be an essential element of the claim. Mr Gillett claimed that he accepted a lower salary than would otherwise have been appropriate. But that was not made out on the evidence. There were other points going both ways but I thought it wrong to try to draw up a balance sheet of advantage and disadvantage. As I said:

“The Gilletts decided at an early stage that their future lay with Mr Holt, and as with most human relationships that involved obligations and compensations.

I could not find “such a balance of ‘detriment’” as to support the case for a legally enforceable obligation.

The Court of Appeal disagreed, in a powerful judgment by Walker LJ which has become the leading authority on the subject. My approach to “unconscionability” had been too narrow:

²¹ *Taylor’s Fashions Ltd v Liverpool Trustees Co* [1982] QB 133

²² *Ramsden v Dyson* LR 1 HL 129.

²³ [1998] 1 FLR 806

“... the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round.”

In looking for evidence of a promise expressed to be irrevocable, I had taken “too restricted a view of the first essential element of this very flexible doctrine”. Similarly the issue of detriment was to be approached as part of “a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances”. He was also dismissive of my chicken-counting analogies:

“It is entirely a matter of conjecture what the future might have held for the Gilletts if in 1975 Mr Holt had (instead of what he actually said) told the Gilletts frankly that his present intention was to make a will in their favour but that he was not bound by that and that they should not count their chickens before they were hatched. Had they decided to move on, they might have done no better. They might... have found themselves working for a less generous employer. The fact is that they relied on Mr Holt's assurance, because they thought he was a man of his word, and so they deprived themselves of the opportunity of trying to better themselves in other ways.”

To give effect to his equitable right Mr Gillett was awarded the freehold to one of the farmhouses and the land attached to it, and £100,000 in cash.

Walker LJ's statement of the law on this topic has been accepted as authoritative by the courts and textbooks²⁴. He himself has taken the opportunity to explain and develop the concept in two cases in the House of Lords: *Cobbe v Yeoman's Row Management Ltd* (2008)²⁵ and *Thorner v Major* (2009)²⁶.

In *Cobbe* he undertook a more detailed review of the authorities by reference to what he called the “taxonomy” suggested by a leading textbook.²⁷ He returned to the difficult question of distinguishing between mere hopes or expectations and “irrevocable” commitments. He thought this was more likely to be an issue in cases in a commercial context²⁸ rather than in domestic cases, in which he put *Gillett v Holt*. Of the latter group he said that the claimants were unlikely to have taken any legal advice. In those cases in which an estoppel was established, “the claimant believed

²⁴ See eg *Snell's Equity* 12-038ff

²⁵ [2008] 1 WLR 1752 para 66ff

²⁶ [2009] 1 WLR 776

²⁷ Gray and Gray *Land Law* 4th Ed 10.189

²⁸ Exemplified by the Privy Council decision in *Attorney General of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd* [1987] AC 114,

that the assurance on which he or she relied was binding and irrevocable”. Some of them might have been decided differently if the nature of the claimant's beliefs had been more “vigorously investigated in cross-examination”, as in *Gillett v Holt* of which he said (quoting his own judgment in that case²⁹):

“Mr Gillett was cross-examined at length about some increasingly improbable eventualities: that Mr Holt would marry his housekeeper, that he would have children, that his elderly sister would suddenly lose all her investments and turn to him for help. Mr Gillett naturally enough conceded that in those circumstances Mr Holt could or would have made some provision for these moral obligations. But, in giving evidence, he stuck resolutely to the promises made to him. . . Mr Gillett was not in the witness box to take part in a seminar on the elements of proprietary estoppel (although parts of his cross-examination suggest otherwise). He was there to give evidence, which was largely unchallenged and which the judge accepted, about the assurances made to him and his detrimental reliance on them.”

In a domestic or family context, he said, the typical claimant “does not stop to reflect... whether some further legal transaction (such as a grant by deed, or the making of a will or codicil) is necessary to complete the promised title.”

As a trial judge one’s responses to be being reversed on appeal may be very mixed. Sometimes one is disappointed but acknowledges the greater wisdom of the appellate judges. Sometimes one thinks they have taken leave of their senses. On this occasion I welcomed the Court of Appeal’s decision, as producing a more just result on the facts of the case than I had felt able to do. At the time I was also persuaded by Walker LJ’s reasoning and readily accepted that I had taken too narrow a view of the law.

Reviewing the case almost two decades on, I am a little more hesitant, not so much about the result as about the legal foundation. I am troubled that here, as in knowing receipt, the concept of unconscionability may be too “vague and malleable” to provide a satisfactory basis for determining legal rights, or for deciding when mere hopes and expectations are to be converted into binding commitments. In *Cobbe* Lord Walker had an answer. “Unconscionability” he said was used (not as in *Akindele* to describe a state of mind – in the sense criticised by Peter Birks) but as “an objective value judgment on behaviour”. As such, in his view, it played a very important part in the doctrine of equitable estoppel, “in unifying and confirming, as it were, the other elements”:

²⁹ [2001] Ch 210, 229

“If the other elements appear to be present but the result does not shock the conscience of the court, the analysis needs to be looked at again...”³⁰

But that seems an uncertain criterion. I fear that some judicial consciences may be more easily shocked than others. It seems a little like the judicial “outrage” proposed by Lord Diplock as a test for irrationality in judicial review cases.³¹

Nor with respect am I wholly convinced by the distinction drawn by Lord Walker in *Cobbe* between business and domestic dealings. Mr Gillett *was* a businessman, and he came across as reasonably astute. As the 1975 exchange showed, he knew the value of getting something in writing, and was disappointed not to get it. He took Mr Holt as a man of his word, but he was also realistic. He recognised that circumstances might change. Certainly, he had relied on the good faith of the assurances, but I doubt if it can be said that (as Lord Walker put it in *Cobbe*) he “believed” them to be “binding and irrevocable” in any legally relevant or even moral sense.

I am also a little uncertain whether Mr Gillett satisfied the “detriment” requirement. The traditional principle, illustrated by well-known cases from *Ramsden v Dyson* (1866) to *Crabb v Arun DC* (1976),³² required not just that the claimant should have acted to his detriment on the basis of the assurances, but that the defendant should have encouraged or at least knowingly allowed him to do so and done nothing to stop him. Mr Gillett made his life with Mr Holt from a very young age, and it suited him to continue that relationship after he married. I am not sure that his evidence would have given me any reason to think that he would not have done the same, even if Mr Holt qualified his promises in some way. Until Mr Wood came along, it is hard to see why he would have wanted to uproot himself and his family from the place where they had lived happily for most of their life. I doubt in any event whether he gave Mr Holt reason to think that he was making decisions about his future life solely or principally on the basis of those assurances. In the end the most damaging thing for Mr Gillett had been the unsupported allegations of misconduct, which were not only very distressing but also would have made it difficult to move to another job. Had it not been for them, I wonder if the case would have come to court.

This is not the place or time to discuss these points. But I gain some comfort from Lord Walker’s reference in *Thorner* to one academic comment that: “there is no definition of proprietary estoppel that is both comprehensive and uncontroversial...”³³ I find it hard to disagree.

³⁰ [2008] 1 WLR 1752 para 92

³¹ “a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it”: *CCSU v Minister for Civil Service* [1985] AC 374, 410

³² *Crabb v Arun DC* [1976] Ch 179

³³ Gardner *An introduction to Land Law* (2007) p 101

So what conclusions should this conference draw from my rather self-indulgent journey down memory lane? My first plea: as you contemplate your revolutions in private law, I ask you to spare a thought for the trial judge. In the end the facts as found by the judge are likely to be as important as the law. Whatever the fascinations of the legal debate, the judge needs at a reasonably early stage in the trial to form a working view of the law, so he can decide what factual issues are likely to be relevant, and manage the evidence accordingly. In *Twinsectra* and *Akindele* the basic issue was a simple one of honesty or good faith, however the law was later analysed. Even in *Gillett* my findings of fact may have reflected a defective legal understanding, but they provided the springboard for the Court of Appeal to make a major jump forward in the law.

The three cases also illustrate the possible risks if the developing law does not keep in touch with the perceptions of ordinary people as to what law or morality should require – and equally important with the perceptions of ordinary lawyers who will be advising them. Chief Akindele had access to expensive legal advice, and would have taken it if he had any doubts about the propriety of what he was doing. He had no reason to think it dishonest, still less unlawful. He would have understood those concepts. But, if someone had asked him whether it was “unconscionable”, I am not sure that he would have understood what they were talking about. He was a businessman, and provided he stayed within the law his conscience was a matter for him.

The other two cases are interesting in that in both solicitors were involved as parties. Mr Leach escaped liability because he did not think he was acting improperly, and on his understanding of the law he had no reason to do so. Not having himself given any undertaking, he thought he was bound by his client’s instructions in the normal way. It did not occur to him that the Sims undertaking “ran with the money” as Lord Hoffmann put it. It is perhaps a little ironic that a solicitor was saved by his ignorance of the law. But dishonesty rightly sets a high hurdle.

In the last case, Mr Holt’s new friend Mr Wood was also a solicitor. He presumably considered the legal consequences of what they were doing to Mr Gillett. He did not give evidence and I had no opportunity to form any view of what he knew of the assurances given to Mr Gillett, or what he thought of their legal implications. I doubt if it would have occurred to him to advise Mr Holt that he had disabled himself from dealing with his own property as he wished. I am not suggesting that we can or should turn the clock back on that particular decision. Indeed the result would probably be seen by most people as conforming to ordinary standards of fair-dealing. But legal revolutions need to be kept under control. We should remember that private law is dealing largely with private people. They should not be left behind.