

## HONG KONG LECTURE 2024

### Never say Never: Equity's Reach in the Modern Age

1. In October 2010 my dear colleague and mentor Lord Neuberger of Abbotsbury stood here in front of your predecessors (and maybe some of you here today) and asked himself: “has equity had its day?” After a typically comprehensive weighing up of all the pros and cons, he concluded: “Law mirrors life, and one rule of life is “never say never”. As the singing prodigy Justin Bieber put it, “I will never say never! (I will fight) I will fight till forever! (make it right)”. Now there’s a new maxim of equity - created in 2008 by a 14-year old Canadian.”
2. Well, here we are again after nearly 14 more years, and both the title and purpose of this address is to put that lyrical conclusion to the test, and perhaps to explain, with some examples, what it has actually meant in practice. I do so acutely conscious that Lord Neuberger is, although long since retired as a Justice of the UK Supreme Court, still very much in the business of decision-making, not least as a judge of your Court of Final Appeal. I fear that he will in due course both read and, more frighteningly, mark what I am saying. And by mark I don’t just mean note (as in “read, mark, learn and inwardly digest”), but really mark, as if this address was my response to an exam paper. And if he doesn’t, we have numerous distinguished judges here to do just the same.
3. If one of you had asked me whether equity had had its day, at any time between 2010 and when I belatedly went down with COVID in March 2022, I might well have found it difficult to say no. The perception was growing on me that fewer and fewer judges (at least in England) seemed to think that equity really mattered. The great equity judges seemed all to have retired or passed away. I was beginning to think of myself as likely to become, before long, the last equity judge left standing, fit only to be put in a cage on public display, under a placard asking anyone minded to feed me through the bars to do so please with clean hands.

4. But then I recovered from COVID in the nick of time to attend a wonderful conference at Oxford entitled Equity Today, laid on by its new professor of English Law Ben McFarlane, to celebrate 150 years since the passing of the Judicature Acts (which were meant to effect a sort of merger between courts of equity and the common law courts). And we spent the best part of three whole days talking (perhaps mainly arguing) over just about every aspect of equity, as if nothing else mattered in the whole wide world. It was a truly international affair, with judicial and academic commentators from all around the common law world. Many of the papers presented now appear as chapters of a new book by Bloomsbury Publishing, again called Equity Today: expensive for an individual student, but I'm sure available in your library, and maybe as an e book. Both the conference and the book show that, at least in the minds of academics and some judges, equity is still very much alive, and in many respects contentious, as a body of legal principles. But more to the point in the real world served by the rule of law, what distinctive contribution does equity now make to the rules and legal norms by reference to which we live and do business together?
5. Equity is notoriously resistant to neat categorisation, but I would tentatively identify three aspects of the way it works that deserve both study and the respectful (maybe even joyful) acknowledgment of recent developments. The first is the way in which, mainly by use of the concept of the trust, equity has led the way in developing much more nuanced and sophisticated concepts of property, proprietary rights and structures for property ownership than could have been achieved either by the common law on its own, or by most civil law systems. The second is the continuing development of equitable remedies for the protection and vindication of proprietary and other rights, and its constant refusal to allow the development of those remedies to be constrained by arcane common law rules about jurisdiction. The third is the way in which, by reference to principles which may loosely be said to derive from the dictates of conscience, equity continues to temper the rigidity and occasional capacity of the common law to work injustice by imposing constraints upon the exercise of common law rights.

6. Before getting into these three central aspects of equity, I need to make clear what I mean by the common law. Looked at from a distance, the common law is that body of mainly judge-made legal rules and principles which, together with statute, make up the whole body of law by which a common law country or territory is regulated. Thus we speak of England and Wales as a (or perhaps two) common law countries, and of Hong Kong as a common law territory. In legal terms we refer to the large family of countries and territories which use the common law as the “common law world”, to distinguish it for example from those which we sometimes call civil law countries governed by a code or codes. Some countries, such as Mauritius and St Lucia, practice a mixture of both, reflecting their historical origins as, at different times, colonies of France and then the UK. No two territories practice precisely the same common law, but they each look towards the judicial precedents and academic writings of the others as valuable guidance. That is the daily work of the Judicial Committee of the Privy Council, which acts as the final court of appeal for about 27 territories (including three independent republics) which follow the common law or, like Mauritius, a mixture of common law and civil law.
7. When I speak of the common law in that sense, I mean to include equity as part of the common law. Equity is a rich part of that common law tapestry. But when looking more closely at how equity works within a particular common law system, I use the phrase “common law” by way of distinction from equity. Thus for example the common law awards damages whereas equity may award specific performance, in both cases for breach of contract. Common law claims may be lost by the operation of the statutes of limitation, whereas equitable claims may typically become barred through laches (i.e. delay). Equity is said to temper the rigidities of the common law by principles based upon conscience. In this address I shall be referring to the common law mainly in that latter sense, as a system of rules admired and used throughout the world for their good sense and predictability, but which need the help of equity to enable them to deliver a closer approximation to what you and I would call fairness and effective justice.

## Trusts and new kinds of property

8. So, turning to my first main topic, the trust is of course of ancient equitable origin. It was originally devised to enable rich landowners to tie up land for the long-term preservation of their family fortunes over successive generations, and to enable property to be administered for the benefit of those without the skills to do so (beneficiaries such as children or the infirm) by others with those skills (the trustees), acting originally for no reward but out of a duty of undivided loyalty to the beneficiaries. From time to time such structures have enormous tax advantages, particularly if the trust can be located in a tax haven.
9. Trusts have during my short professional lifetime come to play a central and vital role in the context of modern business. They have for many years been a widely used framework for large scale pooled investments such as investment trusts, unit trusts and pension trusts. They have come to be the structure of choice for the holding within large banking groups of derivatives and other intangible assets, both for other group companies and for customers<sup>1</sup>. They have, sometimes with less than satisfactory consequences, come to be chosen as the vehicle for trading businesses<sup>2</sup>. These are usually examples of express trusts deliberately created. But the trust has also been used by asset recovery litigators, in the form of the constructive trust, as a more effective means than provided by the common law of recovering assets which, although not originally held on trust, have been misappropriated, deployed or received in breach of fiduciary duty. More recently equity (and the trust in particular) has shown itself both willing and able to recognise entirely new types or forms of rights as, or as if they were, property. The most recent example is cryptocurrency, to which I shall shortly return.
10. It is worth asking, at the outset, why equity has behaved in this way? I think there are two linked reasons. The first is that equity has always tried to serve the parties' intentions. The second is that, in

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<sup>1</sup> *Pearson and others v Lehman Brothers Finance SA and others* [2011] EWCA Civ 1544; [2012] 2 B.C.L.C. 151 ("*Lehman Rascals*").

<sup>2</sup> *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7; [2019] A.C. 271. Unsatisfactory because trusts, unlike companies, lack a developed system of administration in insolvency.

giving effect to those intentions by affording remedies of a proprietary kind for the vindication of rights which, viewed on their own, don't look like property, equity in effect turns them into property for the first time. Let me start with the simple example of a bank current account in credit. Strictly, that merely represents a purely contractual liability of the bank to pay, on demand, the amount showing on the account to the customer named on the account. It is a personal contractual right of the customer as against only the bank. But ordinary people, including most bank customers, speak of that right as money, or money in the bank, as if it were a pile of notes or coins held there by the bank for the customer. Now equity does not of course treat the bank as holding anything on trust for the customer, who (at least as a current account holder) is just an unsecured creditor with no proprietary entitlement against the bank or its assets. But equity does recognise that the credit balance is something which the customer may hold on trust for someone else, so that for example it will not become engulfed in the customer's bankruptcy. Every solicitor's client account works in that way<sup>3</sup>. Thus a credit balance of that kind is only a personal right, but it is capable of being the subject matter of a trust, i.e. what we usually call "trust property". In this way equity responds to the intention common to most people that money in their bank account should be part of their property. This is the basis upon which equitable remedies for the misuse of that money, such as tracing, following and the creation of a remedial equitable charge over a mixed fund, all operate.

11. Sometimes it is the availability of the equitable remedy of specific performance which converts what looks like a purely contractual right into a form of equitable property. Perhaps the best example is the equitable lease. An agreement for a lease is not, on its face, an interest in land. It is just a contract with the landowner which he may or may not perform. But it is an agreement of which equity would grant specific performance, essentially because land is special, and damages are not therefore an adequate remedy for breach of the agreement. It is the availability of that equitable remedy that means that, for over 100 years, an agreement for lease is

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<sup>3</sup> *Pearson v Lehman Brothers Finance SA* [2010] EWHC 2914 (Ch), para 241.

regarded as a form of equitable proprietary interest in the subject land. Following the leading case it is usually labelled a *Walsh v Lonsdale* lease<sup>4</sup>.

12. But sometimes equity recognises as capable of being held on trust a contractual right which is emphatically not specifically enforceable, or even assignable, expressly on the basis that this accords with the parties' intentions. The best example I can think of is the manager's rights under a boxer manager contract. In *Don King Productions v Frank Warren*<sup>5</sup>, two tough boxing promoters went into an unlikely partnership for the management of their separate stables of boxers, who were managed under non-assignable contracts, usually made with one or other of them. On their inevitable falling out one of them claimed to be able to continue managing his boxers free of the partnership interest of the other. The judge (Lightman J) and the Court of Appeal both found that the benefit of the management contracts was partnership property, and that it was held by each partner (i.e. the sole manager of the boxer under the particular contract) on trust for the partnership.

13. Lightman J said<sup>6</sup>:

"The defendants sought to discourage me from finding the existence of any trust in this case, and they invoked for this purpose the long established principle restated in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] A.C. 669, 704-705, that the wholesale importation into commercial law of equitable principles would be inconsistent with the certainty and speed which are the essential requirements for the orderly conduct of business affairs. There can however be no sustainable objection on these grounds to recognition of a trust if the parties have manifested their intention to do so, a fortiori when this is necessary to achieve justice between the parties."

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<sup>4</sup> *Walsh v Lonsdale* (1882) 21 Ch. D. 9.

<sup>5</sup> *Don King Productions Inc v Warren* [2000] Ch. 291 ("*Don King*").

<sup>6</sup> *Don King* at 317.

This outcome was endorsed by the Court of Appeal.

14. A similar intention-driven outcome occurred in a purely commercial context within the Lehman group, as revealed when it spectacularly crashed in late 2008. Lehman Brothers International (Europe) (known to its friends as “LBIE”), based in London, was one of three main hub companies within the group which generally acquired title to securities held for the economic benefit of its affiliates. The securities themselves were mostly in dematerialised form, where legal title remained in custodians (i.e. as trustees), LBIE acquiring just the beneficial interest therein. For many years LBIE dealt with its affiliates on terms which in fact and in law did not impose a trust of the beneficial interest in the securities on LBIE. But when for regulatory and other reasons LBIE set up an automated system of daily repeated repurchase transactions of all its securities around the group (which formed part of a wider project referred to as “Rascals”), it did so on the basis that it thought it did hold the securities on trust for its affiliates. There was no change in the basis on which they had previously been acquired from the street for the affiliates, but the assumption, i.e. the intention that they were held on trust, prevailed so as to create a trust of the securities once the Rascals system got started<sup>7</sup>.
15. Thus far all the examples which I have given occurred before Lord Neuberger asked the question about equity’s continuing vitality that I am trying to answer. I gave the first instance judgment in the *Rascals* case just one month after Lord Neuberger gave his lecture here. But equity’s process of adapting its capacity to recognise trusts and new forms of property didn’t just stop in 2010. While the *Rascals* case concerned dematerialised securities such as derivatives, now equity is getting to grips with even more modern forms of assets such as cryptocurrencies, of which Bitcoin is probably the best known example. I’m not even going to try to describe cryptocurrency. You probably all understand how it works on the blockchain much better than I do.

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<sup>7</sup> *Pearson v Lehman Brothers Finance SA* [2010] EWHC (Ch) 2914; [2011] EWCA Civ 1544

16. Starting in about 2016 and continuing right up to date, the courts of most common law jurisdictions, including England, the USA, New Zealand, Canada, the British Virgin Islands, Singapore and Hong Kong, have come to recognise cryptocurrency as a form of property capable in principle of being held on trust. The cases have all occurred within the last 10 years. To get a very readable account of that process you need go no further than the excellent description given by Justice Linda Chan in March 2023 in your Court of First Instance in *Re Gatecoin*<sup>8</sup>.
17. Whether cryptocurrency is actually held on trust by an exchange platform like Gatecoin depends of course upon intention, to be gathered mainly from the standard terms and conditions under which the platform offers to do business with its customers. Applying the intention test set out in the *Lehman Rascals* case, Justice Linda Chan held that Gatecoin's initial T&Cs did disclose an intended trust, whereas its later T&Cs did not.
18. Why does it matter whether cryptocurrency is property capable of being held on trust? First, because if it is so held, then its beneficial owners can lay claim to it free from the claims of the exchange platform's unsecured creditors in its insolvency. Secondly, and probably more importantly, it makes available to the claimant owner various forms of equitable remedy where it has been misappropriated. By contrast, if cryptocurrency amounted to no more than a mere contractual relationship with the exchange, the claimant would be limited to a claim in damages against the probably insolvent exchange. Those equitable remedies include equitable tracing, constructive trust, proprietary claims against persons into whose hands the cryptocurrency has passed, together with claims for equitable compensation and account. Various forms of disclosure are also available to assist in tracing or finding the property, including disclosure by otherwise innocent third parties who have become involved in the fraud or misconduct of others, and therefore come under an equitable duty to assist<sup>9</sup>. In short the whole

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<sup>8</sup> *Re Gatecoin Limited* [2023] HKCFI 914.

<sup>9</sup> *Bankers Trust Co v Shapira* [1980] 1 W.L.R. 1274 ("*Bankers Trust*").

panoply of equitable remedies, the development of which is the subject of the next part of this address.

### **New kinds of equitable remedy, escaping from restrictive rules**

19. It is easy to forget that almost every kind of remedy other than judgment for damages or payment of money has its original source in equity. Originally that meant that, in England at least, if you wanted an injunction, an account, or the provision of information, you had to go to the courts of equity. But since the fusion of the courts of equity and common law in the 1870s, you can get all remedies from any division of the High Court. And both in England and around the common law world, those remedies are frequently now enshrined in statute. Nonetheless the principles which apply to the discretion whether or not to grant such remedies remain equitable, not just in origin but in day to day practical reality. So also does the sheer imaginativeness of equity continue to inspire the development, for example, of new types of injunction, and the readiness of the courts to explore the granting of existing types of remedy in new circumstances.
20. From time to time senior academics, judges and even courts have tried to encase equitable remedies in neat jurisdictional boxes so that, it is said, a remedy can only be granted if certain rigid conditions are met and, if not met, there is simply no jurisdiction to grant the remedy at all. But even now, over 150 years from the fusion of the courts of law and equity, equity continues to find ways of, let's say, sidestepping those boundaries. I want to look at two recent examples of this process, both relating to injunctions, in which I may be said to have played a walk-on part.
21. The first is, or was, the supposed rule that the court could only grant a freezing injunction by way of ancillary relief in proceedings pursuing a substantive cause of action within the jurisdiction. Put the other way round, you could not get a freezing injunction in (say) England in support of a substantive claim in proceedings in (say) Hong Kong, even if the defendant had to be sued in Hong Kong (e.g. due to residence there) but kept all their assets in England. This was laid down in the House of Lords, in particular by Lord Diplock, in *The*

*Siskina*<sup>10</sup> in 1977, very near the start of the development of freezing orders as a radical new form of injunction. He said<sup>11</sup>:

“Since the transfer to the Supreme Court of Judicature of all the jurisdiction previously exercised by the court of chancery and the courts of common law, the power of the High Court to grant interlocutory injunctions has been regulated by statute. That the High Court has no power to grant an interlocutory injunction except in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment, was first laid down in the classic judgment of Cotton LJ in *North London Railway Co v Great Northern Railway Co* (1883) 11 QBD 30, 39-40, which has been consistently followed ever since.”

22. Lord Diplock’s famous dictum never gained unqualified support, at least from equity lawyers: see the well-known dissent by Lord Nicholls in *Mercedes Benz AG v Leiduck*<sup>12</sup>. He was speaking in the Privy Council on an appeal from Hong Kong. Nonetheless *The Siskina* remained part of the common law until late 2021. Meanwhile, many jurisdictions (including England) circumvented this obstructive supposed principle by legislating for a statutory jurisdiction to grant interim relief in respect of foreign proceedings. But not in the British Virgin Islands. There the *Siskina* obstruction remained until it was demolished in 2021 by a bare 4-3 majority of the Privy Council in *Broad Idea v Convoy Collateral*<sup>13</sup>. Why did we (for I was a silent part of the majority) think it right to overrule (in the BVI at least) a longstanding rule laid down by such an eminent common lawyer as Lord Diplock? One reason was that we thought he had misread the *North London Railway* case, a decision of the Court of Appeal<sup>14</sup> as if it laid down the same rule.
23. But a much more important reason was our view that, in the meantime since *The Siskina*, equity had during the following forty years demonstrated that it was by no means hidebound by

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<sup>10</sup> *Owners of Cargo Lately Laden on Board the Siskina v Distos Compania Naviera SA* [1979] A.C. 210 (“*The Siskina*”).

<sup>11</sup> *The Siskina* at 256.

<sup>12</sup> *Mercedes-Benz AG v Leiduck* [1996] A.C. 284.

<sup>13</sup> *Broad Idea International Ltd v Convoy Collateral Ltd* [2021] UKPC 24; [2023] A.C. 389 (“*Broad Idea*”).

<sup>14</sup> *North London Railway Co v Great Northern Railway Co* (1883) 11 Q.B.D. 30.

jurisdictional rules of that kind. In a whole range of different fields equity had permitted the grant of injunctions otherwise than as ancillary to a cause of action being pursued in proceedings within the jurisdiction. They included anti-suit injunctions (including injunctions to restrain abusive arbitration proceedings), restraints on the presentation of winding up petitions, and above all third party disclosure orders, against innocent persons against whom no cause of action was pursued, but who had become mixed up in the wrongdoing of others<sup>15</sup>. All these developments had occurred before Lord Neuberger asked his famous question, but I think that their implications viewed as a whole had yet to be fully appreciated.

24. Even more recently the English courts, applying equitable principles under the prompting of a European directive, have developed the internet blocking order. In *Cartier International AG v British Sky Broadcasting Ltd*<sup>16</sup> the Court of Appeal upheld decisions of Arnold J to grant injunctions ordering internet service providers (“ISPs”) to block websites selling counterfeit goods. The ISPs had not invaded, or threatened to invade, any independently identifiable legal or equitable right of the claimants. Nor had the claimants brought or indicated any intention to bring proceedings against any of the infringers. It was nevertheless held that there was power to grant the injunctions and a principled basis for doing so to compel the ISPs to prevent their facilities from being abused by others to commit or facilitate a wrong. An analogy was drawn with third party disclosure orders. When *Cartier* came before the Supreme Court on a costs issue, the internet blocking order was expressly held to be justified “on ordinary principles of equity”, quite apart from the power derived from European law<sup>17</sup>.

25. Some academic writers have for long been warning judges not to confine equitable remedies, and injunctions in particular, within rigid, supposedly jurisdictional boundaries. Perhaps the most

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<sup>15</sup> *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] A.C. 133 and *Bankers Trust*.

<sup>16</sup> [2016] EWCA Civ 658; [2017] 1 All ER 700

<sup>17</sup> *Cartier International AG v British Telecommunications Plc* [2018] UKSC 28; [2018] 1 W.L.R. 3259, para 15 per Lord Sumption.

influential expression of this warning is to be found in the 9<sup>th</sup> edition (in 2014) of that venerable tome Spry's Equitable Remedies<sup>18</sup>:

“The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited. Injunctions are granted only when to do so accords with equitable principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. Unfortunately there have sometimes been made observations by judges that tend to confuse questions of jurisdiction or of powers with questions of discretions or of practice. The preferable analysis involves a recognition of the great width of equitable powers, an historical appraisal of the categories of injunctions that have been established and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate.”

A better statement of equity's continuing vitality would be hard to find.

26. That ringing passage played a central part in the second, even more recent, example which I want to provide of equity's vigorous determination to avoid becoming hidebound by common law rules about jurisdiction. There was thought by many senior judges to be a rule that the jurisdiction of the court against a person otherwise than on a purely temporary emergency basis depended on that person being identified and joined to the proceedings as a defendant by service of the proceedings upon them. By “identified” I do not mean necessarily named, but at least identified as a particular person or persons, even if their name was not known. This general principle was most recently affirmed as part of the common law by the unanimous Supreme Court decision in 2019 in *Cameron v Liverpool Victoria Insurance Co Ltd*<sup>19</sup>. That was a purely common law claim for damages, arising from a road accident.

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<sup>18</sup> I. C. F. Spry, *The principles of equitable remedies : specific performance, injunctions, rectification and equitable damages* (9th edn, Sweet & Maxwell 2014), p. 333 (footnotes removed).

<sup>19</sup> *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6; [2019] 1 W.L.R. 1471 (“Cameron”).

27. But this principle was already being put to the test by equity in a number of cases in which local authorities sought injunctions against unlawful camping by Gypsies and Travellers, either as trespassers on Council land or in breach of planning permission. The problem for the Councils was that, if they waited for a Gypsy family to camp on a particular site, and then got an injunction to stop them camping, the family would just move on and be replaced by another family or group, against whom the injunction would be ineffective, and so on ad infinitum. Could the Council get a step ahead of the game by getting an injunction against “persons unknown” so it would be immediately effective when any Gypsy family arrived at the site? The persons unknown were truly unidentifiable. Any Gypsy family in the country might decide to camp on the Council’s land. The legal problem was that they would not have been sued or served with any proceedings when the injunction was granted. It would be what lawyers who love Latin call an injunction contra mundum, i.e. against the whole world. While that might not matter for a very short term interim injunction, would the grant of a permanent injunction, or an injunction for a specified period, without any return date, fall foul of the jurisdictional principle laid down in *Cameron*? A group of Gypsy cases was brought before a single judge, who decided that it would fall foul, and he discharged all the injunctions.

28. It took a lot of head-scratching in the Court of Appeal and the Supreme Court to find ways round this problem. In the Court of Appeal it was thought that an injunction could be framed in terms that a person who disobeyed it would automatically become a defendant to the proceedings<sup>20</sup>. That route appears to have been adopted at first instance in Hong Kong<sup>21</sup>. But in the Supreme Court that solution was not favoured<sup>22</sup>. The main purpose of an injunction is that it should be obeyed. So, if a law abiding Gypsy family saw a copy of the “persons unknown” injunction displayed at the site, and therefore decided not to camp there, they would have been

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<sup>20</sup> *Barking and Dagenham LBC v Persons Unknown* [2022] EWCA Civ 13; [2023] Q.B. 295.

<sup>21</sup> *Airport Authority v Persons Unlawfully and Wilfully Obstructing or Interfering Etc* [2019] HKCFI 2104; *TVB v Persons unlawfully and wilfully damaging any property and injuring any employee of the Plaintiff* [2019] HKCFI 2723

<sup>22</sup> *Wolverhampton City Council v London Gypsies and Travellers* [2023] UKSC 47; [2024] 2 W.L.R. 45 (“*Wolverhampton v Gypsies*”).

compelled by the injunction to behave in accordance with it, without ever becoming parties to the proceedings.

29. The Supreme Court found its solution in the equitable nature of an injunction, and the principled freedom from hard jurisdictional rules which equity had displayed over many decades in framing new types of relief to meet the justice of emerging types of case. On this occasion I was a co-writer of a joint judgment, with which all members of the court agreed. Building on *Broad Idea* we all agreed that Lord Diplock had been wrong in *The Siskina*. More generally, we sought to set out some principles by which the courts could decide whether or not to grant injunctions against persons unknown (or “newcomer injunctions” as they are more accurately named), basing ourselves on the above passage in *Spry*, and on the following general equitable principles:

- (1) Equity intervenes where the common law proves inadequate to protect or enforce the claimant’s rights.
- (2) Equity looks to the substance rather than to the form.
- (3) Equitable relief is essentially discretionary and flexible, and can be tailored to meet the justice of a case on its special facts.
- (4) There is no supposed limiting rule or principle apart from justice and convenience which equity has regarded as sacrosanct over time.

30. The second of those principles – that equity looks to the substance rather than to the form – is of particular importance in this context. The jurisdictional bar prohibiting common law relief against persons who are not already joined (by service) as defendants is, as Lord Sumption explained in *Cameron*, there to ensure that a defendant has a proper opportunity to be heard. In the *Wolverhampton v Gypsies* case we were at pains to uphold the substance of that principle by requiring the advertisement of the intention to seek an injunction so as to come to the notice of voluntary bodies defending Gypsies’ rights before any hearing, the conspicuous posting of copies of the resulting order on the sites affected, coupled with an easily understandable explanation to the

readers of their entitlement to come to court to assert their human rights and generally to have the injunction set aside, if appropriate. Thus effective opportunity to oppose the continuation of the injunction could be given in substance without going through the form of joining them as defendants by service of the claim form before the grant of an (effectively) permanent or fixed term injunction.

31. Research for this lecture reveals that the UK Supreme Court is by no means alone in this development of injunctions against persons unknown, although it may well have examined the issue in more depth than elsewhere thus far. There have been a number of injunctions sought or granted in Hong Kong against persons unknown<sup>23</sup>. In Australia the Supreme Court of New South Wales has this year expressly referred to the *Wolverhampton v Gypsies* case in granting an injunction against persons unknown in a data theft case: see *HWL Ebsworth Lawyers v Persons Unknown*<sup>24</sup>. Injunctions against persons unknown have been recognised as long ago as 1996 as permissible in the Supreme Court of Canada<sup>25</sup>.
32. Injunctions against persons unknown are likely to be of particular value in asset tracing and recovery proceedings following the theft or misappropriation of cryptocurrency, where the perpetrator of the hack or other crime is often unidentifiable. An example of a case where freezing, disclosure and other orders have been made in claims against persons unknown in the cryptocurrency context has been reported in Singapore<sup>26</sup>. All these welcome developments in the long arm of equity make good Lord Neuberger's dictum, in 2011, that<sup>27</sup>:

“In the increasingly sophisticated world of international movement of goods, assets and money, and the formation of companies and the hiding of assets, the courts have to be astute

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<sup>23</sup> See note 21 above.

<sup>24</sup> *HWL Ebsworth Lawyers v Persons Unknown* [2024] NSWSC 71.

<sup>25</sup> *MacMillan Bloedel Ltd v Simpson* [1996] 2 SCR 1048.

<sup>26</sup> *CLM v CLN* [2022] SGHC 46.

<sup>27</sup> *Linsen International Ltd v Humpuss Sea Transport Pte Ltd* [2011] EWCA Civ 1042, para 17.

to ensure that the law keeps pace with modern developments and is not flouted.”

33. There is however one jurisdictional constraint which equity sometimes finds it very hard to sidestep. That is the reluctance to extend equitable relief across national boundaries. Thus for example, although the court often makes international freezing orders, it has been reluctant to order an innocent person in another country to make third party disclosure under the *Norwich Pharmacal* or *Bankers Trust* jurisdiction. And as I shall later explain, the law in another country may make equitable proprietary remedies ineffective, by giving the defendant clean title, free from equitable interests. In a welcome development the International Bar Association is promoting the creation of an international asset recovery convention, along the lines of an UNCITRAL model law. It would enable a requested court to apply both its own remedies and those available to the foreign requesting court in seeking to assist in the recovery of assets within its jurisdiction, in much the same way as the UNCITRAL Model Law on Cross Border Insolvency does already.

### **Tempering the rigidity of the common law**

34. I turn now to my third topic. I have spoken at length about how equity decides whether to grant or withhold relief as a matter of flexible discretion in accordance with general principles, whereas typically the common law grants relief as a matter of right in accordance with clear, fixed rules and conditions. It may be asked how it is that, as part of a system of common law renowned and chosen across the world for its predictability, equity’s approach has survived into the 21<sup>st</sup> century, let alone continued to flourish as it has. The most fundamental equitable principle of all is the prevention of the exercise of strict common law rights where it would be unconscionable for them to be enforced. That is the principle which underlies relief against forfeiture, rectification, equitable remedies including both promissory and proprietary estoppel and the enforcement of some fiduciary duties, and duties arising from a

relationship of trust and confidence, with a remedy also in undue influence.

35. It is fair to say that equity has to walk something of a tightrope between, on the one hand, the enforcement of the dictates of conscience and, on the other hand, the achievement of predictability. Although conscience may, viewed from an individual perspective, be that still, small voice which tells you quietly that something you can lawfully do is nonetheless wrong, in the law conscience refers to a corpus of societal and perhaps moral values which all upright and reasonable people are expected to share. But there will always be some uncertainty, when advising clients, whether a particular judge will see the relevant conduct as falling just on the right or the wrong side of conscionability, thus refusing or granting relief accordingly, in a case where conscience is the governing criterion.

36. Nonetheless equity and its conscience-based principles have to work as part of a system of law in which predictability is often at a premium. Until the advent of land registration, title to and interests in land were governed as much by equity as by the common law. In some respects they still are, and even more so in relation to property of many other kinds where title and beneficial ownership do not depend upon a statutory scheme of priority. Conveyancers and traders have to be sure what the law is in that field, if the marketability of title to property is not to be undermined by uncertainty. It is sometimes said that equity is all about private relations within families and has no part to play in the marketplace. This is completely wrong<sup>28</sup>, but it points to the need for equity to maintain a balance between conscionability and predictability, and to there being something of a spectrum, at one end of which conscience may predominate, while predictability rules supreme at the other.

37. This need to avoid equity falling off the tightrope between the two has led to a surprising number of recent cases in England where

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<sup>28</sup> For a thorough review of the reasons why: See Irit Samet, *Equity: Conscience Goes to Market* (Oxford: Oxford University Press, 2018)

some central, time-honoured and fundamental principles of equity have come up for critical analysis and potential revision. Time permits me to mention only two of them, in chronological order.

38. My first example is about proprietary estoppel. This doctrine or remedy operates almost entirely at the private family end of the spectrum. If, in circumstances not amounting to a contract, A promises B that he has, or will in future be given, some specific part of or interest in A's property, and B acts to their detriment in reliance on that promise, then A may be restrained by equity from resiling from that promise. For most of the history of the development of the doctrine, equity's remedy for the wrong being done to B was to require A to perform his promise, even though it was not binding as a contract. The classic fact-set is that of a farmer telling his young son "one day my son this farm will be yours", and the son then working for most of his adult life for his father on the farm for pitiful wages, after which, when they fall out, father resiles from the promise and gives or wills the farm to his recently married second wife or to other children. In such a case equity requires the father or his executors to give the son the farm or, if that is no longer possible, equitable compensation equivalent to its value.

39. Sometimes however equity recognises that this complete fulfilment of B's expectation would be wholly disproportionate to the detriment suffered, or wholly unjust to other members of A's family with a claim upon his bounty, or even unfair to A who needed that property to fund unexpected medical care during a protracted illness. For example, an elderly lady might promise her house to her carer if she looked after her for the rest of her life, but then the lady dies, unexpectedly, only a month later. In such types of cases the court tempers the amount of the award accordingly<sup>29</sup>. This led to some considerable uncertainty when advising parties to a proprietary estoppel case about the amount of any likely award.

40. Starting mainly in academic circles<sup>30</sup>, the idea grew up that perhaps the modern remedy for the estoppel, if established, should

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<sup>29</sup> See *Jennings v Rice* [2002] EWCA Civ 159; [2003] 1 F.C.R. 501.

<sup>30</sup> See Ben McFarlane, Professor of English law at Oxford University: *The Law of Proprietary Estoppel* (2nd edn, OUP 2020).

simply be an order for payment of compensation for the assessed monetary harm-value of the detriment suffered by B. A bit like damages at common law, treating the promise as a sort of negligent misrepresentation. This detriment-based theory was looked at but ultimately rejected in Australia<sup>31</sup>, but came to a head in a typical father and son case called *Guest v Guest*, in the UK Supreme Court in late 2022<sup>32</sup>. The discounted present value of the expectation to the son, an economically viable part of father's farm on his parents' death, was probably worth at least double the supposed harm-value of the detriment, although the latter would have been very hard to determine reliably. But the falling-out between father and son, including father evicting his son and young family from a farm cottage and cutting him out of his will, occurred while father and mother still appeared to have many years yet to live. So father's promise was not yet due for performance.

41. The appeal turned into a straight but very hard-fought fight between the proponents of expectation fulfilment and the contenders for detriment compensation. The panel consisted of 3 former Chancery (i.e. equity) judges and 2 common lawyers. And surprise surprise, the equity judges won 3-2, but it was, as Lord Wellington said about the Battle of Waterloo, the most close-run thing you ever saw in your life. The common law duet, led by Lord Leggatt, had all the advantages of simplicity and predictability in contending for compensation for the detriment, not to mention impeccable academic credentials, from none other than Ben McFarlane himself. The equity trio (which I had the privilege to lead) reasoned that the essence of the doctrine was equity's determination to remedy the unconscionability involved in father repudiating his promise. No equitable wrong was committed by the making of the promise in the first place. That naturally pointed towards requiring the promise to be fulfilled, but in particular circumstances something less might remove the unconscionability, and complete fulfilment of the promise might cause injustice. Furthermore, this analysis

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<sup>31</sup> *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394; *Giumelli v Giumelli* [1999] HCA 10; 196 CLR 101; and *Sidhu v Van Dyke* [2014] HCA 19; 251 CLR 505.

<sup>32</sup> *Guest v Guest* [2022] UKSC 27; [2022] 3 W.L.R. 911 ("*Guest*").

chimed with what the courts of England and Australia had been doing for well over a century.

42. The “particular circumstance” in *Guest v Guest* was that the promise was by no means due for immediate fulfilment when father and son fell out and the matter went to court. The farm was still father and mother’s home. So we ordered that father should choose between settling the viable proportion of the farm on trust for himself and mother for life, with the remainder to the son, or paying the present value of the son’s future promised interest, discounted for early receipt.
43. It is emerging from early academic and professional comment that, while the assertion of this traditional equitable approach is respected as being consistent with both principle and authority, the decision has not done much to contribute predictability of outcome to an area where equity’s discretion as to remedy is at its most flexible. Perhaps that is as it should be in the non-commercial context in which proprietary estoppel almost always arises. Business people who are negotiating subject to contract can hardly complain of unconscionability if the other party decides at the last moment to withdraw, merely because detrimental steps have been taken on an assumption that a binding contract would ensue<sup>33</sup>.
44. Proprietary estoppel is an area of equity where conscience plays its most active role. The opposite result was reached in the most recent review by the UK Supreme Court of a basic equitable principle, in *Byers v Saudi National Bank*<sup>34</sup>. This was a dispute about that most ancient of equitable doctrines, namely liability for knowing receipt of trust property. Liability in knowing receipt usually arises where a trustee transfers trust property beneficially owned by the claimant to the defendant in breach of trust, and the defendant learns about that breach before disposing of the property by transfer to a third party or by dissipation or destruction of it. In such circumstances, the claimant, as beneficial owner of trust property, is able to claim equitable compensation from the defendant. It is the

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<sup>33</sup> *Cobbe v Yeoman’s Row* [2008] UKHL 55; [2008] 1 WLR 1752.

<sup>34</sup> *Byers v Saudi National Bank* [2023] UKSC 51; [2024] 2 W.L.R. 237 (“*Byers*”).

compensatory alternative to a proprietary claim to the property itself, which may be lost for example upon transfer of the property by the defendant to a bona fide purchaser for value without notice of the breach of trust, someone called equity's darling.

45. In *Byers*, very valuable securities held by a Mr Al Sanea on trust for his company Saad Investments ("SICL") were transferred by him to his bank (a predecessor of the respondent Saudi National Bank) to settle debts which he personally owed the bank. It was held that the bank knew that Mr Al Sanea was acting in breach of trust in using the securities to settle a personal liability of his. The trusts were governed by Cayman Islands law, which was for all relevant purposes the same as English law, but the securities were transferred under the law of Saudi Arabia. Saudi law provided that a qualifying transfer of securities gave clean title to the transferee, and did not recognise a distinction between legal and beneficial ownership of property. Recognising that a proprietary claim would not get off the ground, the liquidators of SICL sued the bank for equitable compensation on the basis of knowing receipt. On the facts as found, no-one would from an English law perspective deny that the bank had acted unconscionably in taking the securities in settlement of Mr Al Sanea's debt.
46. The outcome of the case depended upon the court's view about what, in principle, was the basis of the equitable claim in knowing receipt. Did it simply depend upon the unconscionability of a person (here the bank) dealing with property as their own while knowing that it had been transferred to them in breach of trust? Or did it depend upon the survival of the original beneficial owner's equitable interest in the property after the transfer by the trustee in breach of trust? If the former, then the liquidators would have succeeded. If the latter, then the bank could treat the securities as their own, having obtained clean title to them under Saudi law despite their guilty knowledge.
47. We concluded unanimously that the latter analysis of the principle was the correct one: an equitable claim in knowing receipt cannot succeed once the claimant's proprietary equitable interest in

the trust property has been extinguished by being overreached or (as here) overridden. The answer depended in part upon a painstaking analysis of many less than conclusive authorities going back 150 years<sup>35</sup>. But the principled answer was heavily influenced by our perception that equitable principles needed to respect the need for certainty and predictability in the transfer and ownership of marketable property. I said<sup>36</sup>:

“...Equity recognises the need to balance its function to restrain unconscionable conduct, in the context of equitable property rights, by the need to respect the public interest in the certainty and therefore marketability of title. ... While the regulation of unconscionable conduct may be the underlying purpose of many equitable principles, the extent to which unconscionability acts as a determining factor in the operation of those principles in particular cases varies widely. Where in the broken-down personal relations within a family a non-contractual promise to transfer property in the future has led to detrimental reliance, unconscionability may play a large part in moulding the remedy to be given to the reliant party: see ... *Guest v Guest* ... . But where the competition is between legal and equitable interests in marketable property the underlying objective of regulating unconscionable conduct needs to take second place to the established principles regulating priorities. The dictates of predictable title would be nullified if in every case of competing priorities the outcome depended on the endlessly variable views of different chancery judges about what the dictates of conscience required on the unique facts of that particular case. The same principled approach answers the appellants’ related submission that the knowledge requirement is only a flexible aspect of the need to demonstrate unconscionability. Issues as to priority in title to property need to be resolved on a more predictable basis than that.”

48. What do we learn from a comparison between these two recent reviews of fundamental equitable principles? First, the one

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<sup>35</sup> Beginning with *Barnes v Addy* (1874) LR 9 CH App 244.

<sup>36</sup> *Byers* at paras 39-40.

thing they both have in common is that what may be described as traditional, case-hardened doctrine prevailed over very serious attempts to modernise or re-analyse. Proprietary estoppel just managed to avoid a modernist, academic-led revision on the basis that neither principle nor the traditional authorities supported it. Knowing receipt did just the same, but with less difficulty.

49. But secondly and more fundamentally, equity showed itself ready to revisit long standing doctrines and justify them afresh by reference to basic principle about the way in which equity works to temper the occasional injustices of the common law. The two cases which I have described were by no means limited just to dry analysis of binding authority. They approached the questions at stake in a thoroughly modern way, conscious of how the common law needs assistance now, rather than just in past centuries.

50. I do not wish to suggest, by concentrating on these two cases, that they are the only examples of the recent re-evaluation of equitable principle going on in common law jurisdictions. In England the law of rectification appeared to have been turned almost upside down by the House of Lords in 2009 in *Chartbrook v Persimmon*<sup>37</sup>, before the heretical hare set running was mercifully killed off ten years later by the Court of Appeal in *FHSC Group Holdings v Glas Trust Corporation*<sup>38</sup> as having been both obiter and wrong. Solicitors' equitable litigation liens have been made to respond to the modern realities of civil litigation, in *Gavin Edmondson v Haven Insurance co*<sup>39</sup> and *Bott v Ryanair*<sup>40</sup>. And the priority between the competing equitable liens of successively appointed trustees was thoroughly revisited in the context of a modern business trust by the Privy Council (on appeals from the Channel Islands) in *Equity Trust v Halabi*<sup>41</sup>, jointly heard with part of the *Investec* litigation.

51. Still less do I want to suggest that the English courts are doing all the heavy lifting. Cases which do so are easy to find in Australia

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<sup>37</sup> [2009] UKHL 38

<sup>38</sup> [2019] EWCA Civ 1361

<sup>39</sup> [2018] UKSC 21

<sup>40</sup> [2022] UKSC 8

<sup>41</sup> [2022] UKPC 36

and New Zealand: see in particular *Bosanac v Commissioner of Taxation*<sup>42</sup>, in which the High Court of Australia started upon (but did not really finish) a much needed modern re-evaluation of resulting trusts, a doctrine which I have described in a lecture (unpublished and out of court) as “quaint, old-fashioned and, but for *Prest v Petrodel* [2013] UKSC 32, mouldering away towards well-deserved obscurity”.

52. Nor do I mean that time-honoured doctrine ought always to prevail. Equity like the common law needs constantly to respond to changes in societal values and modern technology, as indeed it is doing in relation to the expansion and augmentation of its remedies, and in its recognition of new forms of intangible property. *Equity Trust* was a case where (again by a bare majority) a modern application of the maxim equity is equality prevailed over the traditional view that, where the equities are equal, the first in time prevails.
53. What I think this short review does clearly provide is a very positive answer to Lord Neuberger’s question whether equity has had its day. I would suggest that his cautious double negative: “never say never” can, on the basis of equitable activity since then, be replaced by a much more confident assertion: equity is alive and well, vigorously modernising its remedies, alert to the latest technological developments affecting property, its ownership and its theft, and constantly, though not introspectively, revisiting and refreshing the basic principles by which it works to complement and perfect the common law. Long may that continue.

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<sup>42</sup> *Bosanac v Commissioner of Taxation* [2022] HCA 34.