Problem Solving in an Equity–Commercial Context

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1 As his Honour was then
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INTRODUCTION

Wrestling with Hard Law

1. We are all entitled, on the highest authority, to feel that the study of Equity is difficult. Even such an accomplished Equity practitioner as Justice W M C Gummow attests to that experience:

   “Equity is hard law, even to those who have spent most of their professional lives wrestling with it”?

2. But that is only part of the story. For those who confront whatever difficulties the subject entails, there can be a rewarding sense of personal satisfaction. The quote from Gummow J continues:

   “That makes it all the more interesting to teach and to apply in practice, particularly in commercial practice.”

3. At a superficial level the study of Equity can easily be presented as, or perceived to be, a thicket of technicalities always sufficient to obscure commonsense. Viewed in this light, there is little wonder if it seems impenetrable.

4. The redeeming feature of Equity jurisprudence is that, at heart, it presents a way of looking at the world (a philosophy of sorts) informed by a rich cultural heritage. To miss that point is to miss what can be immensely enjoyable about it.

The Importance of Legal History

5. Much of the enjoyment it offers comes best through a study of history. That is because, to a large extent, Equity is a shared tradition. Devotees of Equity do not have a monopoly on a love of history, but it is difficult to enjoy a full sense of the subject without it. Historical experience informs the logic that underpins it.

6. It is not without significance that some of the divisions between contemporary scholars find reflection in the historical traditions to which they appeal. Devotees of Equity as a separate field of study draw inspiration from the development from the English Court of Chancery. Modern critics of Equity not

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uncommonly draw inspiration from the Roman law and its influence upon English law. These differences are largely a matter of emphasis when allowance is made for the influence of Roman law on the civil law, and canon law, in Europe and the influence of canonists in the development of Equity. Nevertheless, the philosophical pre-dispositions of scholars is reflected in their perceptions of history.

7. Of particular historical significance for an understanding of current debates about the role of Equity, the nature and content of the law of restitution and the desirability or otherwise of unity and diversity in the law of obligations is the period from the late 18th century until the end of the 19th. Many strands were drawn together during that period. Modern Equity emerged during the chancellories of Lord Eldon (1801-1806 and 1807-1827), although substantial steps were taken towards its emergence by Lord Hardwicke (1736-1756) and Lord Thurlow (1778-1783 and 1783-1792). Lord Mansfield is the darling of restitutionists and the father of much modern commercial law. As Chief Justice of the King’s Bench (1756-1788) he encouraged English common lawyers to draw upon European law. In the first half of the 19th century what now passes for the classical law of contract emerged with the benefit of European learning. All this happened during a period of ferment which culminated in enactment of the Judicature Acts of 1873 and 1875 (UK).

Implications of Case Management Philosophy

8. The object of this paper is to examine the principles, practice and procedure of Law and Equity in a commercial context from an angle not customarily seen in standard texts: that is, one that views the law primarily as a problem solving tool for legal practitioners called upon to identify, and to construct

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practical solutions to, client problems. Its intention is to provide a framework for decision-making, not definitive statements on doctrine.

9. The characterization of law as a tool for the solving of problems is not a radical idea. Nor does anything in this paper naturally attract that description. There is, however, a shift in emphasis that is worthy of notice in three respects: (a) First, the motivation for a shift is a perception that the way the court system now works calls for a reassessment of how the law it administers is viewed. “Alternative Dispute Resolution” procedures such as mediation are now so commonplace that they no longer have the character of an “alternative” culture that they once did. With the advent of “compulsory mediation” they joined the mainstream. Civil cases are now rarely determined by juries, but routinely by judges dedicated to a “case management” philosophy. They routinely encourage the resolution of disputes without adjudication, or via mediators relatively untrammelled by formalities of the law. (b) Second, to view the law as a problem solving tool is to move towards a conception of the law as an instrument of management and away from a conception of it as a means for the vindication of rights. The common law, in particular, developed by reference to the vindication of rights; the practical moderation of them by juries in particular cases did not deprive assertions of right of that colour. The discretionary character of Equity jurisdiction made it naturally more amenable to managed solutions to particular problems, with relief moulded to meet the ends of justice in each case; but, still, it managed without the language of management. (c) Third, with the move towards subordination of adjudication to managed solutions the focus of litigants and their lawyers necessarily shifts from all the formalities of adversarial litigation of “questions” towards accommodation of substantive problems underlying any formal dispute.

10. This shift in emphasis is not confined to civil courts. It can be seen more dramatically in the criminal justice system.5 The possibility that it will have an increasingly profound impact upon problem solving techniques deployed in the law cannot be discounted.6

11. An insight consequent upon characterisation of law as a management tool is that analysis of the law in practice must, for a time at least, rise above the thicket of technicalities in which the study of Equity too often becomes entangled. Technicalities have their place but, more often than not, they serve rather than

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5 NSW’s experiment with a “Drugs’ Court” is not unique. See, for example, Greg Berman and John Feinblatt, Good Courts: The Case for Problem-Solving Justice (The New Press, NY, 2005).

6 For elaboration of this possibility in the context of NSW’s Uniform Civil Procedure regime, see G. Lindsay, The Handbook: Thomson’s Guide to Civil Procedure in NSW (Thomson, Sydney, 2005), chapter 1, especially pages 30-45.
control, something larger. That something is essentially cultural – the ebb and flow of concepts that inform our decisions, such as “agreement”, “fairness” and “freedom of contract”.

THE INTERPLAY BETWEEN EQUITY AND COMMERCIAL LAW

Definition of Terminology

12. The terms “Equity” and “Commercial Law” are not capable of precise definition. They can convey different things to different people. Much of what passes today for “Commercial Law” is infused with, or informed by, principles derived from “Equity”. The point is reinforced if the notion of “property” is introduced into the equation.

13. It is not difficult to get swamped in the process of defining terminology. Without abandoning the eternal search for exactitude in conceptual analysis, there is merit in sidestepping complexity in search of practical insights. Legal practitioners need to be aware of the existence of debates on finer points of abstract thought, but not to be ensnared by controversy about them.

14. To capture some sense of the thought processes involved in “problem solving in an Equity/Commercial context” there is utility in an (over-simplistic) identification of “Commercial Law” with the “law of contract”, which is (essentially) derived from that branch of judge-made law known as “the Common Law”, and to contrast it with “Equity” as another branch of judge-made law, assuming all the while that there are no other branches of the law derived from judicial pronouncements.

15. Of course, the real world is much more complex. Commercial Law is a much broader concept than contract. Debt collection – a process that lies at the heart of much Commercial Law – does not depend upon the law of contract alone. Much Commercial Law is administered by Equity practitioners whose work is governed by statutes, such as the Corporations Act 2001 (Cth) and the Australian Consumer Law, that do not lend themselves readily to characterisation simply as either “Law” or “Equity”. And the law

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7 This point is made by Justice P W Young in “Equity, Contract and Conscience”, chapter 19 in Degeling and Edelman (ed), Equity in Commercial Law (2005) at page 489.
is too rich to be confined exclusively to those two categories. Administrative law has increasingly demanded attention as a field of study in its own right, and admiralty law has long done so, for example.

A Simple Model

16. Recognising the potential for more complex layers of thought, when we think of the interface between Equity and Commercial Law we generally focus on the capacity for Equity to “interfere” with contracts made between private parties. That is a recurrent thought, whether the focus is upon substantive law (where Equity’s imposition of fiduciary obligations might qualify contractual terms) or remedies (where Equity’s orders for specific performance or injunctions might override the Law’s system for the payment of damages).

17. The function of the Common Law is sometimes regarded as being not to compel performance of contractual duties, but to give a remedy against a contracting party who “elects” to pay damages in lieu of performance. This view is characteristic of lawyers who regard contracts simply as “bargains” between hard-headed people. The influential American jurist, Oliver Wendell Holmes Jnr, was such a lawyer. In his classic work, The Common Law⁸, he wrote:

“The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if [a] promised event does not come to pass. In every case it leaves him free from interference until the time for fulfilment has gone by, and therefore free to break his contract if he chooses.”

18. In this light, a contract is little more than a promise to perform, or to pay compensation for non-performance, at the election of the promisor. The law technically enforces the contract, to the extent that an obligation to pay damages is imposed as an obligation secondary to a primary obligation of performance⁹, but the philosophical predisposition underlying this approach is summarised as one of “non-interference” with “freedom of contract”.

19. Equity operates as a qualification on freedom of contract. It can, and does, make orders compelling a reluctant promisor to perform contractual promises. In theory, the ultimate justification for such compulsion is generally that Equity operates on the conscience of the promisor to protect the promisee

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⁸ Little, Brown & Co, Boston, 1881, page 301.
⁹ Moschi v Lepp Air Services Ltd [1973] AC 331 at 350.
from conduct on the part of the promisor which is characterised as “against good conscience”.10 If damages awarded at law are regarded by the Court as an adequate remedy it will generally, at least in theory, leave the promisee to that remedy by withholding orders for compulsory performance.

20. In practice, some classes of contract (notably, contracts for the sale of land) are treated as having a character that generally attracts an order for compulsory performance without any need to investigate underlying facts as to whether or not, in particular cases, damages would serve as an adequate remedy.11

21. A classic conundrum that arises in this and other contexts relates to the interplay between “rights” and “remedies”.12 Care needs to be taken not to make too much of adages based upon adaptations of Equity’s traditional maxims, such as “there is no right without a remedy” or “wherever there is a right there must be a remedy”. They might, at the margins of persuasion, carry some weight, but reliance upon them in any substantive sense is dangerous. Not every “right” can be “remedied” by the law.

Court Orders, Commerce and Property
22. Nevertheless, a party that has the benefit of a court order does have an entitlement in the nature of property (an enforceable right), particularly if that entitlement is able: (a) to be transferred; or (b) to be enforced against the whole world. Assignability and enforceability of rights against the whole world (that is, against parties not privy to an agreement, as well as against those who are) are the hallmarks of “property”. They distinguish the concept from “contract”, which can subsist where the only rights conferred are rights personal to the parties to an agreement.

23. This is important in the context of “Commercial Law” because much commercial activity can be analysed not only in terms of “contracts” but also, or alternatively, in terms of a grant or exchange of “property”.

24. To the extent that predictability emerges in the types of cases in which parties of a particular class can obtain the benefit of a court order, a species of property might, over time, gain recognition as existing without the precondition of a court order. The availability of an order provides the foundation for the

10 Observations in Tanwar Enterprises Pty Ltd v Couchi (2003) 217 CLR 315 at 324-326 warn against too general a use of the expression “unconscionable conduct”. The Court in that case preferred the expression “unconscientious conduct”. The need for caution arises from a tendency in the legal profession to equate the concept of “unconscionability” with something akin to an equitable tort (a misnomer) or a generic defence in Equity to legal claims. It is not.

11 There is a divergence between Australian and Canadian treatment of contracts for the sale of land in this regard: Robert Chambers, “The Importance of Specific Performance” in Degeling and Edelman (ed), Equity in Commercial Law, chapter 17.

12 In Burns Philp Trustee Co Ltd v Viney [1981] 2 NSWLR 216 Kearney J confronted the conundrum in considering how the common law incapacity of a capital felon to institute proceedings affected his rights in Equity.
existence of a property right. A recent example of that process has been the emergence of “confidential information” as a species of property. However, the same fundamental idea underlies long held notions of “equitable ownership” of, and security interests in, property. And this is not the preserve of Equity only or of modern times. It is a function of the availability of curial relief, not necessarily the identity of the court exercising jurisdiction.

25. At the margin between Equity and Commercial Law is an eternal struggle between competing social interests. Society has an interest in striking a balance between “freedom of contract” and “fairness”, and between protecting “property” without allowing property rights to impede “trade” or other activities. The need to strike the right balance (whatever it might be) lies at the heart of debates about the ambit of equitable jurisdiction.

26. An understanding that tensions like these exist provides insight into how the law operates in particular cases, and how it might develop. Although an expansive view of equitable jurisdiction (embracing broad concepts of unconscionable conduct or fiduciary obligations), or an expansive view of the law of restitution (embracing broad notions of unjust enrichment) might enable courts to give primacy to a felt need for “fairness” in commerce, if courts stand too ready to make orders affecting freedom of contract they might stifle socially desirable activity, including fair trade and reasonable enjoyment of property rights.

27. At a doctrinal level that is one reason, for example, why it might be preferable for the law to address considerations of fairness in commercial law through implied terms as to good faith or the like, or through statutory remedies (such as the Australian Consumer Law and the Contracts Review Act 1980 (NSW)) that permit individual contracts to be varied to meet the needs of particular cases, without the articulation of broad equitable entitlements capable of generating rights or expectations in the nature of property.

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14 Professor S F C Milsom argues that some fundamental property rights have their origins in social expectations arising from administrative decisions that become routine: A Natural History of the Common Law (Columbia UP, New York, 2003); The Legal Framework of English Feudalism (Cambridge UP, 1976).
THE CURRENT BALANCE BETWEEN LAW AND EQUITY IN COMMERCIAL LAW

The Nature of Dispute Resolution Processes
28. The process of legal problem solving cannot be divorced from the potentiality of litigation requiring a curial determination of disputed entitlements. Lawyers should not be blinkered by the idea that all rights and obligations are governed by the closed world in which litigation lawyers live. Nevertheless, the ever-present possibility of litigation, and accommodation of it, need to be taken into account in a society governed by rule of law.

Purpose, Perspective and Competing Interests
29. The process of legal problem solving is governed, at every turn, by the concepts of “purpose”, “perspective” and “competing interests”. When those who administer the law turn their attention to particular problems, they are likely to be affected by their perception of the purpose served by the law in their definition and application of particular rules governing the making or refusal of court orders. Because legal decision-making is generally “outcome driven”, is it necessary for all participants in the legal process to identify desired outcomes and means available to achieve them. Decisions are not made by any individual in a vacuum. Different perspectives and competing interests need to be consulted and, abstract though it might be, the law has a life of its own that cannot be ignored.

The Ebb and Flow of Equitable Jurisdiction
30. In his paper, “Equity Contract and Conscience” Justice Peter Young justified an historical review of the interplay between Equity and Law in the law of contract by pointing to the capacity of Equity to expand, and contract, its influence as needed: “...[Equity] never actually loses jurisdiction. The common law or statute may take over a field from Equity and Equity will subside as, if there is a full remedy at Law, there is no need for it. However, history shows that circumstances change and gaps appear in the common law’s coverage and Equity once again comes to the fore”.


32. The fundamental truth of Justice Young’s view of the ebb and flow of Equity is borne out by observations of the Court in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 182-183 [48], albeit in the context of the law of contract. There the court justified adoption of a robust view of the general law by pointing to the recent enactment of legislation designed to ameliorate hardship in particular cases:

“In most common law jurisdictions, and throughout Australia, legislation has been enacted in recent years to confer on courts a capacity to ameliorate in individual cases hardship caused by the strict application of legal principles to contractual relations. As a result, there is no reason to depart from principle, and every reason to adhere to it, in cases where such legislation does not apply, or is not invoked”.

33. On this approach, close attention must be given in each case to the potential application of legislation and the doctrinal limits of general law principles.

**Objective Standards Govern both Law and Equity**

34. In the Equity/Commercial context, the High Court of Australia has thus reaffirmed the importance of objective standards in the formulation and application of the law. The current balance of Australian jurisprudence favours “freedom of contract” (over an expansive view of equitable intervention) coupled with reliance upon legislative remedies available to address hardship in particular cases.

35. In *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179-183 the Court forcefully articulated “the principle of objectivity by which the rights and liabilities of the parties to a contract are determined”. In doing so the Court specifically emphasised the objective significance attaching to a party’s execution of a contractual document. And the Court was encouraged to adhere to a robust statement of the general law by noting the existence of statutory jurisdiction for courts to ameliorate, in individual cases, hardship caused by a strict application of legal principle to contractual relations.
36. In *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 324-329, and the accompanying case of *Romanos v Pentagold Investments Pty Ltd* (2003) 217 CLR 367 at 375, the Court emphasised that, if Equity is to intervene on the basis of “unconscientious” behaviour to prevent reliance by a party upon a contractual right, there needs to be a finding that, were the party to enforce that right, it would be acting in a manner duly recognised as against conscience. Equity supplies no broad discretion to rewrite a contract in the name of fairness.

37. It is, perhaps, no coincidence that these robust statements of the province of Law and Equity were made in the context of contract law cases, where standards imposed by law could take as their measure the actual or presumed intention of parties to an agreement that has an objective reality independent of judicial pronouncement. There was nothing fictional about the existence of some form of agreement in those cases.

38. The standards imposed by law are less settled where, although common community experience might suggest a need for the law to recognise rights and obligations, they cannot readily be measured by reference to an agreement between parties. That appears to have been the recent experience of courts and commentators alike in expounding both the law of negligence and the law of restitution.

39. A jurisprudential advantage of reliance upon legislative remedies to ameliorate hardship in particular cases is that the criteria to be applied must be founded in the legislation, and can be adjusted by legislative amendment, even if they confer broad discretions on the judiciary. Expectations arising from an expansive view of the capacity of the general law to solve every problem are not so easily confined or regulated.

THE COURSE OF WRITING ON LAW AND EQUITY

40. A more complete understanding of what the law is requires an appreciation of the current state of an ongoing conversation between commentators on Law and Equity.

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16 Witness the criticisms of Kirby J in *Neindorf v Junkovic* [2005] HCA 75 (8 December 2005); 222 ALR 631 at [20].

17 Witness: (a) the observations of Gummow J in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 539-558; and (b) Professor Birks’ revision of his views in *Unjust Enrichment* (Oxford UP; listed 2003; 2nd ed 2005).
41. The interrelationship between Equity and Commercial Law is a popular theme for conferences, and every few years one or other of the major legal publishers produces a book of learned papers. Something of a publishing tradition appears to have emerged. What has emerged from these publications is a fundamental rift between: (a) what influential academics and overseas courts see as the correct, or optimal, connection between “Law” and “Equity”; and (b) the law stated by the High Court of Australia.

42. This rift has become more noticeable as: (a) views championed by the late Professor Peter Birks18 have gained currency in university circles and in jurisdictions beyond Australia, promoting a “new taxonomy”, or system for the classification of law, designed to eliminate Equity as a separate branch of jurisprudence in common law countries; and (b) the High Court has reasserted a traditional view of equitable jurisdiction comfortable with Equity as a separate head of jurisdiction.

43. Promoters of the new taxonomy tend to support the development of a “unified” law of civil obligations in which historical distinctions between Law and Equity are dissolved in favour of what they perceive to be an integrated, functional system for the classification of law.

44. An interesting example of their approach is Professor Sarah Worthington’s volume, Equity, in the Clarendon Law Series (published by Oxford University Press) edited by Professor Birks.19 She expounds the law in a passionately conceptual, analytical text that (deliberately eschewing references to case law) aims to eradicate distinctions between Law and Equity. Her principal headings are “Property”, “Civil Wrongs”, “Contract” and “Unjust Enrichment”.

45. Although supporters of the new taxonomy tend to propound an “ahistorical” functional approach, their classification system (to which Professor Worthington’s headings conform) can be traced back to The Institutes of Gaius20, a second century publication on Roman law which Justinian’s Institutes21 (the foundation for all modern studies of Roman law) drew in the 6th century. Professor Birks was a keen Roman scholar22.

18 Birks died on 6 July 2004. His Australian obituaries include (2004) 25 Aust Bar Rev 99-102 and (2004) 78 ALJ 615-616, the latter of which was written by his former student, Justice Keith Mason. Mason and Carter, Restitution Law in Australia (Butterworths, Australia 1995) is the leading Australian text on the law of restitution.
19 Sarah Worthington, Equity (Oxford University Press, 2003).
21 A modern edition of Justinian’s Institutes (published by Duckworth, London, in 1987) was translated, with an Introduction, by Peter Birks and Grant McLeod.
46. The influence of Roman law on the Common Law is by no means confined to Birks\(^2\) but, with substantial success, he brought Roman law thinking in a common law guise to modern prominence. His published works include *An Introduction to the Law of Restitution*\(^2\) and *Unjust Enrichment*\(^2\)5.

47. Birks' influence throughout the Common Law world grew at a time when: (a) Goff and Jones' *The Law of Restitution* had established itself as an influential text for practitioners;\(^2\)6 (b) English law was increasingly required to accommodate European law, substantially influenced by Roman law\(^2\); (c) university courses increasingly included courses on “remedies” as a field of study separate from courses on contract, tort and equity\(^2\)8 and (d) the study of comparative law increasingly compelled academic lawyers to seek to accommodate differences in the jurisprudence of national legal systems, including those founded upon the Common Law and Civilian traditions.\(^2\)9

48. The work of the new taxonomists has been sufficiently influential outside Australia that the latest (31\(^{st}\)) edition of *Snell's Equity* begins with the following apology in the Editor's Preface:\(^3\)0:

“A treatise on equity necessarily identifies its material by harking back to the distinction between the separate rules applied by the court of chancery and by the common law courts prior to the Judicature Acts. The recent debate about taxonomy has shown that a division of legal rules on this basis is unhelpful and has lead to duplication and inconsistency. A more illuminating exposition of legal rules would, so far as possible, avoid making that distinction. For these reasons, in a perfect world there would be no place for a book such as this. So much is clear. What is not so clear however is how the duplication and inconsistency between common law rules and rules of equity are to be ironed out so that it will eventually be possible to describe the rules of the legal system without regard to their historical origin. One problem is that generations of lawyers have been used to thinking in terms of separate rules at common law and in equity. Indeed the distinction has become so imbedded in concepts such as legal and equitable interests in property that a description of such concepts


\(^2\)2 This work, published by Oxford University Press, first appeared in 1985. It was reissued as a paperback (with revisions) in 1989.

\(^2\)3 This title was published by Oxford University Press as part of the Clarendon Law Series. The first edition appeared in 2003. The second edition was published posthumously in 2005. In the preface to each edition Birks highlighted substantial revision of his thinking without abandonment of his core commitment to unjust enrichment as an indispensable category of private law.


\(^2\)6 Wayne Covell and Keith Lupton, *Principles of Remedies* (LexisNexis, Australia, 2003) at paragraph [1.0] says that, in English and Australian law, the first scholarly work devoted to remedies was F H Lawson’s *Remedies of English Law*, first published (by Penguin Books) in 1972.

\(^2\)7 In this area a seminal work is K Zweigert and H Kotz, *Introduction to Comparative Law* (Clarendon Press, Oxford). The first edition was published in 1977, the second in 1987 and the third (current) edition in 1998.

without using words such as legal or equitable would seem very odd indeed. Another problem is that the fusion of legal and equitable rules can only be carried out properly, and with due regard to the richness and subtlety offered by the existing system once those separate rules have been fully understood. The understanding of equitable rules in particular has been hampered by formulations in terms of competing principles doctrines and maxims, the notion that remedies depend on the exercise of judicial discretion, and opaque concepts such as unconscionability. The aim of this book is to assist in the understanding of those equitable rules. If that means that, in due course, it is possible to state the rules of our legal system without reference to their historical origin, so that a book such as this is no longer required, then so be it.”

49. This conditional death wish pays homage to Peter Birks’ very public insistence that all specialist equity texts in general, and Snell in particular, had outlived their usefulness. That was his verdict in a review of the fourth edition of Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies.31

50. It is difficult to imagine any edition of Meagher Gummow and Lehane going the way of Snell. It is a long way from apologizing for its own existence, and the course of jurisprudence in the High Court of Australia provides fortification for future editors. When viewed in its historical setting, its insistence upon the importance of Equity as a separate field of study demands admiration even from detractors of Equity as a discipline.

51. The interest in the study of Equity generated by the publication of the first edition of Meagher Gummow and Lehane in 197532 was reinforced by the writings of Paul Finn, particularly in his seminal work, Fiduciary Obligations.33 Finn (now Justice Finn of the Federal Court of Australia) was then an academic at the Australian National University.

52. Several books in the modern seminar tradition, following the publication of Meagher Gummow & Lehane, come to mind. The first is the title Equity and Commercial Relationships, published in 1987 under Finn’s editorship.34 It was one of five volumes of essays on the “Law of Obligations” published between


32 In an essay entitled “The Role of the Equity Bar in the Judicature Era”, published in G Lindsay and C Webster, No Mere Mouthpiece: Servants of All, Yet of None (LexisNexis Butterworths, Australia, 2002) J D Heydon described the book as having crucial importance in arresting: first, the decay in the study in university law schools; and, second, the tendency of Australian judges to follow doctrinally loose reasoning by Lord Denning and Lord Diplock in England and by Canadian and New Zealand courts. The first edition was published in 1975, the second in 1984, the third in 1992 and the fourth in 2002.

33 P D Finn, Fiduciary Obligations (Law Book Co, Sydney, 1977). In his essay on ‘The Role of the Equity Bar in the Judicature Era’ Heydon JA wrote of the first edition of Meagher Gummow and Lehane: “To some extent the subject [that is, Equity] was restored as a field of wide interest among academic lawyers, this being assisted by the writing of P D Finn, particularly, Fiduciary Obligations (1977)”.

1985-1990 under Finn’s editorship. Contemporaneously with publication of the essay volumes, the same publisher published the papers of an influential Canadian conference to which Professor Finn (as he then was) and other leading Australian lawyers contributed: T G Youdan (ed), *Equity, Fiduciaries and Trusts*. 

53. In 1995 the papers of a conference sponsored by Queensland University of Technology were published as *Equity: Issues and Trends*, edited by Professor Malcolm Cope. The supplementary sub-title of the work was: “The Importance and Pervasiveness of Equitable Doctrines and Principles in Modern Private, Commercial and Public Law”. Professor Cope has written a title, *Equitable Obligations: Duties, Remedies and Defences*, to be published by Thomson this year.

54. The Centenary Conference for the High Court held in October 2003 a year later produced *Centenary Essays for the High Court of Australia*, edited by Professor Peter Cane. Four chapters had a direct equity/commercial flavour.

55. Most recently published, in the same tradition, is *Equity in Commercial Law*, edited by Simone Degeling and James Edelman. The essays it publishes arose from a conference hosted by the University of New South Wales in December 2004 on the topic, “Fusion: The Interaction of Common Law and Equity”.

56. Much on the mind of the editors, and those who attended the conference generally, was the work of Professor Birks, his championship of the law of restitution, his promotion of the new taxonomy, the philosophical divide between “fusionists” and “dualists”, and the influence of *Meagher, Gummow and Lehane*.

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35 The other three volumes (all published by Law Book Co, Sydney) were: *Essays in Equity* (1985); *Essays on Contract* (1987); *Essays on Torts*; and *Essays on Restitution* (1990). Taken together these volumes reflect a preoccupation of the times with the “Law of Obligations” as a single field of study. In his obituary of Birks, Justice Mason described Finn as one of Professor Peter Birks’ leading students: (2004) 78 ALJ 615.

36 This work was published Carswell/The Law Book Co in Canada in 1989. Australian contributors were Professor Finn, Justice Gummow (then on the Federal Court), Professor R P Austin (now Justice Austin), the late J R F Lehane (who became Justice Lehane) and Professor M A Neave.

37 The Federation Press (in association with The Centre for Commercial and Property Law, Queensland University of Technology), Sydney, 1995.


39 Anthony Duggan, “The Profits of Conscience: Commercial Equity in the High Court of Australia” (Ch 15); Deborah A De Motte “Fiduciary Obligation in the High Court of Australia” (Ch 16); Joachim Dietrich, “Centenary Reflections on Restitution and Equity” (Ch 21); and Dr Simon Evans, “The High Court’s Equity Jurisprudence” (Ch 22).

57. The express purpose of the conference was to bring together many of the world’s leading judges, academics and practitioners to consider contemporary and unresolved issues relating to the relationship between law and equity in commercial law. In the words of the conference organizers (the editors, Degeling and Edelman):

“Underlying many of these issues is a question of deep theory about which there is acrimonious debate: what is the relationship between those ‘common law’ doctrines deriving historically from the King’s Courts and those doctrines of ‘equity’ deriving from Chancery? The resolution of this underlying question informs the approach taken to the following issues: (1) to what extent, if at all, should the common law and equity develop by reference to each other?; (2) is judicial law reform legitimate where it seeks to eradicate distinctions between law and equity so as to produce what is said to be a ‘principled product?; and (3) how should law school curricula be structured to teach effectively those equitable doctrines sourced in Chancery?” 41

58. No paper on the topic of “problem solving in an equity-commercial context” can disregard the scholarship that is manifest in these various publications. Nor is it possible, in a paper designed to provide practical guidance to litigation lawyers, to do justice to competing views of the “question of deep theory about which there is acrimonious debate” in learned circles.

59. Nevertheless, because this paper is written from, and towards, the perspective of a lawyer practising as such in Australia, it is important that the existence of controversial debate be expressly noticed. Knowledge of the debate is important to practitioners if only to serve as a caution against unqualified reliance upon academic or judicial pronouncements which are at odds with prevailing orthodoxies in Australian law.

60. Although, as Harris v Digital Pulse Pty Ltd42 illustrates, senior Australian judges can be found on either side of the philosophical divide, those who Edelman and Degeling characterize as “dualists” represent Australian orthodoxy even if (as might be the case) “fusionists” are in the ascendency in jurisdictions beyond Australia and in universities generally. A handy point of reference for identification of prevailing lines of demarcation between competing camps – easily overlooked by practitioners disdainful of student texts – is J D Heydon and PL Loughlan’s Cases and Materials on Equity and Trusts.43

42 (2003) 57 NSWLR 298
61. From a practitioner’s perspective, there is an important message in the cautionary remarks made by Justice Gummow in the closing chapter of *Equity in Commercial Law*:

“There are two points which I wish to make at the outset. One concerns the use of the word ‘fusion’ in the title for the conference which formed the basis of this book. The fact of the matter is that that term will not be embraced by judges as providing a catch-all general answer to doctrinal issues. I very much doubt if the judges of the Equity Division, as they get on with their difficult tasks from case to case, ruminate upon ‘fusion’. Those who teach law should realise this.

Indeed, and this is the other point, in Australia rather too much modern academic writing is an exercise in the promotion of the writer’s view of what the law ought to be without prior analysis of how the law came to be in its present state. To proceed on the footing that the law ought to be X, and that the law is therefore X, and any decision of an ultimate appellate court to the contrary therefore must be in error, and to teach students accordingly, is unsatisfactory.”

62. This paper is not concerned with any aspect of the “fusion” debate, or the broader debate about “taxonomy” of which it forms part, beyond what is necessary to canvass the question of how an Australian litigation lawyer might productively go about solving problems that arise in an equity-commercial context.

63. In *Unjustified Enrichment: Key Issues in Comparative Perspectives* (a collection of essays arising from a conference at the University of Cambridge) a strong proponent of the importance of (Birksian) “taxonomy” to the law observed: “If you ask a practising lawyer whether a particular claim is a restitutary claim or a proprietary claim, he or she would in all likelihood ask you why you want to know.” The author regarded the hypothetical lawyer’s question as an expression of ignorance of, or indifference to, the question of taxonomy. However, it is equally possible that the lawyer’s question reflected a perceptive, analytical mindset. How a claim for relief can, or should, be characterised depends upon the utility of systems of classification to those who use them.

64. A practitioner is generally inclined, if not bound, to use any system or systems of classification that might reasonably and ethically advance the cause of a client in whose interests a claim for relief is made. So long as claims can be pleaded “in the alternative” practitioners are likely – however they order them – to rely upon inconsistent alternative arguments in support of desired outcomes.

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44 Page 515.
A PROBLEM WITH, AND FOR, LAWYERS: THE DYNAMICS OF LEGAL PROCEDURE

65. A problem inherent in any attempt to systematise techniques for “problem solving” in the law is that the dynamics of the discipline bedevil the process. That is the nature of the beast. The different perspectives of competing interests tend to divide at every turn. Even if the legitimacy of legal process is conceded, the potential for division commences with definition of “the problem” to be solved and continues in fits and starts, but relentlessly, thereafter.

66. The point can be illustrated by an examination of systems of pleading used in litigation throughout the common law world. How do contending parties define the questions that divide them, the “problem” a court might be called upon to solve? There seems to be an eternal desire for a state of perfection nowhere found.

67. Historically and functionally, a contrast is drawn between the system of “issue pleading” used in the courts of common law before enactment of the Judicature Acts of 1873 and 1875 in England and “fact pleading” (based upon Chancery practice) employed thereafter. Fact pleading was introduced to the common law world by the “Field Code” adopted by the State of New York in 1848, championed by David Dudley Field. It was associated with introduction of what was then a new system of judicature under which the administration of law and equity was combined in a single court. That system came fully into operation in England with the commencement of the Judicature Act 1875, by reference to which it is in Australia commonly known as “the Judicature Act system”. It was adopted in NSW in 1972, upon commencement of the Supreme Court Act 1970.

68. The old common law system of pleading was founded on the idea that, by an exchange of documents (sometimes following oral submissions before a court), the parties would define a single issue – either of fact or of law – suitable for determination by the court. If the issue was one of fact, it would be

determined by a jury. If it was one of law, it would be determined by a judge or judges. The common law did not shine upon pleading in the alternative. That was a characteristic of equity pleadings.

69. Occasionally, modern lawyers pine for the reintroduction of what they perceive to be the simplicity of the common law system. They overlook, however, the demise of civil juries and the historical experience of common law pleadings that were extremely technical, and resulted in the determination of cases on artificial pleading points, without any review of evidence or consideration of substantive merits of competing cases.47

70. The theory underlying fact pleading, based upon equity procedure, was that all the facts of a dispute should be brought before the court so that all matters in dispute might be disposed of with finality. In theory, by early identification of all material facts the ambit of the evidence to be adduced at a hearing (and of interlocutory processes of discovery and interrogatories) could be controlled efficiently.

71. In practice, the process has always had its own complexities, exacerbated by interlocutory disputes about the materiality of allegations of fact, particulars and the availability of discovery and interrogatories.48 The search for manageable “issues” suitable for judicial determination has been complicated by an explosion of “potential evidence” available in the form of photocopied documentation and email traffic, increasingly unculled by discerning lawyers.49

72. This experience presaged the increasing importance attributed by courts in the second half of the 20th century to “alternative dispute resolution” procedures (principally arbitration and mediation) and the active management of case preparation by judges. That process was accompanied by debates about “access to justice” and the comparative merits of “inquisitorial” and “adversarial” court systems.50 The courts have sought to solve “problems” confronting them (the unmanageability and cost of proceedings)

47 Jolowicz, op cit, pages 34-35.
48 Jolowicz, ibid, pages 35-45.
49 J D Heydon, “The Role of the Equity Bar in the Judicature Era”, being Chapter 5 in G Lindsay and C Webster, No Mere Mouthpiece (LexisNexis Butterworths, Australia, 2002).
by active intervention in case preparation, and by the delegation of decision-making responsibilities to arbitrators, referees and mediators subject to judicial supervision.

73. The course of the history of pleadings demonstrates not only the difficulties inherent in attempts to define questions for determination – problems to be solved – but also the need to make allowance for competing interests, and different perspectives, in the definition and solution of legal problems.

74. Whether the common law world’s shift away from adversarial litigation towards case-managed litigation provides a more efficient method of administering justice, and regulating civil disputes, remains to be seen. Much probably depends upon the determination and capacity of judges to control the litigation process, and to supervise lawyers effectively. Statutory imperatives that call all participants in the justice system to facilitate determination of “the real issues” in dispute provide a standard against which to measure the efficiency of decision-making. However, at the end of the day the centrifugal forces brought to the process by the different perspectives of competing interests are likely to require eternal vigilance and endless debates about how best to pursue efficient decision-making.

75. The ramifications of changes in procedure can be profound. There is general acceptance, at least in historical review, that “procedure” often governs the development of “substantive law”. It is commonplace in this context to quote Sir Henry Maine’s 1861 statement that “[a] great is the ascendency of the Law of Actions in the infancy of the Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure”. That is often supplemented by F W Maitland’s 1909 statement that “[t]he forms of action we have buried, but they still rule us from our graves”.

76. Too much should not be made of this, as Deane J remarked in his defence of New South Wales’ pre-judicature Act system in Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221 at 252: “Whatever may have been the comparative advantages and disadvantages of the formal system of [common law] pleading and the formal separation of law and equity..., the substantive common law developed in New South Wales with little real hindrance from the continued observance of them”.

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51 Most Australian jurisdictions (in common with England) now have court rules that state, as a “overriding objective”, the “public interest” need for litigation to be conducted with efficiency and expedition: B C Cairns, Australian Civil Procedure (Law Book Co, Sydney, 6th ed, 2005) Chapter 2. The “overriding purpose” stated in Pt 6 Division 1 of the Civil Procedure Act 2005 (NSW) reflects what was formerly P2 1 r. 3 in the Supreme Court Rules 1970 (NSW) enacted in 2000. See generally Thomson’s Guide to Civil Procedure in NSW, The Handbook, referred to in Note 4 above.

52 H Maine, Early Law and Custom (1861) page 389.

77. The same point can be illustrated by two examples not tied to the demarcation between Law and Equity. One is historical; the other is contemporary. In historical fact, much of the competition between the old common law courts (Exchequer, Common Pleas and King’s Bench) which characterized development of the common law – including the early development of the law of contract – was mitigated by the practice of deploying the judges of all courts as commissioners on circuit (ie, “assize judges” sitting at “nisi prius” with a jury), returning a record of circuit proceedings to the court in which they had been commenced, where judgment was duly entered.54

78. Closer to home, it would be a mistake to fall into the trap of thinking that “fusion” of Law and Equity has, or could, rid the law of jurisdictional disputes that were perceived to have bedevilled the pre-Judicature Act system. The practice of law is never quite free of such disputes. In the Australian context, the constitutional distinction between State and Federal Courts remains capable of hosting them. And the tendency of Parliaments to establish specialist statutory tribunals as vehicles for re-orientation of the law is ever present. Tension between courts, and between industrial and commercial law practitioners, in the context of the statutory jurisdiction first enacted in 1959 as section 88F of the Industrial Arbitration Act 1940 (NSW) provides a cautionary tale (now see section 106 of the Industrial Relations Act 1996 (NSW)). What government perceives to be in the best interests of the proper administration of justice is not always neat and tidy. As part of their ordinary work, legal practitioners need to be alive to the existence of opportunities and risks of jurisdictional contests.

79. Historical “truths” about the effect of “procedure” on the development of “substantive law” are not easily translated into guidelines for contemporary application. Nevertheless, we need to acknowledge the possibility that the shift away from adversarial trials and towards judicial “management” of civil disputes—if sustained—could affect how lawyers attempt to define and solve problems brought to attention by their clientele.

PROBLEM SOLVING TECHNIQUE: THE INTERDEPENDENCY OF “PRINCIPLES” AND “FACTS”

80. Inevitably, in a discipline such as law there is interaction between the formulation of principles to guide conduct and the selection of facts in application of them. The “facts” underlying any “problem” must be established with care, and the role of “legal principle” is to help in the task of working out, from the morass of facts, which are important and which are not. In debates that have raged about “taxonomy” in recent years that much is uncontroversial.55

81. So much has been written about Sir Owen Dixon’s commitment to “strict legalism” and the propriety or otherwise of “judicial activism” that what he had to say about problem-solving might easily be discounted as common-place. The collection of his writings published as Jesting Pilate in 196556 provides a standard point of reference for conventional legal debate in Australia, whether his views are accepted or not.57 Some of his mystique as Australia’s “model judge” has perhaps been lost by the recent publication of a revealing biography, but not so much that his iconic role has been surrendered.58

82. For his part, Dixon’s belief was that it was the role of law schools to indoctrinate lawyers with a body of fundamental principle capable of flexible application and to teach them to use it in obtaining for themselves a more extensive and detailed understanding of the law.59

83. Dixon was acutely aware of the dependence of judges upon barristers and solicitors in the “selection of proper material and the points of controversy” necessary to identify “the critical or determining question in a case”. He went so far as to say that “there is no more important contribution to the doing of justice than the elucidation of the facts and the ascertainment of what a case is really about” by the combined efforts of solicitors (bringing the perspective of their clients to case preparation) and barristers

(presenting a case to the courts).\textsuperscript{60} Unfortunately, observations of this character sometimes seem so commonplace that their significance is not appreciated.

84. For all his attraction to what (following Maitland) Dixon described as the “strict logic and high technique” of the common law tradition\textsuperscript{61}, he viewed that tradition as a living one. He was aware that he was living in an age in which society did not embrace a system of fixed concepts, logical categories and prescribed principles of reasoning. He accepted that the law had to operate in an intellectual framework that, by analogy with physical sciences, viewed legal principles as provisional but workable hypotheses. Nevertheless, he did not abandon his faith in the existence of objective, external standards or his search for them.

85. What Dixon said about the principled development of the law remains of general importance, but of immediate interest in the context of this paper is what he said about legal problem-solving. He was not such a formalist that he was unconcerned with substantive reasoning. He was conscious of a need to base judicial decision-making upon a full understanding of the facts underlying any dispute between parties. He did not regard case law as necessarily determinative of legal disputes. Even making allowance for the fact that he viewed the world with the perspective of a judge on what was (almost) an ultimate appellate court\textsuperscript{62}, his approach to problem solving is worthy of notice.

86. In “Concerning Judicial Method”, published in 1955, he made the following observations highlighting the perspective which he brought to legal problem-solving:

\begin{quote}
Law is confined to the realm of ideas. It is concerned with human conduct but otherwise it has no relation to objective fact…. It is from the experience of judges, sharply distinguished no doubt from their logic, that the life of the law is widely held to come, at all events to come more immediately. It is, of course, a developing life and it is not necessarily incoherent. The obsession of our ancestors with certainty in the law as we inherited it at least gave some coherence to the inheritance. But in the end it is what the courts choose to say, the courts considered as an entire hierarchical system, that determines the substance of the law. That is the underlying assumption. It has become possible accordingly to describe or even to define law in terms of predictability.
\end{quote}

\textsuperscript{60} Ibid, pages 245-246 and 253.
\textsuperscript{61} The expression “strict logic and high technique”, which Dixon attributed to F W Maitland, underpinned the analysis in Sir Owen’s classic paper, “Concerning Judicial Method” (1955) 29 ALJ 468, reprinted in Jesting Pilate at pages 152-165.
\textsuperscript{62} In “Concerning Judicial Method” Dixon, understandably enough, characterized the High Court of Australia during his time on the Bench as “a court of ultimate resort”. However, in his comment on a paper by Philip Ayres on “Dixon’s View of the Privy Council”, Justice Ian Callinan drew attention to what was then the High Court’s character as “an intermediate Court of Appeal” in explaining Dixon’s frustration with the Privy Council: (2003) 24 Aust Bar Rev 18 at 20.
All this seems peculiarly unreal and certainly unsatisfying to one who has passed much of his life attempting to administer justice according to law in a court of ultimate resort without restriction of subject matter. Predictability means nothing to a judge in that situation. His decision is final and a knowledge that what this Court will say as to the rule of law is regarded by others as part of a general question of predictability does not help him to decide what to do. Such courts do in fact proceed upon the assumption that the law provides a body of doctrine which governs the decision of a given case. It is taken for granted that the decision of the court will be ‘correct’ or ‘incorrect’, ‘right’ or ‘wrong’ as it conforms with ascertained legal principles and applies them according to a standard of reasoning which is not personal to the judges themselves. It is a tacit assumption. But it is basal. The court would feel that the function it performed had lost its meaning and purpose if there were no external standard of legal correctness…At every point in an argument the existence is assumed of a body of ascertained principles or doctrine which both counsel and judges know or ought to know and there is a constant appeal to this body of knowledge. In the course of an argument there is usually a resort to case law, for one purpose or another. It may be for an illustration. It may be because there is a decided case to which the court will ascribe an imperative authority, if the court has established by its practice a distinction between persuasive and imperative authority. But for the most part it is for the purpose of persuasion; persuasion as to the true principle or doctrine or the true application of principle or doctrine to the whole or part of the legal complex which is under discussion.” [Emphasis added]\(^{63}\)

87. Upon the occasion of his first presiding as Chief Justice at Melbourne, on 7 May 1952, Dixon delivered a short speech which included the following more explicit observations on legal problem-solving:

“For many lawyers there is a fascination in advocacy of all descriptions, but, for those intensely interested in the law, the fascination is most before courts composed of a number of judges sitting in Banc…. In advocacy of that description, you learn many things. Not the least of all that candour is not merely an obligation, but that in advocacy is a weapon. You learn, too, that it is not case law which determines the result; it is a clear and definite solution, if one can be found, of the difficulty the case presents – a solution worked out in advance by an apparently sound reconciliation of fact and law. But you may learn that the difficulty which has to be solved must be felt by the Bench before the proper solution can exert its full powers of attraction. It is only human to underestimate the value of the solution if it is presented to you before you are completely alive to the nature and difficulty of the problem which it solves, and the judges who were more than human are long since dead.” [Emphasis added]\(^{64}\)

88. These observations, although made in the context of appellate advocacy, have broader scope for application. So much of legal problem-solving involves a search for “a clear and definite solution, if one can be found, of the difficulty [a] case presents – a solution worked out…by an apparently sound reconciliation of fact and law”.

\(^{63}\) *Jesting Pilate*, pages 154-156.  
DISTINCTIVE FEATURES OF LEGAL PROBLEM SOLVING GENERALLY

89. Minds might differ about whether problem solving in a legal context is as unique as lawyers appear at times to assume. There is nothing particularly unique about a reasoning process that calls for the definition and solution of particular problems in the context of a generalised system of thought. Attempts to reconcile empirical observation and working hypotheses characterised as principles are not unknown beyond the law. As insightful as Sir Owen Dixon’s observations are, too much should not be claimed for them. Nevertheless, they do throw light on the dictates of legal problem solving.

90. Without pretending to claim exclusivity for legal reasoning, or an authoritative or exhaustive elaboration of its characteristics, legal problem solving (especially, but not only, in the realm of litigation) might be thought to have at least some distinctive features.

Law as a Variable Set of External Standards

91. Legal problem solving of every description must generally allow the character of the law as a variable set of external standards (that is, standards external to the owner of “the problem” and any individual decision-maker), beyond the control of any one person, but subject to human influence and the frailties of the human condition.

92. Debates about whether truths are “absolute” or “relative” in a legal setting generally melt away upon close examination. The residual reality is that, whatever it might be, the prevailing law must be taken into account. It might change over time or space – as legal history and comparative law teach – but in some form or other it is ever-present.

Principled Pragmatism

93. Legal problem solving calls for an appreciation that the world in which decisions must be made is not perfect. As critically important as it is to the integrity of society that legal decision-making be informed
by ideals of “truth and justice”, there needs to be an understanding that the administration of justice at best only approximates abstract notions of justice, and pragmatism must attend the application of abstract ideas.

Analytical Holism

94. Although the process of legal reasoning might involve or require successive, discrete steps to be taken (such as identification of facts and law), legal problem solving requires an exercise in holistic thought. An examination of “the whole picture” might reveal something greater than an examination of each of the parts of a jigsaw puzzle. An optimal solution to a complex legal problem will rarely present itself without a process of stepping back to look at the whole picture, the formulation of working hypotheses tested more than once against empirical observation and challenged assumptions, and alternating applications of inductive and deductive reasoning before anything like a “final” picture emerges.

Multiplicity of Perspectives to be Consulted

95. Because of the social, interactive nature of law the solution to any legal problem requires consideration of more than a single perspective. No man is an island complete unto himself.

96. All legal problems and solutions must be tested against standards society chooses to call “law”. Some of those standards live in the abstract world of legal thought, some in discernible principles, others in concrete rules and regulations, and still others in the policies, procedures and practices of law enforcement agencies and courts. What they generally have in common is that they are larger, or potentially larger, than any individual.

97. There is often a difference in perspective between lawyers and their clients that needs conscious identification and constructive engagement, particularly on the lawyers’ side of the equation. Lawyers have to remind themselves to listen; to stand in their clients’ shoes to see the world as their clients do; and to explain patiently how the law works, its strengths and weaknesses, its limits and the costs and benefits of alternative courses of action. A lay client cannot be expected to know the law. A lawyer is expected to be sufficiently familiar with life’s experiences to serve a client’s best interests. In doing so lawyers need to guard against the possibility that they are unwittingly imposing their view of the world
upon clients who inhabit another. They need to be careful not to provide a “legal service” merely because they are in the business of providing such a service. They need to remember that the most important “problem” to be solved is ultimately that of the client, not anybody else.

98. Even outside the context of litigation, legal problems and solutions generally need to take into account the existence, perspectives and potential intervention of competing interests. That is most easily done in an open confrontation between identified combatants fighting in a regulated environment. It is at its most elusive when competing interests are wholly or partially obscured from view or hedged about by contingencies and hypotheticals. In a practical world, a lawyer might never be able to exclude risks, only to minimise them or (when danger looms) channel them into a regulated environment (such as a court) in which there is some hope of successful confrontation or containment.

Primacy of a Purposive Approach

99. Much of the law and legal process is governed by a purposive approach.65

100. Parliaments and courts have increasingly promoted the idea that the formulation, construction and application of the law should be governed by an attempt to give effect to underlying purposes. Recognition that much law involves leeways of choice has carried with it calls for choices to be informed by common purpose.

101. The conduct of participants in the legal process is also, generally, governed by a determination to achieve a particular outcome or outcomes. Every lawyer is, or must stand ready to become, an advocate in a client’s cause. Every client is more or less captive to self-interest that demands protection if not advancement. The presentation of a persuasive legal argument might (and should) proceed in logical steps towards a particular outcome, but construction of such an argument generally commences with identification of a desired outcome. Advocates “present forwards” but “reason backwards”. (For that reason they tend to overlook or discount inconvenient facts, and their arguments are liable to be defeated by a close examination of surrounding facts and implicit or explicit assumptions).

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Problem Solving in a Dynamic World

102. The definition and solution of legal problems rarely takes place in a static environment. It generally involves a dynamic process or, at least, exposure to a risk that an apparently static picture will change. It is in that context that legal problem solving generally requires identification of a “desired outcome” in pursuit of which the owner of the problem, and those working towards a solution favourable to the owner’s interests, must judge the utility of every step taken or not taken. Lawyers are generally end-driven, not free agents in pursuit of ultimate truths.

Need for Agility of Mind

103. Legal problem solving requires sophistication enough to identify, rank and pursue a range of alternative “ends and means”. That generally requires a mind open to alternative constructions of the facts, adept at creative application of the substantive law, and familiar with available legal forums and the adjectival law (rules of evidence, practice and procedure) they apply. Such a mind needs to master reasoning process that are capable of linear or non-linear progression to particular outcomes as occasion demands, and to develop an appreciation that there is no necessary coincidence between “battles” and “wars” won and lost. There can be strategic victory in tactical defeat in a complex or dynamic environment, and a party’s declared object or primary case does not necessarily represent the desired outcome under pursuit.

Case Construction/Destruction

104. Because legal problem solving involves interaction between parties, and the possibility of conflict in a dynamic environment, a problem-solver needs to have the facility to “construct” a case and to “destroy” an opponent’s case in equal measure as occasion demands. The solution of one party’s “problem” not uncommonly involves the creation of “problems” for competing interests.

Not Every Problem is “Legal” in Character

105. Finally, although the point has a legitimate claim to primacy, the legal problem-solver needs constant reminding that many problems that present as “legal” are not and, of those that are, there is often a more
efficient solution available under the law than legal process might offer. Self-help remedies (as lawyers characterise them) are sometimes the most effective.

DISTINCTIVE FEATURES OF EQUITY/COMMERCIAL PROBLEM SOLVING

106. Experience suggests that (although not unique to the equity/commercial context) some features of legal problem solving have a particular resonance in that context.

Need to Identify Regulatory Regimes

107. To define and solve an equity/commercial problem efficiently a decision-maker needs to ascertain as soon as possible whether there is any (and, if so, what) regulatory regime that governs, or might govern, the problem-solving process.

108. The expression “regulatory regime” allows for the possibility of: (i) legislative controls; (ii) administrative fiat by executive government; and (iii) constraints arising from membership of a voluntary association.

109. More than once Gummow J has highlighted the importance of statute law in the interplay between those branches of judge-made law respectively styled “common law” and “equity”.66 Chief Justice Spigelman has described the law of statutory interpretation the most important single aspect of legal practice.67 The over-arching operation of legislation is capable of rendering otiose doctrinal disputes between enthusiasts of each branch, fusionists and dualists. Insufficient attention is sometimes given to the dictates of statutory construction, and to the extent that legislation is built upon assumptions derived from the general law. Be that as it may, the primacy formally accorded parliamentary-based law demands early attention in legal problem solving.


110. Licensing systems of various descriptions now govern many of the parties, and much of the subject matter, affected by the equity/commercial jurisdiction(s), however defined. The basic legislative scheme for many licence systems involves a statutory prohibition tempered by an administrative or judicial discretion to grant a dispensation – labelled a “licence” – in the character of a grant of permission to engage in otherwise proscribed conduct. That form of scheme has long been known to the law; something very much like it (imposition of a death penalty coupled with a reprieve for those who voluntarily submitted to overseas travel) underpinned early English schemes for transportation of convicts to the colonies.\(^{68}\) Many professions, trades and businesses are regulated in modern society by conceptually similar mechanisms. The practise certificate regime for legal practitioners is a case in point.\(^{69}\) Another is found in regulatory regimes administered by the Australian Securities and Investments Commission in conjunction with courts exercising the jurisdiction under the Corporations Act 2001 (Cth) and related legislation; the very concept of a modern corporation involves a grant of governmental recognition upon regulatory terms.

111. The operation of legislation in this form often permits broad parallels to be drawn between equity and administrative law principles because both involve the judiciary in the exercise, or supervision, of discretionary powers. One such parallel is found in the possibility that a licensee confronted with a decision-making dilemma might protect itself from allegations of misconduct by seeking, and acting upon, the guidance of a governing body in much the same way as a trustee seeks judicial advice from a court. A licensee who acts upon a positive, but erroneous, ruling from its governing body might rely upon the ruling as a defence to a charge of wrong-doing; Law Society of NSW v Moulton [1981] 2 NSWLR 736 at 756-757. A party to whom such a procedure is available might be able to obtain practical protection, through responsibility shared in the public interest, in relation to problems incapable of clear solution.

112. Not dissimilar considerations might arise in the contexts of parties bound by membership of a voluntary association. However, in that context specific consideration needs to be given to whether, as a practical reality, continuing membership of the association is important and whether, in light of the principles


\(^{69}\) eg, the Legal Profession Act 2004 (NSW) ss 14, 15 and 39-241.
canvassed in Cameron v Hogan (1934) 51 CLR 358 and Scandrett v Dowling (1992) 27 NSWLR 483, rights and obligations of association members are legally enforceable.

Need to Identify Formal Decision-Making Processes

113. Early consideration needs also to be given to the possibility that the course of legal problem solving is itself governed by processes specifically regulated by public or private law principles.

114. That is increasingly important in the current legal climate where policies of all branches of government (parliament, the executive and the courts) favour mediation and arbitration as forms of dispute resolution procedure.

115. The regulatory regimes of private contracts warrant particular attention because a failure to comply with them might or might not, depending upon the terms of the particular contract carry irreversible consequences. An option to buy, sell or lease property generally lapses if not duly exercised within the time stipulated by the grant of option. An act done without authority, but in purported exercise of a contractual right, might not be able to be ratified after expiry of the time limited for exercise of the option.

Where contracting parties submit to a "final and binding" decision by a third party on a question (such as a valuation) arising under their contract, any entitlement to challenge the decision depends upon whether it can, upon proper construction of the contract, be characterised as a decision authorised by the contract. The idea that contracting parties are under an implied obligation to act in good faith in performance and enforcement of their contract is perhaps most readily supported when viewed in the context of a contract involving formal processes that require co-operation.

70 J W Carter and D J Harland, *Contract Law in Australia* (Butterworths, 4th ed, 2002) paragraph [1837]; K E Lindgren, *Time in the Performance of Contracts* (Butterworths, 2nd ed, 1982) paragraph [335]. Whether an option is viewed as a conditional contract or an irrevocable offer to make a contract (Laybutt v Amoco Australia Pty Ltd (1974) 132 CLR 57 at 71-82), a key feature is that it must be exercised within time or not at all. Because an option confers a conditional right, if the condition does not occur the right does not inure. Equity does not grant relief against forfeiture – as it might where property is forfeited upon breach of a contract – because, firstly, the non-occurrence of the condition involves no breach and, secondly, such (if any) property right inherent in the grant of an option does not carry with it a property right continuing after expiry of the time limited for exercise of the option.


72 Legal & General Life of Australia Ltd v A Hudson Pty Ltd (1985) 1 NSWLR 314 at 335-337.

73 The foundation for the existence of such an implied obligation is *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234. It has been endorsed by a number of decisions, including *Alcatel Australia Pty Ltd v Scarcella* (1998) 44 NSWLR 349 at 369B. Those decisions (of the NSW Court of Appeal) bind NSW State Courts, but the High Court’s imprimator remains to be obtained, having said that it did not arise for determination in *Royal Botanic Gardens & Domain Trust v South Sydney City Council* (2002) 186 ALR 289; [2002] HCA 5. There is still abroad a view that there is no necessity for an implied obligation of good faith. Independently of such an obligation, there is generally in contracts an implied term that parties will cooperate in the doing of acts necessary for performance of their contract (*Secured Income Real Estate (Australia) Ltd v St Martins Investment Pty*...
The Objective Theory of Contract

116. Under the prevailing “objective theory” of contract law, the definition and solution legal problems must focus primarily upon an objective assessment of the conduct of parties, not their subjective states of mind, uncommunicated views or private motivations. Thus, a contract entered into under the operation of a unilateral mistake is a binding contract unless and until it is avoided in accordance with equitable principles. And a commercial contract is generally construed by reference to the language it uses without unqualified resort to extrinsic evidence of contractual intention. This point was forcefully made in the following terms in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179:

“This Court, in *Pacific Carriers Ltd v B N P Paribas* (2004) 218 CLR 451, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction: (2004) 218 CLR 451 at 461-462 [22].”

117. This robust approach to the determination of whether a contract was made, and to construction of any contract that was made, is accompanied in contemporary Australian jurisprudence by an equally robust approach to the question whether Equity should intervene to grant relief against forfeiture upon breach of a contract. An innocent party is not, in this context, to be denied a contractual entitlement to treat the contract as discharged unless guilty of unconscientious conduct that caused or contributed in a significant way to the breach of the defaulting party that provided the foundation for termination of the contract: *Taniwar Enterprises Pty Ltd v Cauchi* (2004) 217 CLR 315 at 328 [36]; *Romanos v Pentagold Investments Pty Ltd* (2003) 217 CLR 367 at 375-377 [22]-[26].

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*Ltd* (1979) 144 CLR 596 as well as an implied term that a promissor will not hinder or prevent fulfillment of the purpose of a contractual promise it has made (*Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 45 FCR 84 per Gummow J, citing Dixon J in *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359; *Castlemaine Tooheys Ltd v Carlton & United Breweries Ltd* (1987) 10 NSWLR 468, citing Trego v Hunt [1898] AC 7). To much the same effect, a contract involving a grant of property ordinarily includes an implied covenant by the grantor not to derogate from its grant: Peter Butt, *Land Law* (Law Book Co, 5th ed, Sydney, 2006) pages 301 and 306-308. Classically, a lease (which, since *The Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17, has required the application of ordinary principles of contract law) characteristically includes not only a covenant against derogation from grant but also its positively expressed corollary, a covenant for quiet enjoyment: Butt, op cit, pages 301-306.


Master the Documents

118. The objective theory of contract, and the comparative merits of contemporaneous documents as against bare recollection, generally reinforce the desirability of founding any legal problem solving activity upon mastery of all available documentation, supplemented by instructions and evidence based upon memories refreshed by examination of those documents and an independent, objective reconstruction of events. There is no substitute for mastery of the facts. Contemporaneous documentation might not tell the whole story, or even an accurate one, but an examination of the story it does tell is indispensable to informed decision-making.

119. In a commercial setting, mastery of the documents requires early identification of all documents that might, jointly or severally, be characterised as contractual. Their essential hallmark in that respect is whether they contain a representation of a promissory nature which, alone or in combination with other material, supports an objective inference of contractual intent. A small, but fundamentally important point in practice, is to insist upon viewing the whole of any allegedly contractual document. A road to error is to improvise with incomplete documentation. The importance of whatever is missing is routinely underestimated.

120. Insofar as parties have apparently reduced their agreement to writing in a single document, the “parole evidence rule” still has some part to play. A court might readily infer that an apparently self-contained contractual document contains all the terms of the parties’ contract, and so might not admit evidence of any previous or contemporaneous agreement which would have the effect of adding to or varying it in any way. Cadell v State Rail Authority of NSW (1982) 149 CLR 337 at 345-354 is a standard authority on the operation and limits of the rule, the construction of contracts by reference to extrinsic materials and the implication of contractual terms.

121. After checking whether a contractual document has been signed (Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165) an inquiry should be made as to whether the operation of the document was the subject of any condition precedent not apparent on its face. Contracts made by an exchange of counterparts and undated contracts particularly invite that inquiry. If the parties intended a document to be held in escrow that might not be patently obvious.
122. An early search should be made for two particular types of contractual provision. They often appear side by side. The first, an “entire contract clause”, is an impediment to any attempt to circumvent the limits of a contract by reliance upon another contract said to be collateral to it. A collateral contract is constituted by a promise, the consideration for which is entry into a principal contract by the parties to the promise: *Shepperd v Ryde Municipal Council* (1952) 85 CLR 1. The significance of an entire contract clause is that a collateral contract must not be inconsistent with the principal contract: *Hoyt’s Pty Ltd v Spencer* (1919) 27 CLR 133. An entire contract clause generally, therefore, precludes any finding of collateral contract.

123. What an entire contract clause cannot do is exclude the possibility of an attack on the validity or enforceability of what appears to be a regular contract based upon facts extrinsic to contractual documentation. Under the general law, a contract might be “defective” because it was procured by fraud or undue influence, for example. More often, commercial contracts are attacked by reliance upon contraventions of the *Australian Consumer Law*, or the *Contracts Review Act 1980* (NSW), in circumstances in which a party seeking to escape a contract alleges that he or she was induced to enter it by a misrepresentation.

124. If such an allegation is factually sound, any cause of action based on the contract is doomed. That is why entire contract clauses are often accompanied by a second contractual provision, a “non-reliance clause”. Such a clause might, at best, be no more than part of the evidence going to the question whether entry into a contract was induced by wrongful conduct. It does not operate in law to defeat the attack on the contract’s validity: *Netaf Pty Ltd v Birkane Pty Ltd* (1990) 26 FCR 305; *Lezam Pty Ltd v Seabridge Australia Pty Ltd* (1992) 35 FCR 535.

125. These observations are mere examples of the broader forensic task involved in assessment of contractual documentation. That broader task is to consider whether reliance can and should be placed upon the documentation, in whole or part; and whether an appeal can or should be made to facts extrinsic to the documentation in a challenge to the validity or operation of the contract, or in the course of construing it.
Review Surrounding Circumstances

126. The process of “mastering the documents” should be generally be accompanied by at least some inquiry as to the circumstances surrounding entry into, and performance of, any contract. If for no other reason, that is because objective facts known to the parties at the time of entry into the contract can be taken into account in its construction. Moreover, only by reference to facts extrinsic to a contract can an assessment be made as to the plausibility or otherwise of a collateral attack upon it. And due recognition should also be given to the role played by the law of estoppel since its ambit was expanded in Legione v Hateley (1983) 152 CLR 406, Waltons Store (Interstate) v Maher (1988) 164 CLR 387 and Commonwealth v Verwayen (1990) 170 CLR 394. As a matter of impression, it seems that relatively few “contract” cases are these days litigated without an accompanying allegation of estoppel.76

Allow for the Potentiality of Litigation

127. At all stages in the definition and solution of a legal problem it is generally necessary to allow for the possibility, or probability, that court proceedings will ensue. In consequence of that it is prudent to bear in mind, at least in a provisional way and in simplified outline, the formal elements of any “cause of action”, “equity” or “defense” upon which the owner of the problem might seek to rely. In the preparation of a pleading for court proceedings, and in the formal presentation of a case to a court, there is no substitute for articulation of the case by reference to what has to be proved to the satisfaction of the court, and by whom, to permit the proceedings to be determined by the court according to due process. The court’s problem – how to ensure that proceedings are duly determined – becomes the litigants’ problem because they have to address the court, and each other, in formal terms. Formality necessarily attends court process. No amount of searching for “the real issues” in a case, or promoting “substantive reasoning” over “formalistic reasoning”, is likely to enable the formalities of court process to be wholly dispensed with. Case presentation and preparation might require something more than adherence to formal process or reasoning if they are to be persuasive, but persuasion of a court necessarily involves an element of formality.

128. At this point, it might be thought, disputes about taxonomy assume critical significance. However, in practice that is rarely so. Diligent case preparation and presentation requires all reasonably available perspectives to be taken into account. Competing taxonomies provide inspiration, checks and balances for a litigant, rarely closed systems outside the bounds of which it is fatal to tread.

Practical Research: Find a CLR Foundation

129. A practical reality arising from the divergence of views between the current High Court Bench and those of some academics and overseas judges is this. The search for a solution to an Equity/Commercial problem might well range beyond Australian orthodoxy, but prudence dictates that, so far as possible, it should ultimately be grounded in authority found in the Commonwealth Law Reports. Furthermore, even within the covers of the CLRs, care should be taken not to invest all upon any judgment (such as that of Mason CJ and Deane J in Commonwealth v Verwayen (1990) 170 CLR 394)\(^7\) that presages a movement towards a unified law of civil obligations in which legal and equitable principles have fully merged. The law might ultimately move in that direction; but, until it does, practising lawyers need to mould their cases to find support in one or both of the separate streams of Equity and the Law.

A Focus Beyond the Formal

130. Although prudence generally requires the formalities of pleadings and case preparation to be taken into account against the possibility of court proceedings culminating in a judicial determination, concentration on such formalities to the exclusion of a broader picture is generally as imprudent as disregard of them. For a variety of reasons a broader picture is generally necessary.

a) **Investigation of Facts**: A thorough investigation of circumstances which give rise to a formal cause of action, equity or defence generally requires a perspective beyond the formal so as to ensure that potentially material facts and contentions can be identified and turned to advantage.

b) **Non-Judicial Decision-Making**: Recognition must be given to the truth that not all controversies are determined by judges adjudicating on formal claims formally expressed. Many are determined by processes of mediation or private negotiation. Others still are determined by market or social

\(^7\) Notice the warning in Guimelli v Guimelli (1999) 196 CLR 101 at [7].
realities that transcend the formalities of court proceedings. Leaving aside the prohibitive cost of court proceedings, there is often the possibility (for example) that uncompromising pursuit of a legal right culminating in a nominally favourable judgment might be counter-productive if prospective participants in future business opportunities are thereby dissuaded from doing business with the nominal victor.

c) Leeways for Choice. Although a judicial officer might give primacy to the formal elements of a case in announcing reasons for judgment, he or she might have been persuaded to take that view of the case by evidence or submissions operating at a secondary level not required to be formally noticed and, possibly, not even consciously noticed. If a judge has a “leeway for choice”, to borrow the phraseology of Professor Julius Stone, the fulcrum upon which his or her decision will be balanced is what persuades him or her in making that choice. The outcome of a case thus often turns on factors that might, in formal terms, be of secondary significance. This truth is but an illustration of Holmes’ observation that “the life of law has not been logic; it has been experience”.

The question whether “the law” as expressed in reasons for judgment published by judges can, and should endeavour to, articulate “policy” considerations that underpin it is a separate, but related, question – never quite free of controversy.

For present purposes, what should be noted is that there may be a discontinuity between the terms in which the law is formally described, and the way in which it is applied, so that a legal problem-solver needs to be aware of both.

d) Pattern Recognition, Informing Ideas and Check Lists. Accordingly, the process of problem solving involves an attempt to recognize, in a factual setting, patterns that might influence others (not merely judges) in decisions they might be called upon to make affecting the rights and obligations of the

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79 The full quote (taken from O.W Holmes, The Common Law (Little Brown & Co, Boston, 1881) page 1) is: “The object of this book is to present a general view of the Common Law. To accomplish the task, other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axiom and corollaries of mathematics.”
80 A recent illustration of it is found in Kirby J’s preface for the policy orientated approach to the law of negligence favoured by Caparo Industries PLC v Dickman [1990] 2 AC 605 and the disinclination of the majority of the High Court to embrace it. See, eg, Neindorf v Junkovic [2005] HCA 75 (8 December 2005); 222 ALR 631 at [20].
owner of the problem. Such patterns might not be determinative in formal terms but nevertheless might “inform” an application of the formal law. A check list of the formal elements of a case might well be aided by a supplementary checklist of concepts that, based upon patterns of decision-making, potentially inform an application of the law.

Traditional Equity texts provide, in the form of “maxims”, a convenient check list of concepts that inform the operation of Equity jurisdiction. Gummow J has explained their role in the following terms:

“…[To] speak…of the distinctive character of equitable principles and doctrines is not to refuse to look outside a closed box of historical obscurantism. To the contrary, it is this complex phenomenon, necessarily untidy given the nature of human affairs to which it continues to respond, which enriches the judge-made law and gives remarkable powers of adaptation to social and economic change. Many of the animating ideas of Equity are encapsulated in its maxims. These are not all consistent. That, in turn, provides leeways for choice of the appropriate result in a given case.”82


Another set of ideas capable of informing the operation of the law emerged following the publication in 1936 of now famous articles on the recovery of contractual damages.83 The articles suggest that there are three broad reasons commonly given for the grant of civil remedies, whether at Common Law or in Equity. The first is “the Reliance reason”: Where a party has, to its detriment, acted or refrained from acting in reliance upon the conduct of another, the fact of detrimental reliance might call for the second party to perform duties or to compensate the first for its losses. The second

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81 Degeling and Edelman (ed), Equity in Commercial Law, page 515.
Each of these three reasons is reflected in contract law, most notably the concept of consideration, but also (with the possible exception of the second) in assessments of damages. Even the concept of “restitutionary damages” has its supporters: James Edelman, Gain-Based Damages: Contract, Tort, Equity and Intellectual Property (Hart Publishing, London, 2002) reviewed in (2002) 23 Aust Bar Rev 82-85. Compensation for losses suffered in detrimental reliance on others’ conduct is a common feature of tort law (eg, negligence) and orders that unrequired benefits be disgorged are symptomatic of restitution law. Equity can order a fiduciary to compensate a beneficiary’s loss or to account for profits accumulated by breaches of trust. However, it is contract law which characteristically can compensate an innocent party, not only for losses suffered in detrimental reliance, but also for a loss of expected profits, the only foundation for which might (but not necessarily) be the very agreement which the party seeks to enforce: Hill v Van Erp (1997) 188 CLR 159; Marks v GIO Australia Holdings Ltd (1998) 196 CLR 494. This is no less true because the law of estoppel might be used to enforce an assumption (about the existence of an agreement) falling short of a contract, as occurred in Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387.

The existence of such a principle was denied by the Full Court of the Victorian Supreme Court in Government Insurance Office (NSW) v K A Reed Services Pty Ltd [1988] VR 829 at 830-841 and by the House of Lords in Rhone v Stephens [1994] 2 AC 310 at 322. There remains some judicial support for the principle or some limited application of it (Rural and Agricultural Management Ltd v West Merchant Bank Ltd (1995) 18 ACSR 793, Ryan v Rouen [2000] NSWSC 468 and Clifford v Dove [2003] NSWSC 938; 11 BBR 21,149 at [67]) but, in the absence of approval by the High Court, Australian Courts are likely to be reluctant to apply it: Konstas v Southern Cross Pumps & Irrigation Pty Ltd (1996) 217 ALR 310 at 313-315.

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contract) to evade, or impose, a liability at law or in equity even though courts generally rationalise their decisions by reference to other legal concepts and, in contract law, they treat the “principle against self-induced wrongs” as one of construction, not as a rule of law.86

e) **Look for the Substance of a Transaction:** In defining and solving a legal problem it is important to remember that even judges who prefer to articulate their reasoning in formalistic terms emphasise that, in the analysis of a transaction, a court looks to “substance” over “form”, and the underlying “purpose” of the transaction and its subject matter.

Legal characterisation of an agreement between parties might require considerable weight to be attached to how the parties themselves characterise it, but a court is not generally bound by the parties’ descriptive labels.87

In reaffirming the “principle of objectivity by which the rights and liabilities of parties to a contract are determined” the High Court acknowledged that application of the principle in the construction of contracts normally requires consideration not only of the text, but also of surrounding circumstances known to the parties, and the purpose and object of their transaction.88

f) **Clarify Use of Terminology:** Because the terminology deployed in commerce is often more fluid than is customary in the law, problem solving in commercial law requires special effort on the part of lawyers to understand commercial terminology and to translate it into language more familiar to the law.

Remarkably, this sometimes requires a lawyer to overcome a fear of embarrassment in acknowledgement of ignorance. It is not always easy to confess personal unfamiliarity with popular culture. Still, it must be done.

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86 See New Zealand Shipping Co Ltd v Societe des Ateliers et Chantiers de France [1919] AC 1; Suttor v Gundowdah Pty Ltd (1950) 81 CLR 418 at 440-442.


Definition of terminology used is so important, in order to minimise the risks of miscommunication, that lawyers approaching the definition or solution of a commercial problem should generally challenge all assumptions about the meaning of unfamiliar expressions.

g) Analytical Breakdown of a Problem: The problem solving process is often aided (especially, but not only, in dealing with complex problems) by an analytical breakdown of a problem into manageable components, deliberately using lay language to expose the nature of the problem generally and the character of each component. This can serve as a protection against entrapment by layers of complexity and lawyers’ language.

COMMON PROBLEMS IN EQUITY/COMMERCIAL PROBLEM SOLVING

Avoid Unnecessary Equity Suits Where a Less Complex Alternative is Available: Look to Statute and Contract, if Possible.

131. In consideration of problems that commonly arise in the Equity/Commercial context the importance of “purpose”, “perspective” and “competing interests” should be borne in mind in each factual setting. A fundamental precept in the common law world, at Law and at Equity, is that the facts of each case require close examination.

132. If there is any “moral” underpinning the examples that follow, it is this: Close attention to the essential features of a case might permit any formal process of litigation that ensues be limited to a “cause of action” at Law (such as contract), or a statutory remedy (such as available under the Australian Consumer Law), without pursuit of a potentially cumbersome suit (involving unconfined allegations of unconscionable conduct and breach of fiduciary obligations) in Equity. If such an opportunity is available, serious consideration should be given to embracing it. The complexity and cost inherent in a broadly based review of all material facts in a traditional Equity suit might best be avoided.
133. Nevertheless, if a case is deliberately limited in this way the fully informed instructions of one’s client is a wise precaution for a lawyer to take against the possibility of a professional negligence claim. Such is the way of the world.

The Search for “Property”

134. The nature of “property” and its interplay with “Equity” and “Commercial Law” is, in itself, a large question of fundamental significance. Surprisingly, however, it is not uncommonly overlooked in “commercial” disputes. The ease with which a claim can routinely be made in “debt” (relying upon what were once called “common money counts” to avoid a full pleading of all material facts), or upon a simple contract, sometimes obscures the importance of ascertaining whether a proprietary claim should be asserted in order to maximise potential for a plaintiff to assert a security interest against third parties, or to pursue third parties for a remedy, in the event of a defendant’s insolvency. The mere fact that a proprietary claim might be made, however, does not mean it should be made; it might involve additional costs, and layers of complexity, not worth the candle. It might be necessary, for example, to join in any proceedings all persons interested in the subject matter of a property claim. Whatever decision is made, the important thing is that the desirability or otherwise of a proprietary claim be considered.

135. In the same context, consideration often needs to be given to the desirability or otherwise of an application for freezing order (or asset preservation order or “Mareva injunction”). The grant of such an order does not depend upon the existence of an entitlement to property and, although it might operate in practice provide a fund from which a judgment can be satisfied, it does not in formal terms confer a security interest in property.89

Notices to Complete

136. The concept of a “Notice to Complete” most commonly arises in connection with contracts for the sale of land. It is commonplace. Nevertheless, the function and utility of a Notice to Complete is not universally understood. There is a persistent belief in some circles that the service of such a Notice is a necessary pre-condition to an application for an order that a contract be specifically performed. It is not.

89 Peter Biscoe, Mareva and Anton Pillar Orders: Freezing and Search Orders (LexisNexis Butterworths, Australia, 2005), pages 6-7.
137. A Notice to Complete should not lightly be served unless the party serving the Notice contemplates as a real possibility that it might wish to terminate the contract. A valid Notice to Complete, once served, operates to make time of essence for its giver, as well as its recipient: *Dansford Ltd v Yulora Pty Ltd* [1984] 1 NSWLR 546; *Louinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 523. A Notice to Complete is a weapon which might be used against, as well as by, a party who serves it. Failure by any party to complete in accordance with it exposes that party to termination of the contract at the election of another party ready willing and able to perform its obligations. Misunderstandings arise because of a lack of appreciation of the distinct roles of common law and Equity in governing stipulations as to time in the performance of contracts.

138. The common law construed promissory provisions as to time as “conditions” rather than “warranties”; time was “of the essence” in that a failure to perform a contractual obligation within the time stipulated in the contract (or, in the absence of some stipulation, within a reasonable time) entitled the innocent party to elect to treat the contract as discharged.

139. Equitable relief, in the form of specific performance, might be available to the party in default if justice could thus be served. However, Equity will not grant specific performance where a time stipulation cannot be disregarded without injustice. A court will not readily grant relief against forfeiture of a property interest under a contract for breach of an essential condition of the contract. Equity intervenes in these circumstances only where the party terminating a contract has, by its conduct, caused or contributed to circumstances that would render its insistence upon its legal right to terminate the contract unconscientious.\(^\text{90}\)

140. The general rule is that Equity will not regard time as “of the essence” of a contract except where (a) the contract expressly so provides; (b) the nature of the subject matter of the contract (eg, an asset of fluctuating value such as business premises or liquor outlets, but not a mere dwelling house) so requires\(^\text{91}\); or (c) although time was not originally of the essence, a party unilaterally makes it so by the service of a valid Notice to Complete.\(^\text{92}\)


\(^{91}\) *Summers v Cocks* (1927) 40 CLR 321.

141. If a Notice to Complete (or a Notice to perform an obligation arising before completion) is to be validly given: first, the recipient of the Notice must be in default under the contract; secondly, the giver of the Notice must be ready, willing and able to perform its own obligations under the contract; thirdly, the time fixed by the Notice (as the time upon expiry of which time will be of the essence) must be reasonable or specifically agreed; and fourthly, the Notice must be valid as to form in that it must clearly call upon the recipient to perform the contract.93

142. Section 13 of the Conveyancing Act 1919 (NSW) gives precedence to Equity’s approach to time stipulations over that of the common law.

Good Faith, Fraud and Kindred Spirits

143. Lawyers and the lay community do not always share the same concepts of “honesty” and “dishonesty”, and within any community there can be endless debates about shades of “honesty”94. They provide a fertile field in the search for foundations upon which to establish legal liability. Historical examples can be found in the development of the law of contract by reference to deceit.95

144. The seriousness of an allegation of common law fraud carries with it professional obligations on the part of lawyers not to allege fraud without a firm foundation.

145. In practice, in all but the clearest of cases an allegation of fraud is unnecessary because of the range of alternatives available. In practice, the most significant of these over recent decades has been the proscription of “misleading and deceptive conduct” by section 18 of the Australian Consumer Law. That has been because: first, the section does not require a plaintiff to prove an intention to mislead or deceive96; secondly, silence may constitute misleading or deceptive conduct (particularly, but not only, if

93 K E Lindgren, Time in the Performance of Contract (Butterworths, Australia, 2nd ed, 1982).
94 To adopt a standard of “dishonesty” as governing accessory liability for a breach of trust (as did English law in Twinsectra Ltd v Yardley [2002] 2 AC 164) is not as simple as it might sound. It is reminiscent of a question set for a common law jury. However, judges are not as well placed as juries to apply that standard. They have to publish reasons in support of their (value) judgments. The principles to be applied by Australian courts in a situation to which Barnes v Addy (1874) LR 9 Ch App 244 applies – beyond Consul Development Pty Ltd v DPG Estates Pty Ltd (1975) 132 CLR 373 – may await authoritative elaboration, but much of it can be found in Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22; (2007) 230 CLR 89. See Jacobs’ Law of Trusts in Australia (Butterworths, Australia, 6th ed, 1997) paragraphs [1333]-[1340]; Peter M McDermott, “Equity and Trusts: the Twinsectra Case (Knowing Assistance; Quistclose)” (2003) 77 ALJ 290-293; Peter Millett, “Proprietary Restitution”, chapter 12 in Degeling and Edelman, (ed) Equity in Commercial Law. See also pages 7, 311 and 516.
96 Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Pty Ltd (1978) 140 CLR 216; Parkdale Custombuilt Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191.
there is a duty to make a disclosure or it is accompanied by sharp conduct\(^9\); thirdly, disclaimer or exclusion clauses cannot confine the operation of the Act\(^8\); fourthly, a party which makes a representation about a future matter bears an onus of proving that it had reasonable grounds for making the representation\(^9\); fifthly, persons “involved” in a contravention of the legislation can be sued as well as a party who contravenes it\(^10\); and sixthly, the courts have extensive powers to grant injunctions, vary contracts, award compensation and make ancillary orders in relation to contraventions of the legislation.\(^101\)

146. Of course, the ambit of the Trade Practices Act (and its modern equivalent the Competition and Consumer Act 2010 which enacts the Australian Consumer Law) has long since extended beyond “misleading and deceptive conduct”. Of interest to the subject matter of this paper is the statutory proscription of “unconscionable conduct” by sections 20, 21 and 22 of the ACL. The full implications of that have yet to be worked out. The likelihood is that, although there might be overlap in the operation of the legislation and general equitable principles, the legislation must be given an operation independently of those principles.\(^102\)

147. There is currently much debate about whether the parties to all contracts are bound by a duty, implied by law as a contractual term, to act in good faith in performance of their contracts. That debate was initiated by Renard Constructions (ME) Pty Ltd v Minister for Public Works, a decision of the NSW Court of Appeal. Even if an implied contractual obligation of good faith does not find favour with the High Court, the existing law can accommodate most of the problems that might be dealt with by an allegation based upon an alleged breach of good faith.\(^103\)

148. The point for immediate reflection is that there is a range of concepts available, at Law, and in Equity, that needs to be, and can be, considered where anything like “dishonest” conduct rears its head. Although there might be a temptation to rely upon each of them in the alternative, a more selective


\(^8\) Netaf Pty Ltd v Birkane Pty Ltd (1990) 26 FCR 305; Lezam Pty Ltd v Seabridge Australia Pty Ltd (1992) 35 FCR 535.

\(^9\) Trade Practices Act 1974, s. 51A, (ACL, s.4).

\(^10\) Trade Practices Act 1974 (Cth), ss.75B, 84 (Competition and Consumer Act 2010 (Cth) ss. 75B, 84); Yorke v Ross (1985) 158 CLR 661.

\(^101\) Trade Practice Act 1974 (Cth), ss. 80, 82, 87, (ACL ss. 232, 236 and 242).


\(^103\) See Note 72 above.
approach adapted to the facts of the particular case might ultimately be more cost effective. In particular, it should be noted, the cost and complexity of an allegation of breach of fiduciary duty (arising from a need in such cases to explore complexities of fact with detailed evidence and cumbersome interlocutory processes such as discovery and interrogatories) might best be avoided by a more closely confined case.

Breaches of Fiduciary Duty

149. Much has been written about the essential character of a “fiduciary” and “fiduciary obligations”. The concepts are likely to retain something of their elusive character if only because it is the nature of Equity to insist that such concepts remain open to further elaboration in light of particular factual matrices.

150. In practical terms, the temptation to make an allegation of breach of fiduciary obligation should generally be resisted unless the case falls into a recognized category or there is or was an analogous relationship of trust and confidence between contending parties. Alternative entitlements to relief might be more readily vindicated because they are more manageable in the conduct of litigation.

151. The potential force of a well-founded allegation of breach of fiduciary obligation should not, however, be overlooked. It sometimes happens that reliance upon such an allegation might be used to forensic advantage in interlocutory proceedings. Occasionally it happens that a wronged party, wrestling with the risks attendant upon giving an undertaking as to damages in support of an interlocutory injunction, can reach an accommodation with an opponent by a reminder to the opponent that, if an allegation of breach of fiduciary duty is made out, an account of profits (coupled with proprietary orders) might follow. A well placed letter of demand, elaborating a plausible allegation of breach of fiduciary obligation, might cause sufficient hesitancy upon the part of a recipient to dispense with any need to apply for interlocutory injunctive relief or, at least, to protect an entitlement to an account of profits on a final hearing.

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104 The seminal works remain P D Finn *Fiduciary Obligations* (Law Book Co, Sydney, 1977) and Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (LexisNexis Butterworths, Australia, 4th ed, 2002) chapter 5, and Young, Croft and Smith, “On Equity” (Thomson Lawbook Co, 2008). 105 See Hospital Products Ltd v United States Surgical Corp (1984) 156 CLR 41 at 96-97; trustee and beneficiary; agent and principal; solicitor and client; employee and employer; director and company; and partners. Guardians (Trevorrow v South Australia (No. 5) (2007) 98 SASR 136 at [995] and promoters of companies (Tracy v Mandalay Pty Ltd (1953) 88 CLR 215 at 241-242) have also been held to be fiduciaries.
Partnerships and Joint Ventures

152. These observations apply generally in the analysis of partnerships and joint ventures, which might be attended by significant fiduciary obligations in the negotiation and unravelling (as well as during the currency) of a commercial relationship: *United Dominions Corporations Ltd v Bryan Pty Ltd* (1985) 157 CLR 1.

153. In each case, without undue confinement by labels, the critical analytical question is often how to define the scope of the parties’ relationship. The answer to that question often governs whether there has been any breach of fiduciary obligations at all. The answer is generally found in a contract, agreement or understanding, often accompanied by representations inducing the conduct of a joint enterprise.

Trading Trusts

154. In and about the 1980s substantial problems arose in connection with insolvent “trading trusts.”¹⁰⁶ The expression “trading trust” was used to refer to trading by a trustee who conducted a business under the authority of a trust instrument. That, in itself, was not altogether unusual. What was problematic, however, was that a practice developed of employing as a trustee a corporation, the sole purpose of which was to trade as a trustee in circumstances in which its capacity to access trust property to satisfy debts incurred by it was limited by a trust instrument, and constrained by the fact that, because the trust was a “discretionary trust”, beneficiaries of the trust generally had no vested interest in trust assets.

155. Substantial relief for creditors of “insolvent trading trusts” ultimately came in the form of an expansion of the personal liability of company directors and other officers, as well as regulation of public trading trusts. Provisions of the *Corporations Act 2001* (Cth) governing liability for insolvent trading apply to trustee corporations no less than they do to other corporations.

156. Nevertheless, in dealing with any form of “trading trust” the nature of a trust needs to be borne in mind. A “trust” is not a separate legal entity such as a natural person or a corporation. The expression “trust” refers a more complex situation where an entity (“the trustee”) holds property (“trust property”)

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on behalf of another entity ("the beneficiary") or possibly, in limited circumstances, a charitable purpose. A trustee is personally liable for its acts and omissions as a trustee, including liability for debts. Because debts of a trustee are its own debts, a creditor’s remedy in debt is against the trustee personally and no-one else. A creditor has no direct remedy against trust property. Beneficiaries are not liable to the creditor as such.

157. If a creditor seeks to impose liability on a beneficiary then, in the absence of any remedy arising from direct dealings between the creditor and beneficiary or a statutory remedy (arising, for example, under the Competition and Consumer Act 2010 (Cth), section 75B in a case of personal involvement by the beneficiary in misleading and deceptive conduct on the part of the trustee), the creditor must proceed indirectly. It might be able, in enforcement of its claim against the trustee, to use an entitlement of the trustee to be indemnified by a beneficiary to be subrogated to rights of the trustee against the beneficiary.107 However, a potential difficulty is that the terms of a trust instrument can limit or exclude a trustee’s entitlement to an indemnity.108

158. In these cases there is no substitute for close attention to: (a) the chain of dealings between creditor and trustee, trustee and beneficiaries; (b) the identity of individuals through whom the trust has dealt with the creditor; (c) the nature and extent of trust property; (d) the terms of the trust instrument; and (e) the extent to which, by the trust instrument or otherwise, any beneficiary might have authorised or consented to conduct of the trustee, or received property by way of a distribution from the trust.109

Enforceable States of Mind: Estoppel

159. Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387 alerted the Australian legal profession to the possibility that principles of estoppel could operate to much the same effect as a contract in circumstances in which, although no contract has in fact been made, one party has led another to act to its detriment upon an assumption that the parties were in agreement. Since that time “estoppel” has been relied upon in commercial and other litigation almost as a matter of course. It needs, in each case,
to be considered because it does not fit neatly into taxonomies confined to categories of “contract”, “tort” and “restitution” as representing “the law of civil obligations”.

160. Since The Commonwealth v Verwayn (1990) 170 CLR 394 a live question has been whether the different approaches of Law and Equity to estoppel have been, or are to be, merged in a uniform law of estoppel. Giumelli v Giumelli (1999) 196 CLR 101 at [7] suggests not.

161. Generally speaking, the difference between the two approaches is this. Common law estoppel operates upon a representation of existing fact and, when certain conditions are fulfilled, establishes a state of affairs by reference to which legal relations between parties are to be decided. This form of estoppel does not itself create a right against the party estopped. The right flows from the court’s decision on the state of affairs established by the estoppel.

162. Equitable estoppel, on the other hand, operates upon representations or promises as to future conduct, including promises about legal relations. When certain conditions are fulfilled, this kind of estoppel is itself an “equity”, a source of legal obligations. Cases described as estoppel by encouragement, estoppel by acquiescence, proprietary estoppel and promissory estoppel are all species of equitable estoppel. For equitable estoppel to operate there must be the creation or encouragement by the defendant in the plaintiff of an assumption that a contract will come into existence or a promise be performed or an interest granted to the plaintiff by the defendant, and reliance on that by the plaintiff, in circumstances where departure from the assumption by the defendant would be unconscionable.


164. A question for determination by the High Court where findings of estoppel might be made at both Law and in Equity whether it is open to a court to mould the relief to be granted, as it could in Equity or

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110 This summary is based upon the judgment of Priestley JA in Silovi Pty Ltd v Barbaro (1988) 13 NSWLR 466, modified in Austotel Pty Ltd v Franklins Selfserve Pty Ltd (1989) 16 NSWLR 582.

111 (1955) 29 ALJ 468-476; Jesting Pilate, pages 152-156.
whether it is bound to give effect to the state of affairs upon which the common law estoppel is founded; the common law’s approach was “all or nothing.”\textsuperscript{112}

\textsuperscript{112} MK and JA Roche Pty Ltd v Metro Edgley Pty Ltd [2005] NSWCA 39 at [69]-[76].