

Equity in Practice

University of New South Wales
Continuing Legal Education Seminar
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Opening Remarks
Justice P.A. Bergin

1 This Seminar, entitled "*Equity in Practice*", is to examine "the role of equity in commercial law and litigation". In the stated object of the Seminar the organisers have emphasised that the role of equity "remains a governing influence on commercial behaviour and structures". However that has not always been seen to be the case and the tension between the principles of equity and the need for certainty in commercial transactions has, in this country, been the topic of judicial deliberation as recently as twenty years ago.

2 You may think that a debate in general about the field of commerce being resistant to equitable principles is a little odd having regard to the application of the remedy of specific performance in so many settings over many centuries that could really be categorised as being in the field of commerce. As Lord Evershed MR said of this remedy in 1954 when speaking extra curially:

But there remain the other two of Maitland's novel and fertile remedies, the two most significant of all examples of equitable relief - significant, that is to say, in their influence upon the general law; the decree of specific performance and the injunction. By the former the Courts of Equity called upon a party who was in breach of his contract - originally, in breach of a contract relating to land - specifically to perform it according to its terms. It will be seen at once how far reaching and salutary was this form of relief - and how great its influence upon probity in business dealings [1]. (Emphasis added).

3 It was in 1984 in *Hospital Products Ltd v United States Surgical Corporation and Ors* (1984) 156 CLR 41 that Dawson J said at 149:

To invoke the equitable remedies sought in this case would, in my view, be to distort the doctrine and weaken the principles upon which those remedies are based. It would be to introduce confusion and uncertainty into the commercial dealing of those who occupy an equal bargaining position in place of the clear obligations which the law now imposes upon them.

4 Mason J expressed the different view at 100 that:

The disadvantages of introducing equitable doctrine into the field of commerce, which may be less formidable than they were, now that the techniques of commerce are far more sophisticated, must be balanced against the need in appropriate cases to do justice by making available relief in specie through the constructive trust, the fiduciary relationship being a means to that end. If, in order to make relief in specie available in appropriate cases it is necessary to allow equitable doctrine to penetrate commercial transactions then so be it.

5 That was a case involving the law of fiduciaries. On 1 March 1992 in their Preface to the third edition of *Equity Doctrine and Remedies*, RP Meagher, WM Gummow and JRF Lehane wrote:

If the law as to fiduciaries has been in some respects obscure, it has not ceased to be so, particularly in relation to duties arising ad hoc in commercial transactions. [2]

6 The learned authors cautioned judges against inappropriate "invocations of "unconscionability" as the equitable grundnorm". They reminded the reader of what Lord Radcliffe said in *Campbell Discount Co Limited v Bridge* [1962] AC 600 at 626, that "'unconscionable' must not be taken to be a panacea for adjusting any contract between competent parties when it shows a rough edge to one side or the other".

7 I would like today to raise a matter that in my view must affect equity in practice. I shall leave for you to judge whether it is simply a "rough edge" or whether it something of more substance. The way in which equity is practiced is in many respects dependent upon practitioners. Equity practitioners in New South Wales are either solicitors or barristers and judges are, in the main, chosen from those ranks.

8 Judicial office in New South Wales may be held until the age of retirement, fixed by statute at 72 years. The Bar is open to all properly qualified legal practitioners irrespective of age. So too is practice as a solicitor, except, it appears, for partners of a certain age in the large law firms in this city. In 1996, in reviewing the book *The Allens Affair* [3] Young CJ in Equity wrote:

One of the problems highlighted is one which has been felt in large Sydney law firms. This is that the firm makes itself so glamorous to the 30 and 40-year-old commercial leaders that it is suggested to very capable lawyers in their mid-forties that they are "over the hill" and are not contributing sufficiently to partnership income [4].

9 It seems almost absurd to have to state the proposition that experienced equity practitioners and judges in their fifties, sixties and seventies are a resource that moulds and fosters equity in practice. One needs only to review the contribution made to equity in practice over the centuries by senior practitioners to be satisfied of the justification for that proposition.

10 Let us assume that it is correct to say that, but for a few exceptions, the large law firms in Sydney do not foster the retention of partners once they have reached 55 or 60 years of age. I do not today wish to debate the reasons put forward as justification for such an approach (less contribution to the costs of the partnership, the slowing of the drive to bring work to the partnership, the alleged fading of intellectual sharpness, the need for a new life goal) however I wish to explore the possible impact on equity in practice that such an approach or policy may have.

11 It is the case that if those partners do not remain in the practice of the law, their wealth of experience, good judgment and balance will be lost not only to the firm and the younger lawyers who could benefit from their guidance but to the law, and in this case equity in practice. Years of experience will guide a practitioner to the appropriate equitable remedy far more quickly than the less experienced. That experience can also be conducive to innovative thinking, working with the development of the law and being involved in changing it. Experience assists in being able to quickly assess the ilk of counsel necessary for a particular case.

12 In a recent review [5] of the book *Corrupting the Youth* written by James Franklin, Peter Coleman referred to the author's subtext as follows:

What ideas will give meaning to our lives? More precisely, Australians have for 200 years lived by the Enlightenment ideal of humanism without doctrine. That idea is now exhausted. The young crave inspiration, but today they find nothing. This can't go on. "Someone will have to come up with something".

13 Coleman also referred to Franklin's reference to the state school education system and the contribution of non-Christian, classical education to Australian life and wrote:

"A sound training in Livy and Cicero" helped produce incorruptible men of gravitas such as Victor Windeyer, Adrian Curlewis, Hermann Black, Hubert Murray, Norman Cowper, John Latham and John Peden. Who today has their knightly sense of public service, courage and command? We lost a lot when we threw away classical education. The tradition is not entirely dead. But Franklin finds only one contemporary exemplar: Justice James Wood - a product of Sydney's Knox Grammar, school cadets, lifesaving and the old legal education - who became a famous NSW royal commissioner into police corruption.

14 Pausing to think about some of the lawyers in that group of "incorruptible men of gravitas" is interesting against the back-drop of the absence of partners over 55 or 60 years of age in large law firms in this city [6].

15 Sir Victor Windeyer was admitted to the Bar in 1925 and established a wide-ranging practice predominantly in equity and commercial law. He was appointed KC in 1949. He was lecturer in legal history at the University of Sydney from 1929 to 1936 and lecturer in equity from 1937 to 1940. In 1958 he was appointed to the High Court at the age of 58 years and contributed to the work of that Court until his retirement at 72 years of age. Sir Anthony Mason said:

His judgments ... have been acclaimed, not only in Australia but elsewhere in the common law world. He brought to his work in this Court a profound understanding of the law, stemming from his appreciation of its historical development. His sense of history and his knowledge of literature and the classics strengthened his capacity to articulate the law and explain its place in society. [7]

16 Sir Adrian Curlewis was born in 1901. He graduated from Sydney University and was called to the Bar in 1927. He served in Malaya in World War II and was a prisoner of war from 1942 to 1945. His commitment to public service is also exemplified by his Presidency of the Surf Life Saving Association of Australia from 1933 to 1974, his position as sole Life Governor of that Association from 1974, and his Presidency of the International Council of Surf Life Saving from 1956 to 1973. He was a New South Wales District Court Judge from 1948 to 1971, retiring at the age of 70.

17 Sir Norman Lethbridge Cowper was born in 1896. After graduating from Sydney University he was articled to his father, Cecil Cowper, at Allen Allen & Hemsley, where he spent nearly 60 years. His published articles over 50 years spanned political, constitutional, and financial issues, the law, book reviews and biographies. He also contributed specialist articles to the Sydney Morning Herald during the 1930's. He was a founder of the United Australia Party in 1931; a foundation director and Chairman for six years of the Australian Institute of Political Science; a member of the Council of the Australian National University; and the chairman of the body that prepared the way for Papua New Guinea's independence, the Council on New Guinea Affairs. He was President of the NSW Law Society in 1958 and also served as a councillor of the Solicitors' Admission Board. He was a foundation director of Solicitors' Superannuation Pty Ltd. He also served as Chairman of Angus & Robertson.

18 All of this whilst practicing as a solicitor and subsequently senior partner of Allen Allen and Hemsley (now Allens Arthur Robinson); guiding not only the firm but the myriad of young lawyers who are now leaders of the profession both in practice and on the bench. In his Obituary published in the Sydney Morning Herald Francis James described him as being "surpassed by none in his breadth and liberality of mind, integrity and undeviating, selfless care for the public interest. Through the growing pains and uncertainties of our nation in this century, he had few equals". [8]

19 Sir John Latham was born on 25 August 1877. He graduated from Melbourne University (M.A. LL.M) with prizes in Logic, Philosophy and Law. He was called to the Bar in 1904 and was appointed KC in 1922. He was elected to the Federal House of Representatives in 1922. He was appointed Attorney-General in 1925 and in 1929, after the Government was defeated, became leader of the Opposition. He retired from politics in 1935 and at the age of 58 he was appointed to the High Court as Chief Justice, serving in that role until his retirement in 1952 at the age of 75. Sir Zelman Cowen wrote of Sir John Latham:

His unrelenting work ethic and sense of duty found him an active member of the committees of many public bodies and societies. When nearly 86 he said that he gave up six presidencies to allow himself more time for reading and letter-writing.

...

Latham was a very capable judge and judicial administrator, and his stewardship of the High Court left it in better condition than he found it. [9]

20 Sir John Beverley Peden was born on 25 April 1871. He graduated from Sydney University (BA 1892; LLB 1898) with First Class Honours in both Latin and Law and was the University Medallist in Law. He was a Professor of Law and Dean of the Faculty of Law at Sydney University. He was a fellow of the Senate of Sydney University from 1910 until 1941. He was a Member of the Legislative Council from 1917 until his retirement (at age 75) in 1946. He was President of the Legislative Council between 1929 and 1946, to which role it was said he brought his skill as an orator and his immense legal knowledge [10]. He was an authority on Australian and New South Wales constitutional law.

21 Justice James Wood AO, Chief Judge at Common Law, is of course as Coleman wrote, an exemplar. He won a scholarship to Knox Grammar and graduated in law from Sydney University with the University medal. He practiced as a solicitor from 1965 to 1970 during which time he was a partner at Dudley Westgarth & Co. (now Corrs) and was called to the Bar in 1970. He was appointed QC in 1980. At 62 years of age he will (and we should) celebrate his 20th anniversary on the Supreme Court on 1 February 2004, the last six years of which will have been as Chief Judge at Common Law.

22 Today is the eightieth birthday of the Honourable Thomas Eyre Forrest Hughes AO QC who was called to the Bar in 1949 and appointed QC in 1962. He entered politics in 1963 and served as the Federal Attorney-General between 1969 and 1971. He then returned to the Bar and continues to serve as our most senior silk. His tremendous contribution to the legal wealth of this country has been provided through his leadership as Attorney-General and as Queens Counsel. He wrote of the importance of guidance by more experienced lawyers and of that provided to him by KW Asprey QC and observed:

The political and other minnows who are bent on turning the Bar into an industry rather than a profession would do well to remember that traditions continued by men such as Ken Asprey may not endure if such nihilism prevails. [11]

23 There is no doubt that the richness of our legal landscape would have been greatly diminished if these wonderful lawyers had felt obliged to retire at 55 or 60 years. Yet this is just what is happening today. Great legal brains are leaving the practice of the profession because of the nihilism to which Hughes QC referred and the pressure cooker atmosphere in which time costing and budgets appear to rule supreme combined with the message that the more senior practitioners are "over the hill".

24 The history and development of the integrity of the profession dictates that to set or "suggest" such a low age ceiling is unhealthy not only for the firm in which it is set, but also for the development of the practice of equity and the profession generally. There must be a better way. There must be ways in which budgetary constraints are adjusted to properly accommodate rather than alienate the senior partner with such wealth of experience in the law. Sometimes greatness is not achieved until later in life. Sometimes great contributions to the law are not made until later in life. You might think that the practice of equity would be far better served by keeping the experience and judgment of the senior practitioners rather than "letting them go", to use that ubiquitous term. As Franklin wrote: "Someone will have to come up with something".

1 *"Aspects of English Equity"*: The Hebrew University of Jerusalem, Lionel Cohen Lectures; Second Series - January 1954, page 44.

2 However see the entry for "Equity" in *The Oxford Companion to the High Court of Australia*, Oxford University Press (2001) at page 246, where Patrick Parkinson expresses the view that in articulating equitable principles "the High Court has ensured that equitable doctrine will retain both its vigour and its compelling moral power as a major influence on Australian law in the twenty-first century".

3 Valerie Lawson, Macmillan - Pan Macmillan Australia, 1995.

4 (1996) 70 ALJ 331 at 332.

5 *Thought: Meaning of Us*, Peter Coleman, The Australian, Review, 25 October 2003.

6 By referring to the men named by Franklin and one other it is not to be thought that I have ignored the great contributions to the development of the law of so many senior male and female barristers, solicitors and judges. It is the time constraint for these remarks that has limited my focus.

7 Op. cit., Note 2, page 719.

8 Francis James, *"Obituary: Sir Norman Cowper: Lawyer, Soldier and Writer"*, SMH, 12/9/1987.

9 Op. cit., Note 2, pages 420-421.

10 The Presiding Officers of the Parliament of New South Wales, Sydney, 1995.

11 Tony Stephens, *"The Great Persuader"*, SMH, 16/7/1994.