

---

## PREFACE

---

Each of the essays in this collection considers an unsettled or unexplored aspect of equitable doctrine or methodology. Equity continues to be an important regulator of commercial and personal dealings as well as informing frameworks for statutory regulation. There is continued sense in considering its doctrines and methodology as a coherent and conceptually distinct whole.

Many of the essays draw upon the jurisprudence of the High Court of Australia. The High Court's continued emphasis upon equity as a distinct and vital source of law, combined with its loyalty to Chancery precedent, means that its judgments, whilst sometimes controversial, provide a useful indicator of fault lines in equity. Joachim Dietrich and Mark Leeming's essays evaluate the merits of the principle of unjust enrichment as an alternative and superior explanation to an historical approach to equitable doctrine and methodology. They compare the jurisprudence of the High Court of Australia and the (then) House of Lords. Dietrich considers the question on the macro level by discussing the two courts' attitudes to unjust enrichment on the one hand and the equitable concepts of unconscionability and remedial discretion on the other hand. He finds that, despite their seemingly dichotomous positions, both courts seek the same objectives of legal certainty and transparency of reasoning and attempt to restrain the unbridled use of general concepts. Further complicating the comparison, neither court is entirely consistent in its methodology. Mark Leeming considers the merits of the principle of unjust enrichment on the micro level in relation to equitable subrogation. He argues that the elegant simplicity of the unjust enrichment framework has difficulty in coping with the complex multi-party scenarios that raise subrogation issues. Pauline Ridge also compares and contrasts the methodologies of the Australian and English courts. She argues that an analysis of the case law on participatory liability in equity as a whole suggests a liability scheme for participation in breach of trust or breach of fiduciary duty that is at odds with both the Privy Council and the High Court.

Two essays draw particularly upon the authors' legal history expertise. Joshua Getzler's essay on assignment of future property and Fiona Burns' essay on the doctrine against clogs on the equity of redemption chart the historical development of those respective areas of law. Getzler demonstrates the complex interaction of statute and equity and suggests that equity undermines the spirit of insolvency law in this area. Burns charts the gradual erosion of the anti-clog doctrine due to legal and economic factors concerning the function of mortgages

and the dominance of contract. She shows that English, Australian, Canadian and New Zealand courts have not reacted consistently to these changes and she predicts the imminent demise of the anti-clog doctrine.

By contrast, in his essay Matthew Harding uses legal philosophy to consider the limits of the equitable jurisdiction to allocate family assets on the breakdown of a relationship. He asks why it is that courts exercising equitable jurisdiction do not consider the parties' future needs in allocating family assets, whereas they routinely do so under the statutory schemes. He argues that a distributive norm may apply to the relationship of an unmarried couple that requires the parties to provide material support for each other even after the relationship ends. This would empower courts exercising equitable jurisdiction to consider future needs, although he goes on to explore possible non-doctrinal constraints on the exercise of such a jurisdiction.

Some of the most perplexing problems in equity arise in relation to fiduciaries and trusts. The question of the proper basis of the fiduciary obligation is dealt with by James Edelman who explores the so-called 'self dealing rule' of fiduciary law to determine whether it undermines the argument that fiduciary duties arise only from voluntary undertakings. He argues that the rule is better understood as a collection of distinct rules that are not confined to fiduciary relationships and that apply in a range of different contexts with a range of outcomes. Thus, his 'undertaking' test for imposing the fiduciary obligation remains intact. Jamie Glister unravels the complexities of two problems that beset the remedy of equitable compensation for breach of fiduciary duty, namely, the extent of a custodial fiduciary's duty to restore the trust fund and the application of causation rules to breach of non-custodial fiduciary duties. His essay spans English, Australian, Canadian and New Zealand case law.

Ben McFarlane's essay considers one basis for recognising a non-express trust, as suggested by Lord Browne-Wilkinson's judgment in *Westdeutsche Landesbank Girozentrale v Islington LBC*, and provides an analysis of the circumstances in which such a trust should arise. He argues that the holder of a legal or equitable interest must have acquired the right to that interest by virtue of the same event or transaction that caused the claimant to lose that right (or become subject to a duty in respect of it). The holder of the right must then have knowledge of the matters alleged to affect his or her conscience before a non-express trust over that interest can arise. McFarlane finds support in recent Australian case law for such a trust as well as interesting analogies with the knowledge requirement for recipient liability under the first limb of *Barnes v Addy*. He also finds support in the Australian cases for his thesis that the facts of *Lipkin Gorman v Karpnale* are best explained as an instance of this non-express trust. Michael Bryan also looks at non-express trusts, specifically the remedial constructive trust. He clarifies what is meant by 'remedial' in this context and suggests that proper recognition of remedial constructive trusts has been hindered by a disproportionate fear of the insolvency implications of proprietary interests. He recommends the American Law

Institute's *Restatement (Third) of the Law of Restitution and Unjust Enrichment* as a model for determining when the remedy is appropriate.

Finally, Andrew Butler and Tim Miller's essay considers the ubiquitous rivalry of Australia and New Zealand and argues that, in the context of equity jurisprudence, New Zealand has much to offer.

We hope that this collection highlights the enduring relevance of equity as well as the insights that may be yielded by comparative and inter-disciplinary analysis. All of the essays, apart from Ben McFarlane's, were discussed at a workshop in December 2010 at the University of Sydney. There the authors also benefited from the comments of Simone Degeling, Barbara McDonald, James Penner, John Stumbles and Nicola Bodor. We acknowledge the support of the Ross Parsons Centre of Commercial, Corporate and Taxation Law, and particularly its administrator, Adam Bratt, in facilitating the event. We also thank Richard Hart and all at Hart Publishing.

Jamie Glister  
Pauline Ridge  
August 2011

<http://www.pbookshop.com>