

**50 Years of Commercial Law: The Commercial Law Association of Australia
Anniversary Conference**

31 July 2015

Dixson Room, New South Wales State Library

Equity and Commercial Morality

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- 1 The law regulating the practices of trade and commerce has a rich history. It has its roots in the development of the law merchant,¹ fashioned by custom designed to ensure that the tenets of good faith and despatch in merchant transactions were observed.² Daniel Defoe's analysis of the vagaries of trade and commerce at the beginning of the 18th century provides some insight as to the ever evolving character of mercantile practice:

Trade is a Mystery, which will never be compleatly discover'd or understood; it has its Critical Junctures and Seasons, when acted by no visible Causes, it suffers Convulsion Fitts, hysterical Disorders, and most unaccountable Emotions — Sometimes it is acted by the evil Spirit of general Vogue, and like a meer Possession 'tis hurry'd out of all manner of common Measures; today it obeys the Course of things, and submits to Causes and Consequences; tomorrow it suffers Violence from the Storms and Vapours of Human Fancy, operated by exotick Projects, and then all runs counter, the Motions are excentrick, unnatural and unaccountable — A sort of Lunacy in Trade attends all its Circumstances, and no Man can give a rational Account of it.³

[†] I would like to acknowledge and thank David Monteith, the 2015 Researcher to the Judges of the Equity Division of the Supreme Court of NSW, for his assistance in the preparation of this paper.

¹ Various referred to as the *jus gentium* and the *Lex Mercatoria*.

² See W A Bewes, *The Romance of the Law Merchant* (Sweet & Maxwell, 1923). Custom, in this regard, has been described as the 'fulcrum of commerce' since the very origins of exchange in a barter economy: Leon E Trakman, *The Law Merchant: The Evolution of Commercial Law* (Fred B Rothman, 1983) 7.

³ Quoted in J G A Pocock, *The Machiavellian Moment* (Princeton, 1975) 452-3.

- 2 In the Foreword to W A Bewes' book entitled 'The Romance of the Law Merchant', Lord Justice Atkin wrote:

It is, perhaps, fortunate that the law-makers of former days took little interest in the rules of commerce ... As a result, traders made their own rules and administered them summarily at their own courts, with the tacit or express approval of the Sovereign. Such rules have in the course of ages crystallised into law: in many cases recorded in statutory codes.⁴

- 3 Until the 16th century, the law merchant in England was confined in operation to the courts of the local boroughs and markets.⁵ The history of the early English court of piepowder ('piepoudres' or 'pepoudrous') provides a fascinating example of the various early forums in which the law merchant was practised. The court took its name from the dusty feet of its suitors — wayfaring merchants who "wandered from mart to mart".⁶ The alternative explanation proffered is that so quick was the procedure of these courts that justice was administered while the dust fell from its suitors' feet.⁷
- 4 In his *Commentaries*, Blackstone refers to it as "the lowest, and at the same time the most expeditious, court of justice known to the law of England".⁸ The court of piepowder became a convenient description of the tribunals of local fairs in which merchant disputes arising within that jurisdiction were settled.⁹
- 5 The right to grant a market or fair — what would now be considered a specialist commercial court — was initially a royal prerogative.¹⁰ The only acts of parliament directly concerned with this branch of the judiciary (17 Edw IV, c 2 and 1 Ric III, c 6) provided that for every market or fair there pertained a 'Court of Pypowders' to administer justice and provide lawful remedy in all matters of contract, covenant,

⁴ Bewes, above n 2, iii-iv.

⁵ J H Baker, 'The Law Merchant and the Common Law Before 1700' (1979) 38(2) *Cambridge Law Journal* 295, 296.

⁶ Charles Gross (ed), 'Select Cases Concerning the Law Merchant' (1908) 23 *Seldon Society* vol I, xiv.

⁷ Thomas Edward Scrutton, 'General Survey of the History of the Law Merchant' in *Select Essays in Anglo-American Legal History* (Little, Brown, 1909) vol III, 7, 9. *Contra* Gross above n 6, xiii-xiv.

⁸ William Blackstone, *Commentaries on the Laws of England* (Legal Classics Library, 1983) vol III, 32.

⁹ See generally William Searle Holdsworth, 'The Development of the Law Merchant' in *Select Essays in Anglo-American Legal History* (Little, Brown, 1909) vol I, 289, 298-303; Scrutton, above n 7, 9.

¹⁰ Gross, above n 6, xvi.

debt and any other deed made or arising within the jurisdiction of the court.¹¹ These statutes also provided specific rules to remedy abuses of its jurisdiction.

- 6 One example from the records preserved by the St Ives Rolls shows that on Monday 12 May 1287, William of Lawford appeared as plaintiff against Reginald of Northampton, John Rivet and John Tankus as defendants.¹² The plaintiff had agreed to sell the defendants a horse. The covenanted price was five marks of silver, for which money or a piece of good burel cloth¹³ worth five marks would provide satisfaction.
- 7 When the time came for payment, the defendants tendered a cloth of ray¹⁴ instead which, the plaintiff alleged, was not of equal value. On the plaintiff's account, the defendants then took the horse against his will and detained it "to his damage and dishonour". The defendants contended that the plaintiff had been well satisfied by receipt of the ray cloth and that the plaintiff had, by his own authority, led the horse from its stable to the home of the Reginald. The defendants craved for the matter to "be inquired by merchants and neighbours" to settle the dispute.
- 8 Merchants promptly came and confirmed the plaintiff's version of events. Mr Rivet, the broker of the Reginald, was found to have 'eloigned' the horse against the will of the plaintiff on the command of the Reginald. The Court ordered that the defendant pay five marks to the plaintiff together with the plaintiff's damages.
- 9 The dispute arose on the Sunday (11 May 1287) and the Court made final orders the very next day (Monday 12 May 1287). Such promptitude in dealing with

¹¹ 17 Edw IV, c 2:

Whereas divers Fairs be holden and kept in this Realm, some by Prescription allowed before Justices in Eyre, and some by the Grant of our Lord the King that now is, and some by the Grant of his Progenitors and Predecessors; and to every of the same Fairs is of Right pertaining a Court of Pypowders, to minister in the same due Justice in this Behalf; in which Court it hath been all times accustomed, that every Person coming to the said Fairs, should have lawful Remedy of all manner of Contracts, Trespasses, Covenants, Debts, and other Deeds made or done within any of the same Fairs, during the Time of the same Fairs, and within the jurisdiction of the same, and to be tried by Merchants being of the same Fair.

¹² Gross, above n 6, 25-6.

¹³ A coarse woollen cloth.

¹⁴ Also referred to as a ruffet cloth — a form of textile made from wool pulp.

commercial disputes has not always been maintained.¹⁵ However the need for promptitude in the resolution of commercial disputes has always been recognised. It was also recognised that agreements entered into by merchants and traders ought to be respected and honoured as a matter of sound business sense.¹⁶

- 10 There was a clear preference for commercial disputes to be tried by fellow merchants with expertise in the particular area. In 1278, a suit commenced by William of Dunstable against Robert le Bal’(ancer) was commanded by the King to be inquired:

In the presence of lawful and discreet merchants and citizens of Winchester, by the oath of good and lawful men of the same city through whom the truth of the matter can best be known in the premises, and for swift and competent amends therof to be made according to the law merchant.¹⁷

- 11 The dispute concerned the merchantable quality of 103 sacs of wool sold by Robert to William. William, in turn, had sought to on-sell the wool in a foreign market only to find that the contents of 68 of the sacs (which he had not inspected at sale) were “vile and useless and wholly differing from his agreement”. William complained that, upon exposing the sacs for sale, he stood “in peril of death” in a foreign market. The merchant jurors, upon oath, confirmed the truth of the matter and damages were entered for the plaintiff.
- 12 There is a “tolerably clear line”¹⁸ from the trial by merchant peers to the establishment of a specialist commercial court. There was debate about the genesis of the law merchant. It was suggested that “the medieval law merchant was not so much a corpus of mercantile practice or commercial law as an

¹⁵ A far cry from the delay in the Court of Chancery regaled by Charles Dickens in the preface to *Bleak House* (Penguin Books, 2012; first published 1853) 3-7.

¹⁶ Trakman, above n 2, 1. See, eg, *Pillans v Van Mierop* (1765) 3 Burr 1663; 97 ER 1035.

¹⁷ Extracted in Hubert Hall (ed), ‘Select Cases Concerning the Law Merchant’ (1929) 46 *Seldon Society* vol II, 28-30. The plea was heard on assize at Romsey in the County of Southampton.

¹⁸ I borrow the expression: J A Watson, ‘A Sketch’ in J T Gleeson, J A Watson and R C A Higgins (eds), *Historical Foundations of Australian Law: Institutions, Concepts and Personalities* (Federation Press, 2013) vol I, 1, 18.

expeditious procedure especially adapted for the needs of men who could not tarry for the common law".¹⁹

13 In *Goodwin v Roberts* the Court of the Exchequer said:

It is true that the law merchant is sometimes spoken of as a fixed body of law, forming part of the common law, and as it were coeval with it. But as a matter of legal history, this view is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body of the *lex mercatoria*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of Courts of law, which, upon such usage being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience.²⁰

14 The Court of Exchequer's reference to bills of exchange is important. Actions founded upon bills of exchange and other negotiable instruments came to be heard in the common law courts with the rise of the action of *assumpsit*.²¹ These instruments were developed by merchants, for merchants, as a flexible means of giving and obtaining credit.²² The drawer of a bill could endorse it to a third party by way of settlement of a debt owed or, alternatively, a bill could be drawn upon a person with whom the drawer had credit and conducted business. To the extent that this overcame limitations on actions in debt or covenant, such negotiable instruments "oiled the wheels of commerce"²³ through credit with its introduction in England.

15 The mutual advantages of a more flexible (and readily available) source of credit in mercantile practice also informed the proliferation of freemasonry and other 'pseudo-masonic' societies. Membership of these organisations provided:

¹⁹ Baker, above n 5, 301.

²⁰ (1875) LR 10 Ex 337, 346 (Cockburn CJ, Mellor, Lush, Brett and Lindley JJ).

²¹ Baker, above n 5, 308-9.

²² See generally A McNaughton, 'Money and Bills of Exchange' in J T Gleeson, J A Watson and E Peden (eds), *Historical Foundations of Australian Law: Commercial and Common Law* (Federation Press, 2013) vol II, 291, 300-4.

²³ I borrow the expression from John Brewer, 'Commercialization and Politics' in Neil McKendrick, John Brewer and J H Plumb (eds), *The Birth of Consumer Society: The Commercialization of Eighteenth-century England* (Europa Publications, 1982) 197, 215.

a measure of security that was almost impossible to obtain outside the comforting confines of one's association. Trade and business were facilitated and made more reliable, for one came to know intimately the men with whom one was dealing. The club provided a cushion against a member's more aggressive creditors, made borrowing much easier, and provided the organizational base from which to raise larger capital sums.²⁴

- 16 Voluntary associations thus came to facilitate and promote the interests of the commercial classes. Professionals and tradesmen who became members of a particular lodge or society frequently benefited from rules that (a) prevented two persons of the same trade being members of the same club and (b) required that trade, in the first instance, should be between members.²⁵ But to access these benefits, a member had to subscribe to the conventions, codes and practices of the society. Embedded in these associations, therefore, was a ready mechanism to regulate the settlement of disputes between members.
- 17 The Constitution of the Grand Lodge in Freemasonry, for example, provided the Lodge the power of "investigating, regulating, and deciding all matters relative to the craft, or to particular lodges, or to individual brothers".²⁶ The Grand Lodge, as its name suggests, was also the ultimate disciplinary authority with power to "admonish, fine, or suspend a lodge or individual mason" for misconduct. This provided a very simple 'stick' mechanism of enforcement. The threat of expulsion from the organisation provided a strong incentive both to honour agreements amongst members and to settle disputes in accordance with the objects of freemasonry.
- 18 It is not necessary on this occasion to dwell upon the restrictive trade practices that were rife in such organisations impeding workers, particularly Catholics, from obtaining employment. These practices were the basis in part for the formation of other groups and societies that also fostered trade and commerce in a trusting environment amongst their members.²⁷

²⁴ Ibid 228.

²⁵ Ibid 222.

²⁶ *United Grand Lodge of Ancient Free and Accepted Masons of England v Holborn Borough Council* [1957] 8 WLR 1080, 1082-3.

²⁷ Cliff Baxter, 'The Knights of the Southern Cross' (2011) 31/2 *Journal of the Australian Catholic Historical Society* 83, 86.

- 19 By the late 19th century, technicalities and delay in the procedures by which the law tried mercantile disputes led to a considerable decrease in commercial litigation (in favour of arbitration).²⁸ The need for reform was summed up by Sir Sydney Waterlow:

I feel very strongly that in a great commercial country like England tribunals can and ought to be established where suitors might obtain a decision on their differences more promptly than in the Supreme Courts as at present constituted and regulated. Those who support the present system of trying mercantile disputes seem to regard them all as hostile litigation and lose sight of the fact that in the majority of cases where differences arise between merchants and traders, both parties would rejoice to obtain a prompt settlement before a legal tribunal duly constituted, and to continue their friendly commercial relations.²⁹

- 20 Notwithstanding the opposition of Lord Chief Justice Coleridge,³⁰ reform came in February 1895 in the form of the famous 'Notice as to Commercial Causes' issued by the Judges of the Queen's Bench Division.³¹ The Notice created the Commercial Cause List and what became known as the Commercial Court.³² 'Commercial causes' were defined to include:

causes arising out of the transactions of merchants and traders; those relating to the construction of mercantile documents, export or import of merchandise, affreightment, insurance, banking and mercantile agency and mercantile usages.

- 21 The Notice of 1895 did not 'create' a court, nor did it prescribe a set of rules or procedure to be followed in the commercial list. Lord Justice Lindley went so far as to describe it as "a mere piece of convenience in the arrangement of business".³³ What the introduction of the List did achieve, however, was the development through time of a recognised practice as to pleadings, admissions,

²⁸ Theobald Mathew, *The Practice of the Commercial Court* (Butterworth, 1902) 1-2.

²⁹ Quoted in Charles A Stanuelli, 'The Practice of the Commercial Court' (1906) 86 *Journal of the Statistical and Social Inquiry Society of Ireland* 365, 366. See George Smalley, *The Life of Sir Sydney H Waterlow* (Edward Arnold, 1909) 161.

³⁰ His Lordship was opposed to the concept of a 'commercial judge' because it involved the suggestion that all members of the Bench were not equally fit to cope with every subject of litigation. See Stanuelli, above n 29, 367; Anthony D Colman, *Mathew's Practice of the Commercial Court* (Butterworths, 2nd ed, 1967) 8.

³¹ See Colman, above n 30, 10-11, also extracted in Stanuelli, above n 29, 379-80.

³² Trakman, above n 2, 370.

³³ *Baerlein v Chartered Mercantile Bank* (1855) 2 Ch D 488, 491.

evidence and the disclosure of documents to facilitate the administration of commercial disputes.³⁴

- 22 The object of the establishment of the Commercial Court of England was to provide a forum for the litigation and resolution of disputes between merchants and traders who were prepared to take up an early opportunity of having their disputes decided.³⁵
- 23 Within the space of 8 years, New South Wales followed suit.³⁶ The *Commercial Causes Act 1903* was the idea of Bernhard Ringrose Wise, the Attorney General for New South Wales in 1903, consequent upon representations from the commercial community and the legal profession and after discussions with Chief Justice Darley. It was his aim, as he put it, to have commercial causes dealt with “under special provisions directed to securing rapidity of decision and cheapness”. The Court could dispense with pleadings and technical rules of evidence in order to identify the real issues in dispute.³⁷
- 24 The *Commercial Causes Act 1903* was repealed in 1972 with the commencement of the *Supreme Court Act 1970* (NSW).³⁸ The Commercial List was retained in the Common Law Division of the Supreme Court.³⁹ In 1987, the Commercial List became the Commercial Division of the Supreme Court to which was assigned ‘all proceedings of a commercial nature’.⁴⁰

³⁴ Colman, above n 30, 11.

³⁵ *TSF Engineering Pty Ltd v Hill* [1980] 2 NSWLR 105, 110 citing *Witten v Lombard Australia Ltd* (Unreported, Supreme Court of New South Wales, Macfarlan J, 25 May 1967).

³⁶ *Commercial Causes Act, 1903*. More extensive summaries of the course of events leading to the passage of the Commercial Causes Bill are found in J J Spigelman, ‘Commercial Causes Centenary Dinner Address’, Speech delivered at the Commercial Causes Centenary Dinner, 6 November 2003, Sydney and P A Bergin, ‘Commercial Causes Centenary Dinner Welcome Address’, Speech delivered at the Commercial Causes Centenary Dinner, 6 November 2003, Sydney.

³⁷ Section 6. See New South Wales Parliamentary Debates, Session 1903 Vol XIII (William Applegate Gullick, 1904) 4624 (W P Crick).

³⁸ Section 5.

³⁹ Section 56(1) *Supreme Court Act 1970* (NSW) as made. Note also the amendments introduced by s 8 of the *Administration of Justice Act 1973* (NSW).

⁴⁰ *Supreme Court Act 1970* (NSW) s 53(3E) as amended by the *Supreme Court (Commercial Division) Amendment Act 1985*.

- 25 Causes of a commercial nature were defined in the Rules to include (subject to certain exceptions) proceedings: (a) arising out of commercial transactions; or (b) in which there is an issue that has importance in trade or commerce.⁴¹ The object of the speedy determination of the real questions between parties to litigation was retained.⁴²
- 26 In 1986, the then Chief Justice, Sir Laurence Street, issued a Practice Note for the Commercial Division that described the purpose of the Commercial Court as being “to provide a service to the commercial community” in which “[t]he paramount consideration, so far as the [commercial] court is concerned, is to do whatever is practicable to assist in the expeditious and economical determination of commercial disputes”.⁴³
- 27 In 1988 the work of the Construction List of the Common Law Division was brought under the control of the Commercial Division, and so too the Admiralty Division in 1995.⁴⁴ Then in 1998, upon the recommendation of the former Chief Justice Spigelman,⁴⁵ the Court was restructured and the Commercial Division was abolished by amendments to the Supreme Court Rules which came into effect on 1 July 1999.⁴⁶ Matters previously assigned to the Commercial Division were assigned to a new Commercial List to be administered in the Equity Division.⁴⁷

⁴¹ Initially Supreme Court Rules 1970 (NSW) pt 14, r 2(1) but later pt 14, r 1 by amendment.

⁴² *Supreme Court Act 1970* (NSW) s 76A as amended by the *Supreme Court (Commercial Division) Amendment Act 1985* schedule 1(6), extracted in *Challenge Bank Ltd v Raine & Horne Commercial Pty Ltd* (1989) 17 NSWLR 297, 304E-G (Rogers CJ Comm D).

⁴³ Commercial Division Practice Note No 39 issued by Chief Justice Street on 12 November 1986: (1986) 6 NSWLR 119, 121-2.

⁴⁴ Supreme Court of New South Wales, *Annual Review* (1997) 25.

⁴⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 November 1998, 10720 (Paul Whelan); New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 December 1998, 10872 (J W Shaw, Attorney-General).

⁴⁶ Supreme Court Rules (Amendment No 322) 1998 (NSW). See also Supreme Court of New South Wales, *Annual Review* (1999) 26.

⁴⁷ Supreme Court of New South Wales, *Annual Review* (1998) 33. Part 14 of the Supreme Court Rules has been replicated in the Uniform Civil Procedure Rules (NSW) r 45.6.

- 28 The object of this structural change was to improve the operation and efficient functioning of the Court.⁴⁸ The legislative intent, as set out clearly in an Explanatory Note to the amendments, was: “to restructure the Court to ensure that it best orders the management of business before the Court and maximises the utilisation of judicial resources and, for this purpose, to transfer the work of the Commercial Division to the Equity Division, where it is to be included in a Commercial list”.⁴⁹
- 29 There are now only two trial divisions in the Supreme Court — the Equity Division and the Common Law Division — and the work of the Court is administered through the specialist and general lists of each of the trial divisions. Practice Note SC Eq 3 governs cases in the Commercial List.
- 30 The establishment of the Commercial List in the Equity Division recognised that many commercial cases include claims for equitable relief with commercial parties taking advantage of the development of the law of estoppel and equitable compensation.⁵⁰ I should like to add to that list the decree of specific performance and the injunction. As Lord Evershed MR, writing extra-curially, said of these equitable remedies, “[i]t 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”.⁵¹ If the larger part of the collective existence of our community is consumed with commercial activity, the idea that a court would order specific enforcement of an agreement is surely a natural development.⁵²
- 31 In this regard, it is the distinctive and flexible character of equitable principles and doctrines that explains why the Commercial List has found its true home in the Equity Division. As Justice Gummow remarked extra-curially, “equity meets a need of any sophisticated and successful legal system”.⁵³

⁴⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 December 1998, 10872 (J W Shaw, Attorney-General).

⁴⁹ Explanatory Note, Supreme Court Rules (Amendment No 322) 1998.

⁵⁰ *Anpor Holdings Pty Ltd v Swaab* [2008] NSWSC 208 [8].

⁵¹ Sir Raymond Evershed, *Aspects of English Equity* (Magnes Press, Hebrew University of Jerusalem, Lionel Cohen Lectures – Second Series, 1954) 44.

⁵² Sir Henry Maine, *Ancient Law* (John Murray, 1916) 345. See also Peter W Young, ‘Equity, Contract and Conscience’ in Simone Degeling and James Edelman (eds), *Equity and Commercial Law* (Lawbook, 2005) 489, 505.

⁵³ William Gummow, ‘Conclusion’ in Simone Degeling and James Edelman (eds), *Equity and Commercial Law* (Lawbook, 2005) 515.

- 32 But what about the interaction between Equity's conscience and the commercial morality or lack thereof in the vibrant world of commercial traders?
- 33 In *Twyne's Case* before the Star Chamber in 1601, one Pierce, being indebted to Twyne for 400 pounds and to C for 200 pounds, assigned in secret all his goods and chattels in satisfaction of his debt to Twyne, pending the issue of a writ in an action of debt commenced against Pierce by C.⁵⁴ Pierce, however, continued in possession of the goods and dealt with them for his own commercial purposes. Judgment was entered against Pierce and the writ to make execution of the goods issued. Twyne intervened, resisting the Sheriff on the basis that the gift had been effective to convey the property to him. Unsurprisingly, the conveyance was held to be fraudulent — in modern terms, a fraudulent disposition with intent to defeat creditors. The relevance for our purposes is that the case was later described in a paper read before the Juridical Society in 1869 or 1870 as one of “mercantile immorality, connoting mercantile enterprise”.⁵⁵
- 34 It has been said that ‘English Equity’ operated as a system of moral rules forged by the morality of past centuries.⁵⁶
- 35 Enter William Murray, born in 1705 at the palace of Scone, near Perth, Scotland, the fourth son of David Murray, Viscount Stormont. His was to be an extraordinary and rich life until his death in 1793. He received a BA from Oxford University in 1727 and an MA from Oxford in 1730 the year in which he was called to the Bar. In 1754 he was appointed Attorney General and two years later he was appointed Chief Justice of the Court of King's Bench and raised to the peerage as Baron Mansfield. In 1757 and 1767 he was appointed temporarily as the Chancellor of the Exchequer. He twice declined offers of the post of Lord Chancellor (in 1756 and 1771).⁵⁷ In 1776 he was appointed Earl of Mansfield. Lord Mansfield was described as “the founder of commercial law” in England.⁵⁸

⁵⁴ [1774] All ER Rep 303; 76 ER 809; (1601) 3 Co Rep 80.

⁵⁵ R Robinson, ‘Anticipations under the Commonwealth of Changes in the Law’ in *Select Essays in Anglo-American Legal History* (Little, Brown, 1909) vol I, 467, 487-8.

⁵⁶ Maine, above n 52, 70.

⁵⁷ Norman S Poser, *Lord Mansfield: Justice in the Age of Reason* (McGill-Queen's University Press, 2013) 243

⁵⁸ Paterson *Curiosities of Law and Lawyers* 42.

- 36 The principle of “moral obligation” came to the fore in Lord Mansfield’s time.⁵⁹ As Norman S Poser wrote in his recent analysis of Lord Mansfield’s life:

Merchants, manufacturers and carriers of goods make agreements to buy and sell goods and services, to be delivered or provided in the future. Trade depended on merchants being able to rely on the word of others, and Mansfield’s decisions in contract cases showed a strong bias in favour of enforcing promises.

An important issue in contract law was the idea of “consideration.” The common law had long required that, in order for a promise to be legally binding, there had to be a consideration for it; i.e. a promise of something in return. A bare promise (such as the promise of a gift) ... without any consideration for it, could not be enforced. In *Pillans v Van Mierop* Mansfield rejected this ancient doctrine because it was contrary to the usage in law of merchants. ... After pointing out that it was the custom of merchants to honour a written promise in the absence of any consideration, he boldly declared that “the ancient notion about the want of consideration was for the sake of evidence only.” If a promise was in writing, no consideration would be necessary because the writing provided evidence that the promise had actually been made. But here Mansfield’s rejection of precedent was unsuccessful. Thirteen years later, the House of Lords overruled *Pillans*, restoring the consideration requirement even where a promise was in writing.

Mansfield, ever resourceful, got around the House of Lords, at least to some extent, by broadening the definition of consideration. In *Hawkes v Saunders*, the executrix of an estate had promised to pay all of the descendant’s debts but failed to do so, even though there were significant assets in the estate. Mansfield held that the executrix’s *moral* obligation to pay the debts was an adequate consideration for her promise.⁶⁰

- 37 This “resourceful” approach has been the subject of some criticism. However over 200 years later, Young J reached back to Lord Mansfield’s discussion and said:

I think it is extremely doubtful whether the fact that there is a legal requirement to pay for past services or merely a moral one is a matter that weighs very much with commercial people who are involved in ongoing relationships. In commerce whether one has to keep one’s colleagues happy as a matter of legal obligation or moral obligation or purely because of one’s own financial future is really a matter of marginal importance, the important thing is the future commercial relationship between the parties. Indeed it could almost be said in commerce that where a man is under a moral

⁵⁹ *Bush v Burns* (1873) SCR 186 at 192.

⁶⁰ Poser, above n 57, 229-30.

obligation, which neither the court of law or equity can enforce, and promises to do something, then the honesty and rectitude of the thing is for him a consideration.⁶¹

- 38 There is of course a difference between seeking Equity's intervention where the maintenance of a legal right would in the circumstances be unconscientious and seeking redress on the grounds that the other party's conduct lacked commercial morality. In 1988 Professor Paul Finn's exquisite analysis addressing the topic "Commerce, the Common Law and Morality"⁶² included the following:

Howsoever we may wish to define morality, it seems incontestable that the evolution of our law, including our commercial law, has been influenced profoundly 'both by the conventional morality ... of particular social groups' and by the moral criticism of those 'whose moral horizon has transcended the morality currently accepted'. There is, for example, a transparent moral dimension in our emerging unconscionability doctrine, discomfiting though this doctrine may be to an established order of conventional legal and moral thinking. This said, it equally seems to be incontestable that the law, including commercial law, does not track systematically even at a distance the imperatives of morality, conventional or otherwise. Moral values (and contentious ones at that) can and manifestly do inform the law. They are not its master. Illustrative of this is the very obvious truism that legal censure does not as of course parallel moral censure.

- 39 These observations were made 27 years ago at a time when Professor Finn observed that the "unconscionable dealings doctrine" was resurgent; "consideration" was under siege; privity had taken a mortal blow and the doctrine of good faith was squarely upon contract's agenda.⁶³ Professor Finn also spoke of the emergence of a law of unjust enrichment or restitution. It has been suggested by some that "good faith" is "part of every contract".⁶⁴ Perhaps Lord Mansfield might have agreed. If good faith is equated with honesty it may not be far from the position adopted by his Lordship that people who make promises have a moral obligation to fulfil them. The elevation of a moral obligation and a promise in writing to the concept of "consideration" is, however, another matter.

⁶¹ *Devereaux Holdings Pty Ltd v Pelsart Resources NL (No 2)* (1985) 9 ACLR 956, 959-60.

⁶² (1989) 17(1) *Melbourne University Law Review* 87, 87.

⁶³ *Ibid* 88-9.

⁶⁴ J W Carter, Elisabeth Peden and G J Tolhurst, *Contract Law in Australia* (LexisNexis Butterworths, 5th ed, 2007) 2-19.

40 Traders and commercial organisations have over many years used what has been referred to as “letters of comfort”. They are frequently used in international financing transactions. These letters, sometimes known as “letters of awareness” or “keepwell agreements” and “support agreements”, may contain statements ranging from mere acknowledgements or intentions towards the “moral” end of enforceability through to direct promises towards the legal end.⁶⁵

41 Indeed the topic of letters of comfort was addressed in the proceedings of this Association in 1986.⁶⁶ The common reason for use of such letters was identified as the existence of some legal impediment to the granting of a guarantee. The authors observed that to that date such letters had traditionally been used in jurisdictions where exchange control approval was required for a party to give a formal guarantee commitment and where such letters would not infringe exchange control regulations. The authors observed:

Where the Letter has no contractual effect it is binding in commercial morality and commercial practice only.

...

The use of Letters of Comfort may appear to be anathema to the eyes of a cautious lawyer. Nevertheless, the use of Letters of Comfort between major corporations covering significant transactions and across jurisdictional boundaries indicates the existence of a commercial “morality” and honour in dealings between traders. The effect is that they recognise a form of commitment upon them which most commonly gives rise to no legal rights and duties. Any assessment of whether or not to accept the Letter of Comfort, as distinct from requiring the “commitment” implied in the letter to be put in the form of a legally binding contract, must rest on an assessment of whether the other party will act according to his representation at some future point in time when it is no longer to its immediate advantage to do so.

...

In short, Letters of Comfort are effective in practice because both sides perceive that it is in their own long term interests to accept and fulfil the moral obligations stipulated in such Letters.

42 In 1989 the English Court of Appeal dealt with a case in which a subsidiary of a public limited company incorporated in Malaysia was granted an acceptance

⁶⁵ Leigh Schulz, ‘Letters of Comfort: Where do we stand?’ (2013) 29(3) *Australian Banking and Finance Law Bulletin* 34.

⁶⁶ Robert Sauer and Howard Marks, ‘Letters of Comfort’ (1986) 18(1) *Commercial Law Association Bulletin* 1.

credit/multi-currency cash loan by Kleinwort Benson Ltd, merchant bankers, in reliance upon a “comfort letter” by which it was asserted by the public company that it was their “policy” to ensure that the business of their subsidiary was at “all times in the position to meet its liabilities” to the merchant bankers. The facility was increased from 5 million pounds to 10 million pounds when a second comfort letter in substantially identical terms was furnished. The subsidiary went into liquidation and the public company refused to pay the outstanding sums under the facility arrangements. It was contended that the statement in the comfort letter had not been intended to impose any binding legal obligation. At first instance judgment was given for the merchant bankers in the amount of 12.26 million pounds plus interest. This decision was overturned on appeal.⁶⁷ The Court of Appeal said:⁶⁸

But in this case it is clear, in my judgment, that the concept of a comfort letter, to which the parties had resort when the defendants refused to assume joint and several liability or to give a guarantee, was known by both sides at least to extend to or to include a document under which the defendants would give comfort to the plaintiffs by assuming, not a legal liability to ensure repayment of the liabilities of their subsidiary, but a moral responsibility only.

...

If my view of this case is correct, the plaintiffs have suffered grave financial loss as a result of the collapse of the tin market and the following decision by the defendants not to honour a moral responsibility which they assumed in order to gain for their subsidiary the finance necessary for the trading operations which the defendants wished that subsidiary to pursue. The defendants have demonstrated, in my judgment, that they made no relevant contractual promise to the plaintiffs which could support the judgment in favour of the plaintiffs. The consequences of the decision of the defendants to repudiate their moral responsibility are not matters for this court.

- 43 In the following year the Commercial Division of the Supreme Court of New South Wales posed but did not answer the question whether the prohibitions against unconscionable conduct, misleading or deceptive conduct or conduct that was likely to mislead or deceive had “succeeded in bringing legal obligation into closer

⁶⁷ *Kleinwort Benson Ltd v Malaysia Mining Corporation Berhad* [1989] 1 WLR 379 (Fox, Ralph Gibson and Nicholls LJ).

⁶⁸ per Ralph Gibson LJ at 391, 394 (with whom Fox and Nicholls LJ agreed).

alignment with the call of commercial morality?”.⁶⁹ In drawing on the recent literature at the time the Court identified once again the frequency of the use of letters of comfort in international commercial transactions.⁷⁰ However the approach in France was seen to be “refreshingly honest and sensible”.⁷¹ Reference was made to the compilation on “Letters of Responsibility” in which it was stated:⁷²

A so called “letter of responsibility” will, under French law, be considered as a commitment to perform (‘obligation de faire’) because in the commercial world the creation of a meaningless instrument or document is unthinkable. It is not a full sized guaranty (*sic*) – otherwise it would say it is so – but some performance is provided in order to help a creditor insure his rights. Refusal of such performance opens a case for damages; this is the legal rule of violation of an ‘obligation de faire’.

- 44 In construing the circumstances and the terms of the subject letter in that case the Court found that there were two enforceable contractual promises within the letter and accordingly the defendant was in breach of those promises.
- 45 The advent of equity into commercial relationships was not at first a popular one. In the late 1800’s such advances were said to be undesirable and Lord Lindley observed that the courts had always “set their faces resolutely against” the extension of equitable doctrines of constructive notice to commercial transactions.⁷³
- 46 This continued into the 20th century. The equitable doctrines were referred to as “trespassers” in the world of the sale of goods.⁷⁴
- 47 In a claim for equitable relief against forfeiture in a case in which a ship owner had exercised a power of withdrawal of the vessel from the service of the

⁶⁹ *Banque Brussels Lambert SA v Australian National Industries Ltd* (1989) 21 NSWLR 502, 505.

⁷⁰ *Ibid* 520.

⁷¹ *Ibid* 521.

⁷² By Leon Proscour at 302.

⁷³ *Manchester Trust v Furness* [1895] 2 QB 539 at 545.

⁷⁴ *Re Wait* [1927] 1 Ch 606 at 635-636.

charterers under a time chartered party Robert Goff LJ said when dealing with the need for certainty in commercial transactions:⁷⁵

The policy which favours certainty in commercial transactions is so antipathetic to the form of equitable intervention invoked by the charterers in the present case that we do not think it would be right to extend that jurisdiction to relieve time charterers from the consequences of withdrawal. We consider that the mere existence of such a jurisdiction would constitute an undesirable fetter upon the exercise by the parties of their contractual rights under a commercial transaction of this kind. It is not enough to say that it will only be exercised in rare cases. For the mere possibility that it may be exercised can produce uncertainty, disputes and litigation, and so prevent parties from knowing where they stand, particularly as the jurisdiction, if available, would be discretionary and there may be doubt whether it could successfully be invoked in any particular case.

48 That is not to say that equity has not played its part in moulding and enforcing certain standards of behaviour in commercial dealings. It is the capacity of equitable principles to adapt to social and economic change that has meant that equity and commercial morality have, through time, become inextricably intertwined. In contrast to the approach of Robert Goff LJ, Mason J said in *Hospital Products Ltd v United States Surgical Corporation* that “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”.⁷⁶

49 It is unfortunate that commercial skulduggery continues to present to a select few as the preferred course of conducting business.⁷⁷ In this regard, the writings of Sir Henry Maine remain apposite:

It is the confidence reposed and deserved by the many which affords facilities for the bad faith of the few, so that, if colossal examples of dishonesty occur, there is no surer conclusion than that scrupulous honesty is displayed in the average of the transactions which, in the particular case, have supplied the delinquent with his [or her] opportunity.⁷⁸

⁷⁵ *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] QB 529, 541.

⁷⁶ (1984) 156 CLR 41, 100 (emphasis added).

⁷⁷ *Hill v James* [2004] NSWSC 55 [1].

⁷⁸ Maine, above n 52, 321.

- 50 Members of the commercial community have been conducting business on the basis of the usual commercial arrangements and commercial undertakings that have served them well over the centuries. In the main they have not been troubled by the complexities of the law merchant or commercial law because they have lived pragmatically with the commercial outcomes of their transactions. Equity or the Court of Conscience has not intruded into their lives.
- 51 Realistically the vast majority of successful commercial organisations from centuries past to the present have survived in part because they have stayed away from the courts. The focus of these organisations is not on the morality of the transaction. They are interested in the commercial success of the transaction – and rightly so, you may say. What does morality matter? Equity should not be seen as an impediment to a successful commercial outcome. Equity should not enter the fray unless, in accordance with developed principles, there is conduct of an unconscientious nature.
- 52 Equity is no longer a trespasser. It has full licence to be involved in the world of commercial transactions. However equity must not be mistaken for preciousness in the world of commercial robustness. It recognises the need for freedom in commerce. It has found its place. Its presence is permanent.