Equity in Australia and the United Kingdom: dissonance and concordance

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This paper falls within the area of "comparative common law" (a concept which includes equity). It touches on four aspects of equitable principle. Speaking generally, some aspects of the first and second (confidential information and liability for knowing assistance in a breach of trust) in the Australian and United Kingdom legal systems have diverged; some aspects of the third and fourth (exceptions to Saunders v Vautier and judicial advice) have converged. How did that come about and what can be learned from it?

Introduction

I am no expert of the law of England and Wales,[1] still less Scotland, but my firm view is that there is utility in considering how different legal systems address quite precise questions *at a level of detail*. That is not to deny the utility of a more general approach, as is often undertaken in some branches of comparative law. From time to time courts have to resolve controversial questions which are, in a sense, universal. Should

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1 Hereafter, for concision, "England".

advocates enjoy an absolute immunity from suit? Should claims for pure mental harm be permitted? It is certainly useful to know the answers given in other legal systems to such questions, and quite commonly the answers are accessible, because the issues have been determined by ultimate appellate courts. But the devil may lurk in the details:[2] there is often a level of concealed complexity in the answers if divorced from their rationale and historical development. The Australian approaches to advocates' immunity[3] and damages for "nervous shock" or pure mental harm,[4] are quite complex.

Most decisions of most courts turn on much more narrowly framed questions. It is to be borne in mind that *every time* a litigant in an Australian court relies on a decision of a United Kingdom court (which must be hundreds and probably thousands of times each year), one aspect of assessing its persuasive value turns on the extent to which the foreign law has diverged from the Australian law. Sometimes this may not be separately articulated, and sometimes it is instinctive – no one would cite United Kingdom authority on quantum for compensatory damages for personal injury. Instead, citation of foreign law tends to occur in areas where the divergence is less pronounced, and, especially, where statute has not intruded at all, or has occurred in a similar way. But that may make it even harder to determine to what extent such divergence as there has been should detract from the value to be accorded to the decision.

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2 See *Tony Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* [2018] HCA 53; 93 ALJR 1 at [127] (Gageler J).

3 In *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; [2005] HCA 12 the High Court preserved the immunity, rejecting a submission based in part upon developments in the United Kingdom, but altered its basis, so that it rested upon finality, with the consequence, only recently established, that it does not apply to negligent advice as to the settlement of litigation: *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1; [2016] HCA 16, with familiar flow on consequences as the new law was applied to cases in the system: see for example *Kendirjian v Lepore* (2017) 259 CLR 275; [2017] HCA 13.

4 Principally because (a) Australian courts did not follow the lead of English courts in departing from *Victorian Railways Commissioners v Coultas* (1888) 13 App Cas 222, and (b) a minority of State legislatures introduced reforming legislation in the mid 20th century which anticipated the availability of such damages to close family members and witnesses but which then were outflanked by developments in judge-made law in cases from other States where there was no such legislation, and (c) 21st century legislation curtailing the right to recover in all cases where injury is caused by a failure to take reasonable care: see M Leeming, *The Statutory Foundations of Negligence* (Federation Press, 2019), ch 7. The details in particular areas, such as carriage by air, continue to be worked out: see *Parkes Shire Council v South West Helicopters Pty Ltd* [2019] HCA 14.

The four topics are chosen, not accidentally, from equity's exclusive jurisdiction. As James Allsop has recently observed, "Equity and equitable principle have a justification and coherence that is not merely historical and rooted in the organisation of English courts of centuries past. A conception of equity is an inhering part of any civilised system of law and justice."[5] Those characteristics, which I (echoing, amongst others, Lords Millett and Briggs)[6] have elsewhere sought to defend,[7] suggest that equity ought to provide strong, interesting candidates for comparative analysis. The examples are selected in part with a view to putting to one side the distorting effect of statutes. The purpose is to consider how and why two broadly similar legal systems have converged and diverged in their responses to the same precise questions.

Confidential information

The first topic updates a presentation given at Cambridge 8 years ago this month.[8] The paper started by noting the absence of any equivalent to the *Human Rights Act 1998* (UK) in most Australian jurisdictions. Nothing much has changed, despite recommendations in a major report from the Australian Law Reform Commission,[9] save for the passage of the *Human Rights Act 2019* (Qld), parts of which have recently commenced, with the balance coming into force on 1 January 2020. The Queensland Act contains a privacy right[10] but

5 J Allsop, "The Intersection of Companies and Trusts", Harold Ford Memorial Lecture, 26 September 2019, pp 2-3.

6 See P Millett, "Equity's Place in the Law of Commerce" (1998) 114 *LQR* 214; M Briggs, "Equity in Business" (Speech delivered as The Denning Society Annual Lecture, Lincoln's Inn, London, 8 November 2018), https://www.supremecourt.uk/docs/speech-181108.pdf; (2019) 135 *LQR* 567.

7 See M Leeming, "The role of equity in 21st century commercial disputes – Meeting the needs of any sophisticated and successful legal system" (2019) 47 *Aust Bar Rev* 137, the title of which derives from W Gummow, "Conclusion" in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co, 2005).

8 M Leeming, "Confidential Information: Same Problems, Different Resolutions in the United Kingdom and Australia", Sydney Law School Research Paper No. 11/70, available at SSRN: https://ssrn.com/abstract=1942069.

9 *Serious Invasions of Privacy in the Digital Era* (AGPS, 2013), ALRC Report 123.

10 Section 25: "A person has the right — (a) not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and (b) not to have the person's reputation unlawfully attacked."

does not implement the ALRC's recommendations. It confers no right to injunctive or pecuniary remedies of itself. It contains a provision requiring *statutes* to be interpreted, to the extent possible, so as to be compatible with human rights,[11] but is silent as to judge-made law. There are considerable similarities with the *Human Rights Act 1998* (UK), including provisions for declarations of incompatibility,[12] with no private law consequences *per se*.[13] Yet Australian jurisdictions have not developed anything like a tort of misuse of private information.[14] There has been little incentive to follow the English approach. Eight years ago, a High Court decision on the Victorian *Charter of Human Rights and Responsibilities Act 2006*, which includes counterparts to Articles 8 and 10 (see sections 13 "Privacy and reputation" and s15 "Freedom of expression"), had just been delivered.[15] Gummow J said that "the House of Lords decisions upon the UK Act exercised a fascination to the point of obsession in the preparation and presentation of much of the submissions in the present appeal. That proved unfortunate ...".[16] One critical distinction flows from Australian federalism, for it is far from clear how developments of judge-made law underlying the *Human Rights Act* could apply to the common law of Australia where only one of six States has enacted similar legislation; the same may be said of the position where two States and one Territory have done so. The characterisation of the right has very significant consequences, including in relation to

11 Section 48(1): "All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights."

12 Section 53.

13 Section 54: "A declaration of incompatibility does not — (a) affect in any way the validity of the statutory provision for which the declaration was made; or (b) create in any person any legal right or give rise to any civil cause of action."

14 Cf *Campbell v MGN Ltd* [2004] 2 AC 457; [2004] UKHL 22 at [14], *Murray v Express Newspapers Plc* [2009] Ch 481 and *Google Inc v Vidak-Hall* [2016] QB 1003; [2015] EWCA Civ 311 esp at [51]-[54] and see B McDonald and D Rolph, "Remedial Consequences of Classification of a Privacy Action: Dog or Wolf, Tort or Equity?" in J Varuhas and N Moreham, *Remedies for Breach of Privacy* (Hart Publishing, 2018), ch 10. For Australia, see *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63 at [38]-[41] (Gleeson CJ) and [335] (Callinan J); *Grosse v Purvis* [2003] QDC 151; Aust Torts Reports 81-706; *Doe v Australian Broadcasting Corporation* [2007] VCC 281; A Mason, "Legislative and Judicial Law-making: Can we Locate an Identifiable Boundary?" (2003) 24 *Adel L Rev* 15 at 35-36; D Butler, "Protecting personal privacy in Australia: Quo vadis?" (2016) 46 *Aust Bar Rev* 107.

15 *Momcilovic v The Queen* (2011) 245 CLR 1; [2011] HCA 34.

16 At [160].

choice of law, the availability of injunctions and damages, and the way in which other parties may be liable (vicariously and in other ways). [17]

Perhaps the largest change in the United Kingdom has not yet been felt. *The Trade Secrets (Enforcement, etc) Regulations 2018*[18] implement a 2016 European Union Directive,[19] qualify the granting of relief by mandatory regard to a form of proportionality,[20] and impose a cap which appears to be akin to a reasonable licence fee on compensation which may be ordered in lieu of injunctive relief.[21] They mandate regard to, *inter alia,* "moral prejudice" in the assessment of damages.[22] One way in which the regulation might be influential is the different definition of "trade secret"; another is that its structure appears to force courts to distinguish "compensation" ordered under reg 16 instead of injunctive relief, and "damages" under reg 17, in a way reminiscent of a familiar distinction between damages at common law and under *Lord Cairns' Act* (see further below).

17 See J Varuhas and N Moreham, "Remedies for Breach of Privacy" and B McDonald and D Rolph, "Remedial Consequences of Classification of a Privacy Action: Dog or Wolf, Tort or Equity?", both in J Varuhas and N Moreham, *Remedies for Breach of Privacy* (Hart Publishing, 2018), chapters 1 and 10.

18 I thank Lionel Bently for drawing this regulation to my attention. A timely account of the regulation, and the law prior to its being made, may be found in T Aplin and R Arnold, "UK implementation of the Trade Secrets Directive", available at SSRN: https://ssrn.com/abstract=3393593.

19 Directive 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information against their unlawful acquisition, use and disclosure (OJ L157, 15.6.2017), pursuant to *European Communities Act 1972*, s 2.

20 See regs 12(2) and 15(1), which are in similar terms. The former provides that "In considering whether to make an order under regulation 11(1) and in assessing the proportionality of such an order, a court must take into account the specific circumstances of the case, including where appropriate (a) the value and other specific features of the trade secret, (b) the measures taken to protect the trade secret, (c) the conduct of the alleged infringer in acquiring, using or disclosing the trade secret, (d) the impact of the unlawful use or disclosure of the trade secret, (e) the legitimate interests of the parties and the impact which the granting or rejection of the measures could have on the parties, (f) the legitimate interests of third parties, (g) the public interest, and (h) the safeguard of fundamental rights.") Regulation 11(1) confers power to make orders in the nature of interlocutory injunctions and for delivery up. Regulation 15(1) applies similarly to applications for final relief.

21 Regulation 16(2).

22 Regulation 17(3).

Differences in scope and characterisation of equitable confidence

The paper noted that Australian courts appeared to be more ready to protect so-called "getting to know you" confidences given by a former client – as it has been put, "the client's strengths, weaknesses, honesty or lack thereof, reaction to crisis, pressure or tension, attitude to litigation and settling cases and tactics".[23] That trend has continued,[24] while the reluctance of English courts[25] seems, so far as I can see,[26] not to have changed.

The paper noted the differences within Australia's separate jurisdictions. Most Australian courts hold, in agreement with *Prince Jefri Bolkiah*, that there is no "duty of loyalty" between a solicitor and a former client, such that he or she is free to act for a new client with an adverse interest so long as there is no breach of confidence or conflict with a duty to the court, save that Victorian courts persist in recognising such a duty.[27] Since then the weight of authority has continued to disfavour a duty of loyalty, including a line of Federal Court decisions in the Victorian registry,[28] although Victorian Supreme Court judges have (entirely understandably) continued to recognise this duty.[29] Although, unlike the United States, there is said to be a single common law of Australia, that does not prevent the existence of sharp points of difference within different jurisdictions. But

23 *Yunghanns v Elfic Ltd* (3 July 1998, Supreme Court of Victoria).

24 See for example In the matter of *Edgecliff Car Rentals Pty Ltd (deregistered)* [2017] NSWSC 244 (injunction granted by reason of knowledge of "litigious character and tendencies" of former clients; *Nash v Timbercorp Finance Pty Ltd (in liq)* [2019] FCA 957 at [68]-[69], [79]-[81] (applicant ultimately unsuccessful, but not on this ground).

25 See Goubran, "Conflicts of Duty: The Perennial Lawyers' Tale – a Comparative Study of the Law in England and Australia" (2006) 30 *MULR* 88.

26 I am conscious that that tentative conclusion is based only upon the absence of decided cases. The legal system is vastly more than the tiny self-selecting minority of proceedings that run to judgment.

27 See *Ismail-Zai v Western Australia* (2007) 34 WAR 379; [2007] WASCA 150; see also *PCCW-HKT Telephone Ltd v Aitken* [2009] HKCFA 11, noted *Nolan* (2009) 125 *LQR* 374.

28 *Dealer Support Services Pty Ltd v Motor Trades Association of Australia Ltd* (2014) 228 FCR 252; [2014] FCA 1065; *Nash v Timbercorp Finance Pty Ltd (in liq), in the matter of the bankrupt estate of Nash* [2019] FCA 957 at [121]-[122]. See also *Tecnicas Reunidas SA v Andrew* [2018] NSWCA 192 at [36].

29 See *Berengo v Berengo* [2014] VSC 667 at [53]-[57] and the decisions there cited, and *Break Fast Investments v Rigby Cooke Lawyers* [2015] VSC 305 at [2]. For the difficulties in other jurisdictions such as the Australian Capital Territory, see *Birkett Investments Pty v Streatfield Investments Pty Ltd* [2016] ACTSC 323 at [25].

neither has it prevented courts in England from applying Australian (and New Zealand) decisions when they have seemed apposite.[30]

Pecuniary remedies for breach of confidence

The paper then turned to the question: "What pecuniary remedies are available for a breach of confidence at general law?" Australian law had not then,[31] and still has not today,[32] taken what Lord Nicholls described as the "modest step" of permitting an account of profits for breach of contract.[33] That leads to a crisp question: when the source of a confidence is a contractual promise, when nonetheless will an account of profits be available in equity? The paper addressed the then recent decision of the Full Federal Court in *Optus Networks Pty Ltd v Telstra Corporation Ltd*,[34] where elaborate contractual provision had been made identifying what was confidential and limiting damages for breach of those provisions. The Court rejected the proposition that that was of itself sufficient to deny the availability of an account, and regarded the unavailability of an account of profits for breach of contract as a powerful reason telling against the implied exclusion of an equitable obligation. However, if the confidence is equitable, common law damages are not available, and the weight of Australian authority is to the effect that *Lord Cairns' Act* damages are not available.[35] There is an exception in Victoria, where legislative amendment has expanded the power to order such damages.[36]

30 See, most recently, *Glencairn IP Holdings Ltd v Product Specialities Inc* [2019] EWHC 1733 (IPEC).

31 *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157 at [158]-[159].

32 See *Rickard & Wilson & Active Safety Services Pty Ltd v Testel Australia Pty Ltd* [2019] SASCFC 16 at [116]-[122] (Kelly J, Kourakis CJ and Bampton J agreeing).

33 *Attorney General v Blake* [2001] 1 AC 268 at 285.

34 [2010] FCAFC 21; 265 ALR 281.

35 See *Concept Television Productions Pty Ltd v Australian Broadcasting Corporation* (1988) 12 IPR 129 at 136.

36 See *Giller v Procopets* (2010) 24 VR 1 at [403] (noting that the text above considerably simplifies the reasoning of a decision which remains controversial, and see K Barnett and M Bryan, "Lord Cairns's Act: A case study in the unintended consequences of legislation" (2015) 9 *J of Eq* 150.

The Full Federal Court held that the plaintiff could sue on an equitable confidence, notwithstanding that it was partly regulated by contract, and then elect (if appropriate, after obtaining discovery) between a compensatory order (either damages for breach of contractual confidence, or equitable compensation for breach of equitable confidence) or an account of profits. The latter might still be denied on discretionary grounds, no differently from most equitable remedies.[37]

It seems that English courts have grappled with these precise problems quite differently. The starting point for present purposes is Lord Nicholls' observation in *Attorney General v Blake*:[38]

> If confidential information is wrongfully divulged in breach of a non-disclosure agreement, it would be nothing short of sophistry to say that an account of profits may be ordered in respect of the equitable wrong but not in respect of the breach of contract which governs the relationship between the parties.

The "equitable wrong" (which I confess jars to my Australian ears)[39] in contrast with the contractual right recognises the different causes of action such a plaintiff might have, but the conclusion that there might be different remedies (which is the established Australian position) is dismissed as mere "sophistry". I wonder if this is an instance of rhetoric substituting for reasons – what is so untoward about the same conduct giving rise to separate causes of action with different remedies (such as (i) breach of contract and conversion, or (ii) negligence and breach of fiduciary duty)? On this basis it was held that an account of profits could be ordered in exceptional circumstances for breach of contract; perhaps not surprisingly, given the highly unusual facts of *Blake*, it has been noted that those "exceptional circumstances" have proven difficult to articulate.[40]

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37 In *Australian Medic-Care Co Ltd v Hamilton Pharmaceuticals Pty Ltd* [2009] FCA 1220; 261 ALR 501 at [674], Finn J had said "The grant of this form of relief in breach of confidence cases is in the end a matter for the Court, notwithstanding a party's election for an account ... An apparent reason for this is that, given the variable character of confidential information, its misuse even in a profit making activity may not realistically be able to be said to result in any profit being attributable to it, the misuse merely effecting what was in effect a saving of time and trouble ..."

38 [2001] 1 AC 268 at 285.

39 As Peter Turner has written, "It is no coincidence that equity contains no law of torts, nor that equity declares itself unable to award damages": P Turner, "Privacy Remedies Viewed Through an Equitable Lens" in J Varuhas and N Moreham, *Remedies for Breach of Privacy* (Hart Publishing, 2018) 265 at 279.

Some local disquiet with aspects of Lord Nicholls' speech in *Blake* may arguably be seen in Lord Reed's judgment in *Morris-Garner v One Step (Support) Ltd*.[41]

> Finally, in relation to Lord Nicholls' speech, the connection which he drew between *Wrotham Park* and an account of profits has had consequences in the later case law which are unlikely to have been intended. One has been a view that damages assessed on the basis of a hypothetical release fee, and an account of profits, are similar remedies (partial and total disgorgement of profits, respectively), at different points along a sliding scale, calibrated according to the degree of disapproval with which the court regards the defendant's conduct ... Related to this has been a view, illustrated by the present case, that damages assessed on the basis of a hypothetical release fee, like an account of profits in some circumstances, are available at the election of the claimant, and can be awarded by the court at its discretion whenever they might appear to be a just response. Neither view can be justified on an orthodox analysis of damages for breach of contract.

That said, his Lordship subsequently acknowledged that "some contractual rights, such as a right to control the use of land, intellectual property or confidential information" might warrant different treatment.[42]

Discretionary refusal of pecuniary remedies

The paper then stated that more interesting than the debate about whether equitable compensation or *Lord Cairns' Act* damages are available for a breach of an equitable confidence were the quite recent suggestions that there are restrictions on the right of election. A judgment of a relatively junior judge in the Chancery Division, Sales J, in *Vercoe v Rutland Fund Management Ltd*,[43] which invoked Lord Nicholls' reasoning for the reverse purpose of restricting the availability of an account of profits for an equitable confidence, was quoted at length. The analysis is, if I may say so, thoughtful and careful,

40 See D Campbell and P Wylie, "Ain't no Talking (what circumstances are exceptional)" [2003] *CLJ* 605, and the unsuccessful claims in *Marathon Asset Management LLP v Seddon* [2017] EWHC (Comm); [2017] FSR 36 at [192]-[219] and *Stretchline Intellectual Properties Ltd v H&M Hennes & Maurtiz UK Ltd (No 3)* [2016] EWHC 162 (Pat); [2016] RPC 15.

41 [2019] AC 649; [2018] UKSC 20 at [81].

42 At [92]-[93].

43 [2010] EWHC 424.

and it is not possible in the space available to do justice to it. The paper reproduced the following paragraphs:

> Lord Nicholls also identified certain remedial differences between equity and common law in relation to infringement of rights of property as being the product of mere accidents of history rather than any valid underlying principle (p280D) and rejected the sophistry involved in saying that the remedy of an account of profits may be available for breach of confidence but not for breach of contract, where the equitable and contractual obligations are in substance the same (p285C-E).
>
> In my view, Lord Nicholls' speech in *Blake* has opened the way to a more principled examination of the circumstances in which an account of profits will be ordered by the courts and where it will not. His reasoning at p285C-E, comparing remedies available in contract and for breach of confidence in relation to the same underlying facts, flows in both directions. It both opens up the possibility of an award of an account of profits in relation to breach of contract relating to confidential information and also opens up the possibility for a more principled debate about when an account of profits should be refused in relation to a breach of confidence, and a damages award (typically assessed by reference to a notional reasonable price to buy release from the claimant's rights, similar to the award made in *Wrotham Park* and *Seager v Copydex*) made instead. Both in cases of breach of contract and in cases of breach of confidence, the question (at a high level of generality) is, what is the just response to the wrong in question (cf Lord Nicholls at p284H, set out above)? In both cases, to adapt Lord Nicholls' formulation at p285A, the test is whether the claimant's interest in performance of the obligation in question (whether regarded as an equitable obligation or a contractual obligation) makes it just and equitable that the defendant should retain no benefit from his breach of that obligation. ...
>
> The law will control the choice between these remedies, having regard to the need to strike a fair balance between the interests of the parties at the remedial stage, rather than leaving it to the discretion of the claimant. The significance of *Seager v Copydex* is that it shows that, even in relation to confidential information closely akin to a patent (such as a secret manufacturing design or process), the law will not necessarily afford protection to the claimant extending to an account of profits. Still more strongly will that be the case as one moves further away from confidential information in a form resembling classic intellectual property rights towards forms of obligation in respect of confidential information more akin to purely personal obligations in contract and tort.

The paper noted that the key steps in the reasoning process were to observe that Lord Nicholls' reasoning "flows in two directions", to treat as immaterial whether the obligation is "regarded as" an equitable obligation or a contractual obligation, and

thereby to elide distinctions between the right to performance of a contract and the right to protection of a confidence.

Summary

The paper summarised the divergent positions as follows:[44]

> There may thus be seen two very different approaches to the same problem. The Australian approach is informed by an inability to obtain a non-compensatory remedy for breach of contract, and it may readily be conceded that there are respectable arguments on both sides of the "exceptional circumstances" power to do so identified in *Blake*. The Australian approach involves questions of contractual construction (namely, whether expressly or impliedly the parties have abrogated or qualified their rights in equity; if so, equity follows the law) which are themselves informed by the additional remedies afforded by equity for breach of an equitable confidence. That sort of interplay is, in a sense, the converse of the interplay seen in the typical case where the fact that the parties have stated in a contract that information is confidential is influential (although not decisive) in determining whether it does indeed have the requisite character of confidentiality. However, if an equitable confidence has not been abrogated or qualified, then the traditional election is preserved, subject to discretionary refusal (which might be expected to be rare).
>
> The English approach is simpler; in itself that is certainly no bad thing. It seems to eschew a difference between a contractual confidence and an equitable confidence whose source is contract. Two (related) considerations might be identified to question the universality of that elision. The first is that many if not most contractual confidences are over-reaching, in the sense that as well as protecting by contract what is inherently confidential, the contractual terms prevent unauthorised use of other information which would not be protected in equity. The second is that quite different policy goals underlie the vindication of the performance of contractual obligations (including by equitable remedies in equity's auxiliary jurisdiction), and the protection of confidential information in equity's exclusive jurisdiction (such as whether the adequacy of damages has any relevance to the granting of injunctive relief). It may be recalled that confidence is and has for centuries been one of the three "proper and peculiar objects of a court of equity".

Since then, Sales J's analysis has received substantial support, including from the Court of Appeal,[45] but may perhaps have been undercut by Lord Reed's implicit antipathy to the reasoning in *Blake.* The approach in *Optus v Telstra* accords with what was said in *CF*

44 See now K Barnett, "Gain-Based Relief for Breach of Privacy" in J Varuhas and N Moreham, *Remedies for Breach of Privacy* (Hart Publishing, 2018), ch 8.

Partners (UK) LLP v Barclays Bank Plc.[46] It is nuanced, and presupposes that the threshold issue is that the plaintiff may have overlapping contractual and equitable rights, which may have been excluded by the parties' agreement: if so, equity follows the law.[47] Where a contract is expressed to be exhaustive, that has been sufficient to exclude equitable remedies for breach of confidence.[48] However, if a court in the United Kingdom is ordering damages for misuse of a trade secret in accordance with the 2018 regulations, the pecuniary remedies available under regs 16 and 17 enable the analysis to cut through the complexities encountered in Australia distinguishing equitable and contractual confidences. In particular, that regulation now expressly requires the court to take into account "the negative economic consequences, including any lost profits, which the trade secret holder has suffered, and any unfair profits made by the infringer" in calculating the award of damages.[49]

Three further examples

The following three examples are summaries from a fuller comparative analysis published elsewhere.[50]

(i) Liability for knowing assistance in breach of trust

Although liability is to be traced to Lord Selborne's words in *Barnes v Addy* that "strangers are not to be made constructive trustees merely because they act as the agents

45 *Walsh v Shanahan* [2013] EWCA Civ 411, esp at [63]-[64] (Rimer LJ, Laws and Hallett LJJ agreeing). See also *Marathon Asset Management LLP v Seddon* [2017] EWHC 300 (Comm); [2017] FSR 36 at [222]-[230] (Leggat J).

46 [2014] EWHC 3049 (Ch) at [131]-[134].

47 See M Leeming, "Overlapping claims at common law and in equity: an embarrassment of riches?" (2017) 11 *J of Eq* 229.

48 *Gold and Copper Resources Pty Ltd v Newcrest Operations Ltd* [2013] NSWSC 281 at [89]-[96]. This is consistent with *Streetscape Projects (Australia) Pty Ltd v City of Sydney* (2013) 85 NSWLR 196; [2013] NSWCA 2 at [150].

49 Regulation 17(3)(i).

50 M Leeming, "The Comparative Distinctiveness of Equity" (2016) 2(2) *CJCCL* 403 at 412-419.

of trustees in transactions within their legal powers, … unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees",[51] the Australian approach still requires there to have been a "dishonest and fraudulent design" by the fiduciary, as to which the third party assisted and had sufficient notice. Notice includes knowledge of the circumstances which would indicate the facts to an honest and reasonable person, while mere constructive notice is insufficient.[52] The Australian High Court has emphasised that the formulation by Lord Selborne was not an exhaustive statement of the circumstances in which a person who was not a recipient of trust property and had not acted as a trustee de son tort might be liable,[53] and that, in particular, a person who induces or procures a trustee to commit a breach of trust will be liable irrespective of the quality of the breach. However, a person who participates in the breach but falls short of inducing or procuring it will only be liable if the breach amounts to a dishonest and fraudulent design.[54] All this reflects a close adherence to Lord Selborne's words.

The principles governing liability in England were reformulated in *Royal Brunei Airlines v Tan*,[55] where it was held that a third party could be liable, even for a wholly innocent breach by the fiduciary, if the *third party* had the requisite state of mind. I do not understand the analysis of *Barnes v Addy* liability in *Williams v Central Bank of Nigeria* to touch on this issue.[56] There has been some fluctuation in *Twinsectra v Yardley*[57] and *Barlow Clowes International Ltd v Eurotrust International Ltd*[58] on the question of the third party's state of mind. There has been a similar wavering in Australia, as to the

51 (1874) LR 9 Ch App 144 at 151-152.

52 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22; *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609; [2014] NSWCA 266; *FTV Holdings Cairns Pty Ltd v Smith* [2014] QCA 217 at [58]-[62].

53 *Farah Constructions* at [161].

54 See *Farah Constructions* at [164]; *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609; [2014] NSWCA 266 at [77]-[78]; C Harpum, "The Stranger as Constructive Trustee: Part 1" (1986) 102 *LQR* 114 at 144.

55 [1995] 2 AC 378.

56 [2014] AC 1189; [2014] UKSC 10.

57 [2002] 2 AC 164; [2002] UKHL 12.

58 [2005] UKPC 37; [2006] 1 All ER 333.

fiduciary's state of mind.[59] But whatever be the position on knowledge, the English focus on the state of mind of the third party appears to subsume the distinction made in the Australian authorities.

(ii) Exceptions to Saunders v Vautier

In some circumstances, in accordance with one aspect of the "rule"[60] in *Saunders v Vautier*, fewer than all of a number of absolutely entitled adult beneficiaries can bring a trust to an end *pro rata*, by calling for the transfer of their shares of the trust property. May that occur where the trustee holds shares in a private company and the result is that there is a change of control in the company (as in the case of the breaking up a blocking stake)?

In Australia and England, one beneficiary can bring to an end a trust of divisible property pro rata, subject to there not being "special circumstances". A line of authority holds that the mere breaking up of a parcel of shares is insufficient to constitute special circumstances.[61] However, if it is shown that the consequence is a loss in value, then there will be special circumstances.

In *Beck v Henley*,[62] the New South Wales Court of Appeal was asked to depart from that line of authority. After considering the English decisions from which the "special circumstances" exception was derived, the Court held that it should not lightly depart from judicial authority that was "long standing and consistent", and which had been

59 *Westpac Banking Corporation v Bell Group Ltd (No 3)* (2012) 42 WAR 1; [2012] WASCA 157 sought to dilute the test of dishonesty on the part of the fiduciary; it seems not to have been followed outside Western Australia.

60 The "rule" is better seen as a power on the part of the beneficiaries, with a correlative liability on the part of the trustee. See *eg CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98; [2005] HCA 53 at [44].

61 See *In re Marshall* [1914] 1 Ch 192; *Re Sandeman's Will Trusts* [1937] 1 All ER 368; *Re Weiner's Will Trusts* [1956] 1 WLR 579 and *Lloyds Bank Ltd v Duker* [1987] 1 WLR 1324.

62 [2014] NSWCA 201; (2014) 11 ASTLR 457.

applied and followed in other jurisdictions.[63] Further, the Court considered the potential consequences of deviating, stating:[64]

> It is not possible to quantify the costs — in terms of certainty, and upsetting the considered and informed desires of settlors, testators and beneficiaries, of the change in the law for which [the appellant] contends. All that can be said is that those costs would be real.

(iii) Judicial advice

Statutes in Australia and England, all deriving from a bill sponsored by Lord St Leonards,[65] authorise a trustee to obtain the benefit of a statutory defence if the trustee follows advice given after full disclosure. It makes sense — given the character of the application and the nature of the defence — to regard this as essentially equitable. The subject was considered at length in *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar.*[66]

The High Court of Australia there observed that where the New South Wales legislation "reflected and even copied laws enacted, or made, for identical or analogous circumstances in England, it was permissible and helpful to construe the New South Wales legislation with the benefit of the experience expressed in judicial observations on the English analogues".[67] Despite very significant differences in legislative history, the High Court pointed to what Lord St Leonards had said in 1857 when introducing the Trustee Relief Bill as to its being a "cheap and simple process of determining questions".[68] The High Court continued "The legislative courses taken in England and New South Wales, although superficially they diverged, in substance became very

63 At [81] (my words, with which Beazley P and Sackville AJA agreed).

64 At [81]. See also the evident international comity on this issue in *Carol Boian; Re Estate of Dan Antonio Boian* [2014] NSWSC 800 esp at [31]-[43].

65 Section 30 of the *Law of Property Amendment Act 1859* (UK).

66 (2008) 237 CLR 66; [2008] HCA 42.

67 At [53].

68 At [67].

similar. It is this fact that makes it relevant and useful for this Court to consider them for the purpose of understanding and applying in these proceedings the local legislation."

Nevertheless, the High Court had regard to the significantly altered (and expanded) provisions in section 63 of the New South Wales *Trustee Act 1925* as warranting the result that there should be no limitation confining the availability of advice to non-adversarial proceedings.

Conclusions

Obviously very little by way of empirical conclusion can be drawn from a non-randomly chosen sample of four! With that very important caveat, I suggest the following.

First, there is a role for Lord Neuberger's suggestion that is it "highly desirable for all those jurisdictions to learn from each other, and at least to lean in favour of harmonising the development of the common law round the world".[69] Other things being equal, courts may, when faced with leeways of choice, draw upon the decisions of foreign courts with a view to promoting similar development. Ultimately, this enhances not only the predictability of the law, but also its transparency, because consistency with foreign decisions is a sound reason for preferring one choice to another. This occurs in all common law jurisdictions save the United States of America, where reliance on foreign law is controversial[70] Moreover, as Lord Reed said while applying precisely such an approach, the relevant rules need not be identical: "as in mathematics, isomorphism is not the same as equality".[71] The gravamen of reasoning based on a comparative approach, and indeed the point of the case studies in this paper, is to understand what are the

69 *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250; [2014] UKSC 45 at [45].

70 This was especially associated with Scalia J: see for example *Roper v Simmons* 543 US 551 (2005). This position which is not without some irony, given the multiplicity of divergent and separate systems of "common laws" within that federation, somewhat removed from the *ius commune* or the commonality introduced by the royal courts in mediaeval England. A number of commentators have pointed to other ironic aspects of this position, including P Finkelman, "Foreign Law and American Constitutional Interpretation: A Long and Venerable Tradition" (2007) *NYU Annual Survey of American Law*, Vol 63, 2007-2008. Available at SSRN: https://ssrn.com/abstract=1310733.

71 *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2015] AC 1503; [2014] UKSC 58 at [137].

differences, as commonly may be seen at the level of detail, and how they came about. It may be that a local statute altered the line of authority (judicial advice), or a different step was taken in the judge-made law (in the form of *Blake* and *Royal Brunei*), leading directly or indirectly to a divergent approach making the foreign decision inapt. Alternatively, the issue may be so rarefied and the number of decisions so small and so untouched by statute that there are no differences at all (the special circumstances exception to *Sanders v Vautier*), in which case a foreign decision will carry significant weight. But if there are numerous considerations bearing upon the different approaches (many aspects of breach of confidence), the persuasive force of foreign decisions may be minimal. Such qualitative considerations are indispensable when assessing what weight is to be given to comparative decisions. This is the point noted at the outset of this paper: "comparative common law" is the daily grist in testing and resolving submissions in litigation in Australian courts.

Secondly, the nature of advocacy, and the nature of judgment writing, is that there is a tendency to include as many reasons as are available to support a given conclusion. Often this occurs without a clear statement of which reasons are more powerful and which are less so. This is especially true in appellate courts, where different members of the court may place different weight on the various reasons. Hence a perennial problem in comparative law is that the mere citation of foreign decisions may be merely as a buttress, or even a figleaf, rather than dispositive. Lord Hoffmann's hyperbole contains a germ of truth when he referred to "the way courts always use comparative law; as a rhetorical flourish, to lend support to a conclusion reached on independent grounds."[72] Cognate with this, and especially true of the citation of United States decisions, where there is often a range of decisions on any contentious point, is the risk of conscious or unconscious selectivity.[73] But even if one cannot with certainty identify the extent of the influence, I think one can be confident that it exists. The force of Justice Breyer's observation in debate on this point with Justice Scalia is surely self-evident:[74] "If here I have a human being, called a judge, in a different country, dealing with a similar

72 L Hoffmann, "Fairchild and after" in A Burrows, D Johnston and R Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press, 2013), 63 at 64.

73 "[T]o invoke alien law when it agrees with one's own thinking and ignore it otherwise, is not reasoned decision-making, but sophistry": *Roper v Simmons* 125 S Ct 1183 at 1228 (2005) (Scalia J).

problem, why don't I read what he says if it's similar enough? Maybe I'll learn something." *Beck v Henley* and the *Macedonian Orthodox Church* case are not, on a fair reading of the judgments, decisions where comparative law was cited merely to lend support to a conclusion reached on independent grounds.

A third point concerns the role of academic commentary. Often the easiest way to access foreign law is through academic writings. The only time I can remember being asked, judicially, to read carefully academic writing, with a view to deciding the case in a particular way, was Rayment QC recommending Charles Harpum's long article, "The Stranger as Constructive Trustee".[75] The challenge he faced was unusual in civil litigation. In order to succeed, he had to persuade the court not merely that his was the preferable argument, but that three senior judges sitting as the Western Australian Court of Appeal were "clearly wrong".[76] It may be that many advocates, whose task is merely to win the case, feel that citing academic literature is apt to prompt an unsettling question from the court: "Is there no (judicial) authority that supports this proposition?"

That does not prevent reading academic literature, and citing it when it is insightful. But it is also to be borne in mind that advocates make choices all the time when formulating submissions, and may rely on an idea taken from the literature without acknowledging it. As presently advised, I see no obligation, either as a matter of law or ethics, upon advocates to cite academic literature which has provided the idea for a submission – especially if the article was written in relation to a different jurisdiction. From time to time academic commentators, who understandably desire their work to influence the courts *in ways that are demonstrable*, complain that judgments fail to cite their work. There may be many reasons for that. And just as judgments must not be read as statutes, judgments must likewise not be read as academic literature. In particular, a failure to cite which would be deprecated in an article is not necessarily a defect of a judgment, although where academic literature materially contributes to an aspect of the court's

74 (2005) 3 *International Journal of Constitutional Law* 519, cited by G Halmai, "The Use of Foreign Law in Constitutional Interpretation" in M Rosenfeld and A Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP, 2012) 1328 at 1332.

75 (1986) 102 *LQR* 114, 267.

76 See *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609; [2014] NSWCA 266.

reasoning, citation is ordinarily warranted (which in turn may in some cases give rise to a question whether the litigants ought to be given an opportunity to be heard as to the particular article).

But very often the leeways of choice which arise in an intermediate appellate court – which tend to be relatively interstitial and most commonly involve choices of statutory construction – seem not to be the subject of any considered academic commentary. If they are discussed, that tends to occur in textbooks, rather than journals. My experience is that questions of principle largely divorced from statute law relatively seldom arise – the examples considered in this paper are *not* representative. That is not merely because most appeals are decided on the facts, nor because most law in practice is statutory. It is also because the litigants are concerned to win, and it may sometimes be in neither party's interest to raise a question of law. Winning on a debatable question of law in an intermediate appellate court may be an excellent opportunity way for the loser to seek special leave to appeal to the High Court. The unsought reformulation of *Barnes v Addy* liability by the New South Wales Court of Appeal provides an example.[77]

However, although academic commentary may be lacking, or is not provided to the court, such points may often be found (albeit after diligent research) in other common law jurisdictions. The same problems do, after all, tend to arise in different jurisdictions. To reiterate the first point, in such cases it tends to be essential to know quite a deal about the context and background to the point in *both* jurisdictions, so as to assess how persuasive the reasoning of the other court is.

77 "And the relevant part of the Court of Appeal's judgment was also unjust to the respondent, which might have wished to say something against deciding the case on that basis, or in that particular way. The judgment, which states no reason why restitutionary liability should be recognised, conveys the impression that the result was so foreordained and so inevitably correct that it was not necessary to seek any assistance, however modest, from the respondent. For its part, the respondent, which has its own good reasons for being aggrieved about the step which the Court of Appeal took, offered only the most lukewarm of support for the reasoning in this Court, and then only 'very much as a subsidiary argument'": *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22 at [133].