

**The role of equity in 21<sup>st</sup> century commercial disputes -  
Meeting the needs of any sophisticated and successful legal system**

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*Why is equity a desirable and essential element of commerce and commercial litigation? This article responds to concerns sometimes expressed that equity has little to do with commerce, that contractual disputes do not involve equitable principle and that introducing equitable principles into commerce and commercial litigation leads to uncertainty. This article also addresses the definitional and semantic difficulties inherent in those concerns.*

**Two classes of criticisms of equity in commerce**

From time to time opinions are expressed about equity intruding into the resolution by the common law of commercial disputes. There is nothing new about this. Indeed, it may be seen to underly Portia's varying approaches to Shylock – while her initial appeal to conscience and fair play fails, her insistence on very strict legal rights (devoid of any implied term about blood spilling) succeeds.<sup>1</sup> Speaking very generally, common law legal systems all descend from an English amalgam of two quite separate traditions (rule-based opaque jury determinations versus principle-based decisions by judges accompanied by reasons) and the shifts between form and substance and between rule-certainty and principled exercises of discretion continue to give rise to some of the most difficult legal

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1 See G Keeton, *Shakespeare's Legal and Political Background* (Pitman, 1967) at 135-6 and M MacKay, “The Merchant of Venice: a Reflection of the early Conflict Between Courts of Law and Courts of Equity” (1964) 15 *Shakespeare Quarterly* 371. For the legal errors and discrepancies in the play, see O Hood Phillips, *Shakespeare and the Lawyers* (Routledge, 2013) at 112-117.

problems.<sup>2</sup>

It is convenient to distinguish two quite different occasions when it is said that there should be less, or no, “equity” in commercial law: statements by judges in the course of delivering judgment, and statements in academic [138] writing. Many very distinguished judges have made statements to that or similar effect in the course of delivering judgment. For example, Lord Browne-Wilkinson said that “wise judges have often warned against the wholesale importation into commercial law of equitable principles inconsistent with the certainty and speed which are essential requirements for the orderly conduct of business affairs”,<sup>3</sup> and his Lordship was referring to statements including the caution famously expressed by Lord Selborne in *Barnes v Addy*.<sup>4</sup> Lord Walker wrote of “the general principle that the court shall be very slow to introduce uncertainty into commercial transactions by the over-ready use of equitable concepts”.<sup>5</sup> Note that both pronouncements were nuanced and qualified – *wholesale* importation and the *over-ready* use of equity.

Such statements are *not* the primary subject of this paper. When expressed by judges writing judgments, such statements are usually as part of the justification for the rejection of some particular submission based on equitable principles.<sup>6</sup> More importantly, it is to be steadily borne in mind that reasons for judgment are to be read in their context: “the words of a principle stated in a judge’s reasons for decision require consideration of what those reasons convey about the principle and are not to be applied literally.”<sup>7</sup> Such statements provide at best only slender support for any general contention that equity should not be involved in commercial litigation.<sup>8</sup>

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2 Questions as to the right level of abstraction, or the right frame of reference are as intractable as any in law, and, as Professors Twining and Miers have said in a different context, “There are no categorical rules to direct judges about the selection of appropriate levels of generality”: W Twining and D Miers, *How to Do Things with Rules*, (5th ed, 2010, Cambridge University Press) at 309.

3 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 704. (1874) LR 9 Ch App 244 at 251.

4 *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 at [81].

6 An exception was Lord Brampton's regular disparagement of much equity.

7 *Stewart v Atco Controls Pty Ltd (in liq)* (2014) 252 CLR 307; [2014] HCA 15 at [32]. Or, as Pollock put it, “Judicial authority belongs not to the exact words used in this or that judgment, not even to all the reasons given, but only to the principles accepted and applied as necessary grounds of the decision”: see *R (Smith) v Secretary of State for Defence* [2011] 1 AC 1; [2010] UKSC 29 at [135].

8 Students (and others) find this difficult to understand, especially the so-called “digital natives”, for whom cutting and pasting is endemic. For the caution which should attend the so-called “textualisation of precedent”, see M Leeming, “*Farah* and its progeny: comity among intermediate appellate courts”

The nature of academic commentary is different. There is certainly nothing to prevent broad generalisations, which on occasion can make a useful contribution to the understanding of legal doctrine, although they may also reflect the temptation to import a meretricious symmetry into the law to which Fullagar J once referred.<sup>9</sup> Such generalisations are the subject of this paper.

The particular prompt is the publication in January 2019 of a valuable volume of papers, arising from a conference at the University of Auckland.<sup>10</sup> The papers include a keen attack upon, and a careful defence of, the role of equity in commerce, by Rohan Havelock and Matthew Harding, respectively of the Universities of Auckland and Melbourne.<sup>11</sup> However, what first caught [139] my eye was a prominent statement in the introduction under the heading “Equity and Commercial Certainty”:<sup>12</sup>

As the chapters in this collection demonstrate, transactional and remedial certainty in equity is as desired as it is elusive. Some argue that the flexibility and discretionary nature of equity is at odds with the need for certainty in commercial transactions. The issue has attracted critical attention. Lord Millett, writing extracurricularly, opined:<sup>13</sup>

“Commerce needs the kind of bright line rules which the common law provides and which equity abhors. Resistance to the intrusion of equity into the business world is justified by concern for the certainty and security of commercial transactions.”

Of course, Lord Millett's 1998 paper, published in the *Law Quarterly Review*, famous (or infamous) for its strong criticism of *Target Holdings Ltd v Redferns*<sup>14</sup> was expressing the *opposite* view. Anything else would be remarkable coming from that author, and were there any doubt, it would be resolved by the paper's opening sentence, with which I respectfully agree: “Equity's place in the law of commerce, long resisted by commercial

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(2015) 12 (2) *TJR* 165 at 185.

9 *Attorney-General (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 285.

10 P Devonshire and R Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing, 2018).

11 R Havelock, “Rivalry over Liability for Defective Transfers” and M Harding, “Equity and the Value of Certainty in Commercial Life”, chapters 6 and 7 in the volume.

12 *Ibid* at 12.

13 P Millett, “Equity's Place in the Law of Commerce” (1998) 114 *LQR* 214 at 214.

14 [1996] AC 421.

lawyers, can no longer be denied”. The sentences quoted above are located in a separate paragraph commencing “Even twenty years ago there was still a widely held belief, by no means confined to common lawyers, that equity had no place in the world of commerce”, and went on to give a précis of that belief. But it was a belief which Lord Millett firmly rejected.

### ***Two questions addressed by this paper***

Yet there is no reason to doubt that Lord Millett accurately encapsulated some of the hostility which is sometimes expressed in respect of the role of equity in commerce, and in commercial litigation. And some commentators, such as Mr Havelock, advance such general views. I respectfully disagree. This paper seeks to articulate why equity, far from being antithetical to, is in fact desirable and an essential element of commerce and commercial litigation.

It should be said at the outset that the question seems scarcely to arise in New South Wales, where the *Commercial* List is part of the *Equity* Division of the Supreme Court. To people familiar with its operation, there is no tension, still less any antithesis, in the collocation of “equity” and “commercial”. A subsidiary question, related to the main question asked in this paper, is to ask why the Commercial List is part of the Equity Division of the Supreme Court of New South Wales.

### **[140] *Two meanings of “why”***

In addressing both questions, and consistently with implicit dualities which are one of this paper's themes, one needs to be careful of the subtlety of ordinary English language. “Why” – like most ordinary English words – takes its meaning from its context. However, it is a more deeply ambiguous word than many, because it often fails to distinguish causes and ends. The word “reason” carries the same ambiguity. Take two of the examples given by the distinguished – but nonetheless highly readable – philosopher, Daniel Dennett:<sup>15</sup>

1. Do you know the reason why planets are spherical?

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15 D Dennett, *From Bacteria to Bach and Back – The Evolution of Minds* (Allen Lane, London, 2017) at 39.

2. Do you know the reason why ball bearings are spherical?

The reason why planets are spherical is entirely historical – essentially, that gravity has been sufficiently strong to overcome their own rigidity and results in a spheroid shape<sup>16</sup> (until relatively recently, this was the main element of the definition).<sup>17</sup> “The reason why” in the context of the first question calls for an *historical cause*. Yet answering the second question by reference to the historical cause of the ball bearing's sphericalness (essentially, after being moulded each ball bearing is ground and polished) would probably not address the meaning of the questioner. The second question is, most naturally, directed to the *purpose* for which the ball bearing is intended to be used.<sup>18</sup> Incidentally, both questions illustrate how simple statements may be ambiguous, which ambiguity will not be resolved by a dictionary: the relevant meaning of “why” in the Shorter Oxford is “For what reason; from what cause or motive; for what purpose”, which embraces and does not resolve the basal ambiguity between historical cause and functional purpose.

Coincidentally, in many aspects of law – in making submissions in a court, or in advancing a thesis in legal writing, or in deciding a case – lawyers are concerned with *both* the historical reason for a particular rule or principle, *and* the purpose it serves. Both modes of legal reasoning are invoked in the small minority of cases which present genuine leeways of choice in areas of judge-made law, and more frequently in novel questions of statutory construction. It is a remarkable thing that the same words are used to describe such different approaches. But of course, the complaint that language is especially badly used in law is made familiar by, among others, Hohfeld.<sup>19</sup>

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16 More precisely, planetary gravitation and internal pressure are balanced, reaching a hydrostatic equilibrium.

17 The former-planet, Pluto, satisfies it, but has failed to clear its neighbourhood of smaller objects around its orbit, thereby disqualifying it from planet status under the revised definition of the International Astronomical Union in 2006.

18 Although perhaps if asked by a tour guide in a ball bearing factory, the historical cause may be the intended meaning. Context matters, even where words are used which are not patently dependent on context (or “radically context dependent”, as Endicott puts it) such as “large”: T Endicott, *Vagueness in Law* (Oxford University Press, 2000) at 20 and 131.

19 What is less familiar is that immediately before and immediately after his most famous publication, “Fundamental Legal Conceptions As Applied in Judicial Reasoning” 23 *Yale LJ* 16 (1913), Hohfeld was writing of the relations between law and equity: “The Relations Between Equity and Law”, (1913) 11 *Michigan L Rev* 537 and “The Conflict of Equity and Law” 26 *Yale LJ* 767 (1917).

**[141] Two explanations for the Commercial List being part of the Equity Division**

One answer to the question why the Commercial List is part of the Equity Division looks backwards to the respective histories of the Division and the List. On the one hand, the Equity Division, created following the judicature legislation of 1970 and 1972,<sup>20</sup> reflected the tradition developed in the second half of the 19<sup>th</sup> century of dividing the Supreme Court's jurisdiction between common law and equity.<sup>21</sup> On the other hand, the Commercial List is the successor to the Commercial Division, itself the successor of the mechanism provided by the *Commercial Causes Act 1903* (NSW), an early attempt to take commercial causes away from juries and apply streamlined provisions for their resolution.<sup>22</sup> The latter was conducted on the common law “side” of the Court, until in 1972 substantially the same procedural rules were made applicable to both the common law and equity sides of the Court.<sup>23</sup> Thereafter, for a time, a separate division, the Commercial Division, was created, until a streamlining of the court's structure led to it becoming a list within the Equity Division.<sup>24</sup>

There was no necessary historical reason for the Commercial List to be within the Equity Division. Its predecessors constituted a separate Division, or were located in the Common Law Division. Further, there was no necessary historical reason for the Equity Division to exist, especially when it is borne in mind that there was never a separate chancery court in New South Wales, while the need for judicature legislation itself was a consequence of forces of fission in the nineteenth century, contrary to the tenor of the times.

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20 The *Supreme Court Act 1970* (NSW) and the *Law Reform (Law and Equity) Act 1972* (NSW).

21 See M Leeming, “Fusion – Fission – Fusion: Pre-Judicature Equity Jurisdiction in New South Wales 1824 – 1972” in J Goldberg, H Smith and P Turner (eds), *Equity and Law: Fusion and Fission* (Cambridge University Press, 2019). The causes were complex, but included familiarity with the unreformed English and Irish legal systems, and a Colonial Office directive to assimilate procedure with that in the courts at Westminster.

22 See P Bergin, “Equity and Commercial Morality”, paper delivered 31 July 2015, “50 Years of Commercial Law: The Commercial Law Association of Australia Anniversary Conference”, Sydney, available at [http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2015%20Speeches/Bergin\\_20150731.pdf](http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2015%20Speeches/Bergin_20150731.pdf).

23 Coinciding with the commencement of the (uniform) Supreme Court Rules and the repeal of the *Common Law Procedure Act 1899* (NSW) and the *Equity Act 1902* (NSW); the similarity with the *Judicature Acts* of 1873 and 1875 is remarkable. See M Leeming, “Five Judicature Fallacies” in J Gleeson, R Higgins and J Watson (eds), *Historical Foundations of Australian Law: Volume I Institutions, Concepts and Personalities* (The Federation Press, 2013) 169.

24 Once again, there is a parallel with the power designed by Selborne to abolish, by Order in Council, the divisions corresponding with the former courts (and with them the titles of their presiding offices) which occurred in 1880 after Lord Chief Justice Cockburn and Chief Baron Kelly died.

**[142]** But such an explanation is about as unhelpful as a summary of moulding and grinding and polishing of ball bearings. A much more helpful answer, directed to the *purpose* served by the Commercial List within the Equity Division today, was given by Justice Bergin:<sup>25</sup>

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. 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”. 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.

**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,<sup>26</sup> “equity meets a need of any sophisticated and successful legal system”.**

### ***The structure of the balance of this paper***

Both Justice Bergin, and Justice Gummow whom she quoted, were answering a “why” question by reference to the *purpose* served by equity in the field of commerce. And it is this purpose – the needs of any sophisticated and successful legal system – which leads to the main question to which this paper is directed. In order to do so, it is useful to unpack the various ideas underlying the sometimes expressed antipathy to equity in commerce. They include the following:

2. Equity never had much to do with commerce;
3. Commercial disputes are essentially contractual and do not involve equitable principle;
4. Introducing equitable principles into commerce or commercial litigation leads to uncertainty.

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<sup>25</sup> Id at [30]-[31], citations omitted, emphasis added.

<sup>26</sup> W Gummow, ‘Conclusion’ in S Degeling and J Edelman (eds), *Equity and Commercial Law* (Lawbook Co, 2005) 515.

I will address each in turn below. However, the starting point (as is illustrated by the definitions of the word “why”) is to seek to obtain some precision on:

1. What is meant by “equity”?

### 1. What is “equity”?

The ambiguity in the simple interrogatory “why” is as naught compared to the different meanings of “equity” in the context of commercial litigation.

Equity means different things in different places, even where the English common law system has been inherited. Sir Frank Kitto introduced the first edition of *Equity: Doctrines and Remedies* by [143] stating “The lawyer dreads the layman's question, What is Equity?”.<sup>27</sup> But even to those familiar to the body of principles, themes and remedies associated with the court of chancery, there is ample scope for distortions to occur. Although there is much force in Johnson's observation that sometimes things may be made darker by definition,<sup>28</sup> it is necessary to bring to bear some precision.

The shades of meaning of English words are often best exposed by illustrations of their usage. Murray Gleeson once observed that throughout the common law world, wherever there was an independent Bar, many barristers styled themselves as experts in commercial litigation.<sup>29</sup> Those included the very best silks, the very best juniors, and also (and many more) of those who on most counts were not the very best, and some who were a long way from being the very best.<sup>30</sup> His point was about perception and branding: that most of the English counsel would have regarded themselves as common lawyers, while most of the Sydney counsel would have regarded themselves as equity practitioners.

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27 Foreword to R Meagher, W Gummow, J Lehane, *Equity: Doctrines and Remedies* (Butterworths, 1975), reproduced in 5<sup>th</sup> ed 2015 at v.

28 J Boswell, *Life of Johnson* (London, Jones & Company, 1829) at 366.

29 At the launch of the inaugural issue of the *Journal of Equity* in 2006.

30 That remains true in Sydney. In early April 2019, the New South Wales Bar had, according to its website, 674 barristers who claimed expertise in commercial litigation, of a total of 2492 listed (many of whom are not in full-time practice). See <http://find-a-barrister.nswbar.asn.au/search?practiceArea=13>.



Another example of the divergent understandings of equity here and in the northern hemisphere concerns trading trusts. As Nuncio D'Angelo has explained, trading trusts arose in Australia and New Zealand in the 1970s as a tax-efficient alternative to the limited liability company, suitable to operate a family business.<sup>31</sup> They flourish in Australia and New Zealand. In contrast, the leading English text describes using a trust to carry on business as “nowadays unusual”.<sup>32</sup>

Such examples disclose that the law is a practised discipline,<sup>33</sup> and that to focus merely on the minority of disputes that are resolved in courts (still less, the smaller minority that are resolved on appeal) is to overlook much of its content. For present purposes, the examples illustrate that “equity” as practised in England is different from “equity” as practised in Australia.

The divergences between the legal systems of members of the British Commonwealth and those of the United States of America<sup>34</sup> are even greater, in part because of the sustained efforts of substantive fusion commencing with the Field Codes in the 1840s and culminating at the federal level in the reformed Federal Rules of Civil Procedure in 1938.<sup>35</sup> However, [144] that has not meant that the concept of “equity” lacks contemporary relevance. The term “equitable remedy” remains in use.<sup>36</sup> The Seventh Amendment gives rise to a continuing issue – for that amendment preserves the right to trial by jury in “suits at common law”. That has been interpreted to exclude juries in “traditionally equitable substantive areas” and elsewhere to consider (a) whether the eighteenth-century analogy to the plaintiff’s claim would have been brought at law or in equity, and (2) whether the

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31 N D'Angelo, *Commercial Trusts* (LexisNexis Butterworths Australia, 2014) at 76ff.

32 L Tucker et al, *Lewin on Trusts* (Sweet & Maxwell, 19<sup>th</sup> ed 2015) at 1673.

33 Or, as it has been put, a “practised framework of practical reasoning”: G Postema, ‘Philosophy of the Common Law’ in J Coleman and S Shapiro (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 588 at 596.

34 There are at least 51 jurisdictions, each with separate ultimate appellate courts and considerably divergence – the differences between the laws of, say, California and Nevada, greatly exceed those of New South Wales and Victoria.

35 For the less well known influence of the Field Codes and David Dudley Field on the *English* judicature reforms, see M Lobban, “Preparing for Fusion: Reforming the Nineteenth Century Court of Chancery” (2004) 22 *Law & Hist Rev* 389 and 565.

36 D Dobbs and C Roberts, *Law of Remedies* (3<sup>rd</sup> ed 2018, West Publishing), p 49, and see C Saimam, “Restitution in America: Why the US Refuses to Join the Global Restitution Party” (2008) 28 *OJLS* 99 and C Saiman, “Restitution and the Production of Legal Doctrine” 65 *Wash & Lee LR* 993 (2008).

plaintiff is seeking a legal or equitable remedy, with weight being given to the latter.<sup>37</sup>

Much the same is true of State constitutions.<sup>38</sup> It will be seen that United States law treats the answer to the question posed by the Seventh Amendment as an historical one. And, somewhat remarkably, a question recently presented to the United States Supreme Court is whether an equitable defence is an answer to an action at law. In the *Merck & Co Inc v Gilead Sciences Inc* litigation,<sup>39</sup> the Federal Circuit applied the defence of unclean hands to a legal claim for damages for patent infringement.<sup>40</sup> There have been two decisions of the United States Supreme Court in the last five years confirming (what in some jurisdictions is obvious) that laches is only available against an equitable claim.<sup>41</sup>

Hence there is no surprise in the absence of any mention of equity in the descriptions of the New York Commercial Division on its webpages.<sup>42</sup> It may be that there is no little irony here. I have an impression that there is a measure of international competition between London and New York to secure transnational litigation. Part of this is seen in what Lord Sumption described as the “change in judicial mood” in relation to construction of commercial contracts, seen in decisions such as *Arnold v Britton*,<sup>43</sup> *Krys v KBC Partners*<sup>44</sup> and *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co*,<sup>45</sup> reacting in turn to the emphases on [145] commercial purpose and “common-sense” associated with Lord Hoffmann, notably in *Attorney-General of Belize v Belize Telecom Ltd*<sup>46</sup> and, ultimately, in the line of authority commencing with *Investors Compensation Scheme*.<sup>47</sup> It would be interesting to investigate, to the extent that there is rivalry between London and New York

37 See *Chauffeurs, Teamsters and Helpers, Local No 391 v Terry* 494 US 558 at 565 (1990).

38 See E Hamilton, “Note, Federalism and the State Civil Jury Rights” 65 *Stan L Rev* 851 at 855 (2013) and S Bray, “The System of Equitable Remedies” 63 *UCLA L Rev* 530 at 542-543 (2016). See generally, D Dobbs and C Roberts, *Law of Remedies* (3<sup>rd</sup> ed 2018, West Publishing) at 104-126.

39 <http://www.scotusblog.com/case-files/cases/merck-co-inc-v-gilead-sciences-inc/>. The petition for certiorari was denied on 7 January 2019.

40 *Gilead Sciences Inc v Merck & Co Inc* 888 F 3d 1231, 1239 (Fed Cir 2018).

41 *Petrella v Metro-Goldwyn-Mayer, Inc* 572 US 663 (2014); *SCA Hygiene Prod Aktiebolag v First Quality Baby Prod, LLC* 137 S Ct 954 (2017). See S Bray, “The Supreme Court and the New Equity” 68 *Vand L Rev* 997 (2015).

42 See the (doubtless self-selecting!) endorsements given by practitioners and judges at <http://www.nycourts.gov/courts/comdiv/PDFs/CommercialDivision2016Transcript.pdf>.

43 [2015] AC 1619.

44 [2015] UKPC 46.

45 [2016] AC 742.

46 [2009] 1 WLR 1988.

47 See J Sumption, “A Question of Taste: The Supreme Court and the Interpretation of Contracts” (Harris Society Annual Lecture, Keble College, Oxford, 8 May 2017), available at <https://www.supremecourt.uk/docs/speech-170508.pdf>

as centres of litigation and arbitration, whether there is a lost-in-translation problem as to what is meant by “equity”. But that is a question for another paper.

If one takes a broader viewpoint, to the world of international arbitration, the scope for multiple meanings of “equity” only increases. For example, a recurring issue is whether an arbitration agreement should include an “equity clause”. Such a clause, if permitted by the applicable law, may authorise the arbitral panel to act as *amiable compositeur* or decide the dispute *ex aequo et bono*. It is beyond the scope of this paper to consider the ways in which such clauses have been construed.<sup>48</sup> On one view, it entitles the arbitral panel to decide the arbitration on a basis other than law,<sup>49</sup> and it is clear that under Australian law, a court is not to refuse to enforce an award merely because it discloses error of law.<sup>50</sup> It is thus quite clear that when the Paris Court of Appeal held that “arbitrators acting as *amiable compositeurs* have an obligation to ensure that their decision is equitable or else they would betray their duty and give rise to a cause for annulment”,<sup>51</sup> the reference to “equitable” is very different, and not merely because of the translation from one language to another.<sup>52</sup>

Even in closely related legal systems, such as those of England, Australia, New Zealand, Singapore and Hong Kong, “equity” means different things. Indeed, one of the difficulties, well illustrated by the United States, is that just because a legal system uses a dialect of the same language and is derived from [146] the same source, it does not follow that any particular legal term carries the same meaning. If the proposition to be investigated is that there should be less equity in commerce, or in the resolution of commercial disputes, one

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48 The position is not entirely clear, as is noted (in both cases by reference to authorities) in *Apache Northwest Pty Ltd v Western Power Corporation* (1998) 19 WAR 350 at 367-368 and A Bradbrook, “Legal Issues for Lay Commercial Arbitrators” (1998) 20 *Adelaide Law Review* 265 at 278-281.

49 See H Heilbron, *A Practical Guide to International Arbitration in London* (Taylor & Francis, 2013) at 21.

50 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533; [2013] HCA 5 at [15]-[17] and [70]-[74].

51 See A Redfern and M Hunter, *Law and Practice of International Commercial Arbitration* (4<sup>th</sup> ed 2004), p 119 and K Weinberg, “Equity in International Arbitration: How Fair is Fair – A Study of Lex Mercatoria and Amiable Composition” 12 *Boston U Int'l LJ* 240 (1994). Such clauses were touched upon in *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239; [2011] HCA 37 at [86]-[90].

52 See V Curran, “Comparative Law and Language”, *Oxford Handbook of Comparative Law* (2006) at 678 (“One need only consider that if the French ‘procès’ is not a trial, it is in part because the French ‘juge’ also is not a ‘judge’, or at least that, if she is a ‘judge’, she only is so in some ways, but not in others. Further, if the French ‘juge’ is not entirely a ‘judge’, it is in part because the relevant ‘cour’ or ‘tribunal’ is not exactly a ‘court’ and so on and so forth”).

should not simply assume that there is an obvious meaning to “equity”. A more precise definition may be required in order to prevent competing arguments passing like ships in the night.

## 2. “Equity historically had little to do with commerce”

Speaking generally, if one goes back far enough, it is quite true that equity had little to do with commerce. A powerful case can be made that equity's focus on property and, especially, trusts was foreign to commercial transactions and commercial disputes – especially in an age where commercial activity was disparaged.<sup>53</sup> Mr Darcy's “very strong objections” to Jane Bennet's match with Mr Bingley was “her having one uncle who was a country attorney, and another who was in business in London.”<sup>54</sup> It is clear that both potential connections were viewed as undesirable, but to my mind, even worse than being an attorney (itself of relatively low standing in the early nineteenth century)<sup>55</sup> was being in business in the city.

But that really takes the argument no further. The common law of the 17<sup>th</sup> and 18<sup>th</sup> centuries was equally, if not even more, unsupportive of commerce. Consider how many centuries the common law took to enforce a promise not contained in a deed. Consider the common law's embrace of the conditional bond, which was ameliorated first by equity, then by statute, and as to which Lord Mansfield famously said “the Courts of law did not follow equity, but still continued to do injustice as of course”.<sup>56</sup> Or consider common law's

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53 See for example J Mummery, “Commercial Notices and Equitable Potions” in S Worthington (ed), *Commercial Law and Commercial Practice* (Hart Publishing, Oxford, 2003), 29 at 42.

54 J Austen, *Pride and Prejudice*, vol 2, ch 10.

55 One element was the change in style from “attorney” to “solicitor”. There is a fine account in P Cook, “Williams Spurrier and the Forgery Laws” (1995) 17 *Holdsworth Law Rev* 2 at 3-5, explaining why the ancient (common law) title of “attorney” was supplanted by the (equity) title of “solicitor” (essentially, the perceived higher prestige of the latter), and reproducing (at 4) the telling verse from “The English Dance of Death” (1815) extracted in P Birks, *Gentlemen of the Law* (London, 1960) at 144:

“And thus the most opprobrious fame  
Attends upon the attorney's name,  
Nay, the professors seem ashamed  
To have their legal title named;  
Unless my observation errs  
They're all become solicitors.”

See also R Robson, *The Attorney in Eighteenth-Century England* (Cambridge University Press, 1959), ch 10 “The Road to Respectability”.

56 *Bonafous v Rybot* (1763) 3 Burr 1370 at 1373; 97 ER 878 at 880.

inability *to this day* to recognise something so fundamental to commerce as an assignment of a debt.

Or – perhaps most persuasively of all – turn aside from particular common law doctrines which were unsupportive of commerce, and examine the practice of what occurred on the ground, as best as can be done centuries later. Prior to the nineteenth century, *most* commercial litigation did not take place in common law courts. The typical commercial claim prior to the 19th century [147] was heard and determined by a court of limited jurisdiction applying different procedural rules, and, it may be inferred, different substantive rules, from the superior courts of justice at Westminster. I say “inferred” because records are scarce. That scarcity is the very point. It is a remarkable fact that in the enormous body of learning that comprises 176 thick volumes of the English Reports from 1220 to 1865,<sup>57</sup> so few are commercial cases. This was familiar to one of the masters of commercial law, Thomas Scrutton, who wrote, prominently, in his *Elements of Mercantile Law*, that “if you read the law reports of the seventeenth century you will be struck with one very remarkable fact; either Englishmen of that day did not engage in commerce, or they appear not to have been litigious people in commercial matters, each of which alternatives appears improbable.”<sup>58</sup> That was something of an overstatement, as more modern scholarship has shown.<sup>59</sup> Even so, there is a measure of truth in Scrutton's explanation:<sup>60</sup>

The reason why there were hardly any cases dealing with commercial matters in the Reports of the Common Law Courts is that such cases were dealt with by special Courts and under a special law. That law was an old-established law and largely based on mercantile custom.

Lord Mansfield's much lauded innovations to the common law were needed in part because commercial disputes were resolved not in common law courts, but in separate mercantile courts, administering a different procedure and a different substantive law.<sup>61</sup>

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57 One estimate, inaccurate in its detail, but sufficient to disclose the order of magnitude, is 124,882 decisions: <http://www.commonlii.org/uk/cases/EngR/>. Of course, considerable care must attend reasoning from the minority of surviving records: see J Baker, *The Law's Two Bodies* (Oxford University Press, 2001) at 9-22.

58 T Scrutton, *Elements of Mercantile Law* (W Clowes 1891) at 4.

59 Notably, J Baker, “The Law Merchant and the Common Law before 1700” (1979) 38 *CLJ* 295, and see the account in J Rogers, *The Early History of the Law of Bills and Notes: A Study of the Origins of Anglo-American Commercial Law* (Cambridge University Press 1995).

60 T Scrutton, “General Survey of the History of the Law Merchant” in *Select Essays in Anglo-American Legal History* (Little Brown & Co 1909), Vol 3 at 47.

61 See, generally, N Poser, *Lord Mansfield: Justice in the Age of Reason* (McGill-Queen's University

“Mansfield's great achievement was to construct a settled system of principles and rules upon which merchants, lawyers, and judges could rely.”<sup>62</sup> It may also be recalled that the occasion for Mansfield's celebrated decision of *Moses v Macferlan* was that neither the local Court of Conscience for Middlesex, nor the jury at *nisi prius* in Kings Bench, would [148] accept Moses' defence to Macferlan's claim on four 30 shilling notes<sup>63</sup> which Macferlan had promised, in signed writing for valuable consideration, not to enforce.<sup>64</sup>

It might be said that it is unfair to consider the common law at that nascent phase; one should look instead to the late nineteenth century, after the procedural reforms and when the law of contract was finally being systematised. But then it would also be necessary to compare the enormous volume of work being done in chancery, especially in company law.<sup>65</sup> And even so late as 1871, a parliamentary committee had acknowledged the “general dissatisfaction existing among the mercantile community” with the superior and county courts.<sup>66</sup> One distinguished historian of the era has written:<sup>67</sup>

Most businessmen had long resented the cost, slowness and technicality of common law adjudication, but there was not a substantial body of opinion that objected also to the rigorous application of legal doctrines and hankered after a court which would apply their own customs and usages in a pragmatic, commonsense way.”

In short, historical reasons are of limited assistance in providing a meaningful answer to the question why equity should or should not be involved in commerce and commercial litigation.

### 3. “Commercial disputes are essentially contractual”

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Press, 2013), ch 13.

62 *Id* at 227.

63 Note there were *four* low value notes, so as to retain the jurisdiction of a *non-common law court*, namely, the Court of Conscience established by 23 Geo 2, c 33, sometimes known as the Small Debts, Middlesex Act 1749: see (1760) 2 Burr 1005 at 1005; 97 ER 676 at 676, and Mansfield's explanation in *Silk v Rennett* (1764) 3 Burr 1583; 97 ER 993 (the “Court of Conscience has a mixed jurisdiction, as well equitable as legal: they proceed *secundum aequum et bonum*”).

64 See for details M Leeming, “Overlapping claims at common law and in equity” (2017) 11 *Journal of Equity* 229.

65 See generally M Lobban, “Commercial Law” in *Oxford History of the Laws of England*, Vol XII, pp 613-876.

66 Select Committee on Tribunals of Commerce, Report, 1871, p 1, cited in P Polden, below.

67 P Polden, “Tribunals of Commerce”, in *The Oxford History of the Laws of England* (Oxford University Press 2010), Vol XI, pp 773-776.

To my mind, the factual premise of this objection is ill-founded for two reasons. First, many commercial disputes arise in vast areas of the law, outside the law of contract. Secondly, even those disputes which are essentially contractual very regularly involve equity.

Most commercial aircraft operated by an Australian, New Zealand or east Asian carrier are owned in equity via a moderately complicated series of trusts established by and for sophisticated investors. Some of those trusts will have aggregated the wealth of a multitude of investors (typically, a pension fund); others will have been arranged on behalf of the carrier because it is a more efficient way of financing aeroplanes and their engines.<sup>68</sup> A similar structure will own the land on which many city hotels and office buildings are built. Further, the funds to invest in those special purpose vehicles or trusts were likely acquired through a financially engineered product. None of this is [149] possible without equity. Part of a debt cannot be assigned at common law, and even an entire debt can only be assigned at law by signed writing of which notice has been given to the debtor. That makes the entirety of derivatives (including all forms of swaps underpinning much international trade) impossible but for equity. The same is true of any form of securitisation and many other forms of modern capital raising. Consequently, disputes which arise inevitably involve the application of equitable principle.

Further, consider the fiduciary relationship. As Chief Justice Allsop has said:<sup>69</sup>

It is a key component of the organisation of commercial life. That is because its key ingredients – trust, reliance and joint venture – lie at the heart of many commercial relationships. There is nothing antagonistic or awkward in the relationship between contract, fiduciary relationship and commerce. Commerce, of course, has an inherently selfish character: that is, the search for commercial gain. But it is far more than that. Perhaps it reflects one of the great complexities and subtleties of life that, whilst, to a degree, it has this selfish character, it is also the vehicle and the catalyst for far nobler aspirations and themes. This is so because hard-faced greed does not promote long term commercial success; such is built, as often as not, on mutual respect, decency and honesty. Litigation lawyers (including judges and arbitrators) sometimes scoff at this. But they only see the scrapping unpleasantness of failure and the often bad manners of litigation, or 'dispute resolution' in whatever form. They often overlook the fact that the vast majority of commercial arrangements do not end in tears, but rest on reciprocity, mutual self-interest and a requisite degree

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68 See for example *HNA Irish Nominee Ltd v Kinghorn (No 2)* [2012] FCA 228; 290 ALR 372 at [32]-[48].

69 J Allsop, “Characterisation: Its place in contractual analysis and related enquiries” [2015] *FedJSchol* 29 at [11].

of trust.

I would add that that observation is not only borne out by an appreciation that litigation tends to reflect the extraordinary, rather than the ordinary ebb and flow of commerce, but also by sophisticated game theory analysis.<sup>70</sup> And of course there is to be added the fact that every trustee, director, senior employee, liquidator, receiver, and partner (not to mention every lawyer who advises them) owes obligations which are fiduciary. The result is, as Lord Briggs has recently explained, with the benefit of an intimate knowledge of the Lehman collapse,<sup>71</sup> that:

My own experience, at the bar and more particularly as the London judge in charge of the litigation about the Lehman collapse, has shown me that, in important areas, equity is quite simply the dominant source of the relevant law, and that regulation has not, contrary to the hopes of many, provided a satisfactory alternative.

The significance of that observation is heightened when one bears in mind the place of statutory regulation in addition to that provided by judge-made law. Other examples readily come to mind.<sup>72</sup>

**[150]** Still further, when a dispute which may well arise out of a contract occurs, its resolution if confined to common law would be distinctly unsatisfactory. Does anyone defend common law's narrow approach to contribution (whereby a co-surety could not sue until there had been *actual* payment of more than that surety's just proportion)?<sup>73</sup> Does anyone dispute the merit of a surety being subrogated to its principal's rights when it has discharged its principal's obligations?<sup>74</sup> Likewise with set-off, when there have been

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70 Notably Amnon Axelrod's celebrated prisoners' dilemma computer tournaments. The classic paper is R Axelrod, “The Evolution of Cooperation” *Science*, New Series, Vol 211, No 4489 (Mar 27, 1981) at 1390-1396. For a popular account, see D Hofstadter, *Metamagical Themas* (Basic Books, New York, 1985), ch 29.

71 “Equity in Business”, The Denning Society Annual Lecture, Lincoln's Inn, London, 8 November 2018, available at <https://www.supremecourt.uk/docs/speech-181108.pdf>

72 See for example *CPIT Investments Ltd v Qilin World Capital Ltd* [2017] SGHC(I) 05, concerning Mr Lee Kai Ming (no relation) as to the rights of an equitable mortgagee over the proceeds of sale (significant because plaintiff sought and obtained an account of profits) and *Akers v Samba Financial Group* [2017] UKSC 6 – a disposition by a trustee of intangibles held on trust by a Cayman company being compulsorily wound up.

73 See *Friend v Brooker* (2009) 239 CLR 129 at [52].

74 While subrogation is understood to be an equitable doctrine in Australia: *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269; [2009] HCA 44, and appeared to be similarly regarded in the United Kingdom until the contrary was said to have been recognised in *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221. While that decision is now regarded as wrongly decided by one influential English scholar: R Stevens, “The unjust enrichment disaster” (2018) 134 *LQR* 574 at 592-3, it illustrates the



mutual dealings between commercial entities, one of which is insolvent. Or consider the protection that should be given to confidential information, even when there is no contract (noting that when there is a contractual confidence, of course the primary remedies, typically, injunction and delivery up, are equitable, not legal). I cannot readily imagine responsible businesspeople tolerating competitors exploiting a rival's obviously confidential information which has been acquired from a thief or by accident.

And even in what is probably the majority of commercial cases, which otherwise involve questions of construction, breach, causation and damages in relation to a commercial contract, either or both parties will very commonly apply for equitable remedies, notably injunction (including *Mareva* injunctions), declaration and specific performance. Obviously this happens in New York,<sup>75</sup> but once again it seems not to be *called* “Equity”.<sup>76</sup> There is a parallel in Anglo-Australian law, where we tend not to think of discovery including preliminary discovery as equitable as opposed to common law so much as neutrally procedural. Indeed, in the commercial courts, and commercial divisions and commercial lists around the world, there is an emphasis on a speedy adjudication of the real issues, and a concomitant aversion to lengthy discovery exercises. But this is typically *not* what is meant by reducing the role of equity in commercial disputes, despite the origins of the bill for discovery in equity. (Hence the significance of identifying what is meant by “equity”.)

For those reasons, even if it be accepted that the paradigm commercial dispute is contractual, there is ample need for equity, and if the legal system is to be both sophisticated and successful, so as to deal with the rights of sureties, the possibility of insolvency, proprietary relief, the protection of **[151]** confidential information, effective interlocutory relief and a host of other complexities, there is no avoiding equity.

#### 4. “Equity introduces uncertainty”

This is perhaps the most common criticism of the role of equity in commercial transactions

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importance of asking what is meant by “equity”.

75 Although the scope for granting *Mareva* relief in United States federal courts is limited by *Grupo Mexicano v Alliance Bond* 527 US 308 (1999).

76 See K Funk, “Equity without Chancery, The Fusion of Law and Equity in the Field Code of Civil Procedure, New York, 1846-76” 36 *Journal of Legal History* 176 (2015) and E Stiller, “The Origins of the Oral Deposition in the *Federal Rules*: Who's in Charge?” 10 *Seton Hall Circuit Rev* 43 (2013).

and commercial disputes. An obstacle to testing it is the generality with which the proposition is expressed. As the High Court once said in a slightly different equitable context: “generalisations may mislead”.<sup>77</sup>

First, much of equity – in particular, that part which deals with property and recognises equitable interests of beneficiaries and security interests – is not materially different, insofar as uncertainty is concerned, from the rules of common law. There is ordinarily no uncertainty at all in ascertaining whether a parcel of shares is, or is not, held on trust or that an unperfected assignment is, or is not effective in equity. A large proportion of structured finance turns on equitable interests; the trillions of dollars of assets where only equitable rights are involved is inconsistent with any significantly deleterious uncertainty. (There will of course always be exceptional cases where the rules prove to be problematic, but that is not the norm.)

Rather, the criticism that equity introduces uncertainty tends to be addressed to particular aspects of equitable doctrine, such as the occasions when equity discerns a new, unwritten obligation (say, a fiduciary obligation owed by one joint venturers to another, or owed by the managing agent to its syndicated financiers), and the discretionary remedies (such as rescission for unconscionability or the imposition of a constructive trust). On analysis, it seems that not all equity is said to promote uncertainty, but rather only some disfavoured aspects of it.<sup>78</sup>

Secondly, even if attention is limited to that disfavoured part of equity, the criticism is somewhat unfair. As Hart famously popularised with the prohibition on vehicles in the park, all rules – even the rules of the common law – will inevitably have a penumbra of uncertainty, partly because of the irreducibly open-textured nature of language and partly because that is the nature of rules.<sup>79</sup> The criticism that some aspects of equity introduce

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77 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484; [2003] HCA 15 at [36].

78 See also R Goode, “The Shaping of Commercial Law” in R Goode, *Fundamental Concepts of Commercial Law* (Oxford University Press, 2018), 167 at 177.

79 HLA Hart, *The Concept of Law* (Oxford University Press, 3<sup>rd</sup> ed 2012) at 134-135 (to which Hart added reference, as an “indeterminacy of a more complex kind”, the uncertainty in the operation of the doctrine of precedent). As Endicott has shown, citing Cardozo and Glanville Williams, in his insightful account of the sources and varieties of uncertainty and indeterminacy, the metaphor pre-dated Hart: T Endicott, *Vagueness in Law* (Oxford University Press, 2000) at 8-9.

uncertainty tends to ignore or downplay the uncertainty introduced by a suite of familiar common law doctrines, such as the implication of contractual terms or striking down provisions in unreasonable restraint of trade. Or consider the canonical common law remedy of damages. A remarkable thing about the quantification of damages in commercial litigation (in contrast with, say, personal injuries litigation where damages are often agreed at least in part) is that it is notoriously contestable. Indeed, in some cases there is more uncertainty at common law (for example, the damages for which a negligent valuer is liable will be subject to a reduction for contributory negligence, but [152] not if the valuer is a fiduciary who has breached a fiduciary obligation).<sup>80</sup> So-called “*Wrotham Park*” damages<sup>81</sup> – amounts awarded under Lord Cairns Act when an injunction was refused by way of enforcement of a negative covenant which has caused no loss to the plaintiff – are even more problematic. There have recently been decisions of the ultimate appellate courts of Singapore and the United Kingdom,<sup>82</sup> which themselves diverge.<sup>83</sup> I would readily accept that this is an especially contestable area of pecuniary relief. But it is far from the only area where there is uncertainty. I am not aware of analysis which seeks to evaluate the difference between the uncertainty flowing from the application of common law rules and those of equity – which is a pity, since the proposition that there is uncertainty which in turn is contrary to the needs of business people is an empirical one.

Considerations as to the nature of *Wrotham Park* damages in turn raise a third and broader objection to the generalisation. Are “*Wrotham Park*” damages best regarded as part of common law, or equity, or a statutory remedy? As Justice Gummow once said, generalised comparisons between common law and equity invite myopia by underestimating the significance of the role of statute.<sup>84</sup> Most of the time, as Windeyer J said, “it is misleading to speak glibly of the common law in order to compare and contrast it with a statute”.<sup>85</sup> I have sought elsewhere and at some length to address this

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80 See *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165; [2001] HCA 31 at [86].

81 *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 1 WLR 798; [1974] 2 All ER 321.

82 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44 and *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20.

83 As noted by Man Yip and Alvin See, “One Step away from *Morris-Garner*, *Wrotham Park* damages in Singapore” (2019) 135 *LQR* 36.

84 W Gummow, ‘Conclusion’ in S Degeling and J Edelman (eds), *Equity and Commercial Law* (Lawbook Co, 2005) 515 at 517.

85 *Gammage v The Queen* (1969) 122 CLR 444 at 462.

simplification.<sup>86</sup> I rather suspect that some<sup>87</sup> of the criticism of the Australian courts' application of, say, “unconscionability” in commercial litigation is in truth a criticism not of equity, but of the statutory enhancement of unconscionability as a matter of federal law, which (a) now gives rise to a *right to damages*<sup>88</sup> and (b) applies not merely to “consumer” transactions, but to transactions involving business,<sup>89</sup> and (c) is no longer limited to **[153]** transactions under a specified pecuniary limit.<sup>90</sup> Significantly for present purposes, federal law has for many years contained *separate* proscription against corporations contravening the equitable standard at general law.<sup>91</sup> It seems fairly clear that the separate, not to mention elaborately drafted, provisions proscribing what is commonly referred to as “statutory unconscionability” are broader than the norm developed in equity (most obviously, there is no requirement for any “special” disadvantage or disability, going beyond the doctrine as articulated in *Commercial Bank of Australia Ltd v Amadio* and *Louth v Diprose*).<sup>92</sup>

Thus on the one hand, equitable principle has, historically, contributed to the enactment of provisions imposing a statutory norm of unconscionability, notwithstanding that its breach sounds in damages. On the other hand, statute has expanded upon what were perceived

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86 M Leeming, “Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room” (2013) 36(3) *UNSWLJ* 1002; M Leeming, “Equity: Ageless in the Age of Statutes” (2015) 9 *J of Eq* 108; M Leeming, *The Statutory Foundations of Negligence* (Federation Press, 2019).

87 Not all; Charles Rickett distinguishes, and is strenuously critical of, both: “Unconscionability and Commercial Law” (2005) 24 *UQLJ* 73, although with respect it does little to help to assert that the legislation is “dangerous nonsense” still less to say that “Legislatures may well be able to do what they want, but they do not act constitutionally in my view if they merely foist onto judges the application of categories of meaningless reference”: at 89.

88 Following amendments in 1998 to former s 82 of the *Trade Practices Act 1974* (Cth) and the insertion of (former) s 51AC. See now s 21 of the so-called “Australian Consumer Law” (which is by no means confined to “consumers”).

89 Once again, following amendments in 1998 introducing “business” unconscionability in s 51AC.

90 The limits applicable to (former) s 51AC of the *Trade Practices Act* rose to \$3,000,000 in 2001 to \$10,000,000 in 2007, while in 2008 all pecuniary limits were removed: See *Trade Practices Amendment Act (No 1) 2001* (Cth), Schedule 1, item 2; *Trade Practices Amendment Act (No 1) 2007* (Cth), Schedule 3, items 7 and 8, and *Trade Practices Amendment Act 2008* (Cth), Schedule 3, item 12. See now s 21 of the Australian Consumer Law.

91 “A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.” See s 51AA of the *Trade Practices Act 1974* (Cth), added in 1992; see now s 20 of the Australian Consumer Law.

92 Recently restated in *Thorne v Kennedy* [2017] HCA 49; 91 ALJR 1260 by Kiefel CJ, Bell, Gageler, Keane and Edelman JJ at [38] (“A conclusion of unconscionable conduct requires the innocent party to be subject to a special disadvantage ‘which seriously affects the ability of the innocent party to make a judgment as to [the innocent party’s] own best interests’. The other party must also unconscientiously take advantage of that special disadvantage.”)

as the shortcomings or limitations in equitable principle.

A quick census of Commercial List judgments in the five years from 2014 to 2018 involving allegations of unconscionable conduct is suggestive. Of 17 such judgments:

- only 2 sought relief in equity;<sup>93</sup>
- only 3 sought relief under the statutory counterpart “unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories”;<sup>94</sup>
- 16 out of 17 sought relief under the statutory unconscionability provisions of (former) s 51AC of the *Trade Practices Act*, s 12CB of the *ASIC Act* or s 21 of the *Australian Consumer Law*;<sup>95</sup>
- **[154]** Only two of the claims were upheld (one claim in equity and one claim under s 21 of the *Australian Consumer Law*).<sup>96</sup>

Although Mr Havelock contends that “unconscionable’ is indeterminate and variable in its application”,<sup>97</sup> that is hard to reconcile even with the very simplistic sample of judgments summarised above, which suggests that (a) litigants overwhelmingly rely on statute, rather

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93 *Gladio Pty Ltd v Buckworth* [2015] NSWSC 922 and *Amil Dlakic by his tutor Liliane Dlakic v Michael John Vaughan* [2018] NSWSC 1455.

94 *Traderight (NSW) Pty Ltd v Bank Of Queensland Ltd* [2014] NSWSC 55; *Deloitte Services Pty Ltd v HBO EMTB Interiors (NSW) Pty Ltd (In Liquidation)* [2016] NSWSC 1597; *Allco Funds Management Limited (Receivers and Managers Appointed) (In Liquidation) -v- Trust Company (RE Services) Limited (in its capacity as responsible entity and trustee of the Australian Wholesale Property Fund)* [2014] NSWSC 1251

95 *Traderight (NSW) Pty Ltd v Bank Of Queensland Ltd* [2014] NSWSC 55; *TMA Australia Pty Ltd v Indect Electronics & Distribution GmbH* [2014] NSWSC 409; *Armstrong Strategic Management and Marketing Pty Limited v Expense Reduction Analysts Group Pty Ltd (No 9)* [2016] NSWSC 1005; *Westlawn Finance Limited v Tagg* [2018] NSWSC 1491; *Investec Bank v Naude* [2014] NSWSC 165; *Gladio Pty Ltd v Buckworth* [2015] NSWSC 922; *Deloitte Services Pty Ltd v HBO EMTB Interiors (NSW) Pty Ltd (In Liquidation)* [2016] NSWSC 1597; *PT Ltd v NB2 Pty Ltd* [2017] NSWSC 309; *Management Service Australia Pty Ltd v PM Works Pty Ltd* [2017] NSWSC 1743; *James Woodward Neale v Bank of Western Australia Ltd*; *Bank of Western Australia Ltd v James Woodward Neale* [2014] NSWSC 315; *Allco Funds Management Limited (Receivers and Managers Appointed) (In Liquidation) -v- Trust Company (RE Services) Limited (in its capacity as responsible entity and trustee of the Australian Wholesale Property Fund)* [2014] NSWSC 1251; *Anglican Development Fund Diocese of Bathurst v The Right Reverend Ian Palmer, Bishop of The Diocese of Bathurst*; *CBA v The Right Reverend Ian Palmer, Bishop of The Diocese of Bathurst* [2015] NSWSC 1856; *Carmelo Adriano Mastronardo v Commonwealth Bank of Australia trading as BankWest* [2017] NSWSC 1052; *APS Satellite Pty Ltd (formerly known as "SkyMesh Pty Ltd") v Ipstar Australia Pty Ltd* [2016] NSWSC 1898; *Lauvan Pty Ltd v Bega* [2018] NSWSC 154; *Brown v Tavern Operator Pty Ltd* [2018] NSWSC 1290.

96 *APS Satellite Pty Ltd (formerly known as "SkyMesh Pty Ltd") v Ipstar Australia Pty Ltd* [2016] NSWSC 1898 and *Amil Dlakic by his tutor Liliane Dlakic v Michael John Vaughan* [2018] NSWSC 1455.

97 R Havelock, “Rivalry over Liability for Defective Transfers”, in P Devonshire and R Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing, 2019), 119 at 143.

than equity – for the most part not even relying upon equity as an alternative, and (b) the large majority of claims fail.

Fourthly, a larger problem, as I see it, is that it is unreasonable to expect that in the complicated multi-partite disputes which tend to occupy the civil lists of our superior courts, things will be simple. Once again, Lord Briggs' conclusion is worth repeating:<sup>98</sup>

[G]eneral statements about the need for certainty in business and commercial relations and for the need for equity to tread carefully in that field, however desirable as a goal, do little to enlighten us about the way of achieving it. There can be no general principle which ring-fences all commercial dealings from equitable intervention. Nor is it right that there is less need for the intervention of equity in business rather than personal or family relationships. Business people can be just as abusive, unconscionable and plain beastly to each other as members of a family.

But it is true that the distinction between the rules which largely comprise common law contrasted with the principles which largely comprise equity introduce a different dimension. The papers exchanged at the international conference in Auckland mentioned above included a debate on this question. For example, it was said:<sup>99</sup>

[T]here is also a fundamental difference between (1) determining whether a particular *rule* is satisfied on the facts, and (2) determining whether a particular *standard* such as 'conscience' or 'unconscionability' has been transgressed on the facts. In the former situation, the content of the law (ie the rule) is certain, although there may be scope for difference as to whether and how it applies on the facts. Conversely, in the latter situation, the law (ie the standard) represents a sliding scale, not constrained by rules, and in this sense is uncertain.

I respectfully agree that there is a fundamental difference between applying a rule and applying a principle; essentially, it is a consequence of the fundamentally different historical modes of adjudication at common law and in equity: on the one hand, a procedure designed to produce binary issues which could be determined by the tribunal of fact (typically, a jury); on the [155] other hand, an evaluation of the entire case so as to exercise a discretionary remedy on a principled and transparent basis.<sup>100</sup>

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98 Id at [55].

99 R Havelock, “Rivalry over Liability for Defective Transfers” 119 at 144.

100 See *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113 at 118-119; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392; [2013] HCA 25 at [122]-[123].

Too much can be made of the difference in terms of uncertainty. First, Havelock’s premise, which is sound, is that most disputes of the type he is considering were unexpected and therefore need to be resolved *ex post* (including by litigation). But it needs to be borne in mind that very commonly it will not be possible, in advance of trial, even to determine the facts. Witnesses often do not come up to proof, and those that do rarely have deposed to all aspects of their involvement. The participants to conversations often have different recollections, and while sometimes the differences are stark, other time subtle, in all cases they may be material, for the familiar reasons given by McLelland CJ in *Eq in Watson v Foxman*.<sup>101</sup> Documents (especially emails) are apt to put the parties’ recollection of what they said and did in a different light. And the difficulties with determining the likely findings of contested fact may in turn mean that the litigators may not at first appreciate the ultimately dispositive legal principles. My impression is that factual uncertainty in litigation is far more common than legal uncertainty.

Secondly, there is scope for contending that even as a matter of common law, the role of rules as opposed to principles is declining. That is one of the themes advanced by Professors Carter and Courtney in their article “Unexpressed Intention and Contract Construction”.<sup>102</sup> They make the important point, when dealing with the common case where the parties have failed expressly to attend to a particular circumstance, that “The law of contract embodies a complex set of processes and techniques for resolving issues of unexpressed intention.”<sup>103</sup> It is commonplace to invoke commercial purpose, and the primacy of the text; both are principles (which are not always wholly aligned) rather than rules. Another example (although one which may be more controversial) is the extent to which notions of good faith in the performance of contracts are best seen not as the implication of a term but rather as an underlying principle which finds reflection in a large

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101 (1995) 49 NSWLR 315 at 318-319: “In many cases (but not all) the question whether spoken words were misleading may depend upon what, if examined at the time, may have been seen to be relatively subtle nuances flowing from the use of one word, phrase or grammatical construction rather than another, or the presence or absence of some qualifying word or phrase or condition.”

102 (2017) 37 *Oxford Journal of Legal Studies* 326 at 332 (For the purpose of having regard to commercial purpose, objectively determined, “all the recent decisions emphasise the use of guidelines rather than rules. The most important of these is the preference in favour of reasonable results and against unreasonable results.”)

103 *Id* at 355.

number of more precise rules.<sup>104</sup>

Further, once it is accepted that there is a place for equitable remedies, such as injunction (including interlocutory injunction) and specific performance, [156] then there will inevitably be a role for discretion. This is central to the notion that a sophisticated and successful legal system will involve equity. Commentators who neglect interlocutory relief often fail to appreciate that interlocutory relief (or the threat of it, which can therefore be resolved consensually) is endemic and vital and may often be the most important contributor to avoiding a curial determination of the underlying dispute.

Next, there is a deeper criticism, which is well exposed by Professor John Braithwaite.<sup>105</sup> Rules work well in simple cases. However, in moderately complex disputes, it is certainly contestable, and wrong to leap to the conclusion, that rules will lead to greater certainty than principles or standards. To the contrary, principles arguably create *greater* certainty than rules in complex areas. Braithwaite was acutely conscious that this is contrary to many people's intuitions.<sup>106</sup>

This hypothesis directly confronts the intuitions of most lawyers. Raz articulates this intuition clearly, without providing any empirical evidence for it: "Principles, because they prescribe highly unspecific acts, tend to be more vague and less certain than rules."<sup>107</sup> This empirical claim about how law works becomes a standard positivist normative proposition:

Since the law should strive to balance certainty and reliability against flexibility, it is on the whole wise legal policy to use rules as much as possible for regulating human behaviour because they are more certain than principles and lend themselves more easily to uniform and predictable application.

Yet Braithwaite makes a powerful case for the contrary. When rules operate in any moderately complex environment, they will have a penumbral area of uncertainty, to which "wealthy legal game players aim for the penumbra, play the game in ways that expand the

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104 See especially J Allsop, "Conscience, fair-dealing and commerce - parliaments and the courts" [2015] *FedJSchol* 17 and Lord Hope's speech in *R (European Roma Rights) v Prague Immigration Officer* [2005] 2 AC 1; [2004] UKHL 55 at [57]-[64].

105 J Braithwaite, "Rules and Principles: A Theory of Legal Certainty" (2002) 27 *Aust J Leg Phil* 47.

106 *Id* at 53-54.

107 J Raz, "Legal Principles and the Limits of Law" 81 *Yale LJ* 823 at 841 (1972).



grey area of the law”.<sup>108</sup> Some are glorified under the names “creative compliance” or “compliant non-compliance”.<sup>109</sup> While acknowledging the difficulty in marshalling evidence in support of the empirical proposition,<sup>110</sup> he gives detailed factual examples of multilateral trade negotiations, and nursing home regulation in Australia and the United States, and financial services regulation in the United Kingdom. Braithwaite's thesis corresponds with a familiar intuition associated with the complexities seen in so-called “simplification” projects which have marred Australian corporations and taxation law, in the incomprehensibility of social security legislation and in the recent history of regulation for financial planners.

Most of the literature seems to be in the area of regulation, especially in the [157] United States (notably, following the Enron collapse),<sup>111</sup> while very recently Professor Dimity Kingsford Smith has written of the advantage of principle and norms in regulating the Australian financial system.<sup>112</sup> However, it is applicable to judge-made law as well. It is an area which Allsop CJ has written extensively, including in *Paciocco v Australia and New Zealand Banking Group Ltd*, to the effect that not only does equity permeate commercial law, but also that it has long been understood that certainty was not to be achieved merely by adopting rules.<sup>113</sup>

Certainty is a quality sometimes posited as a reason for removing from the expression of rules to govern conduct (in particular in regard to commercial conduct) standards, values and norms that lack precise definition, or that involve the application of values, or that apply or operate in contestable fields or with contestable results. But no sophisticated legal system, or society, seeks intellectual refuge in the proposition that rules alone are the guardians of the security of certainty. Lord Mansfield recognised this. He said that the law merchant must be

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108 Id at p 54.

109 See I MacNeil, “Uncertainty in commercial law” (2009) 13 *Edin L R* 68 at 73.

110 Not that those propounding the converse and equally empirical proposition tend to provide evidence. Professor Martin Krygier has emphasised that the literature remains largely innocent of empirical investigations of this type: M Krygier, “The Rule of Law: Legality, Teleology, Sociology” in G Palombella and N Walker (eds), *Relocating the Rules of Law* (Hart Publishing, 2009), 45 at 64.

111 See for example ch 3 “Legal Certainty” of E Lees, *Interpreting Environmental Offences: The Need for Certainty* (Bloomsbury, London, 2015), and C Diver, “The Optimal Precision of Administrative Rules” 93 *Yale LJ* 65 at 76 (1983) (“The degree of precision appropriate to any particular rule depends on a series of variable peculiar to the rule's author, enforcer and addressee. As a consequence, generalizations about optimal rule precision are ultimately suspect”).

112 D Kingsford Smith, “The new imperatives: apply, obey and enforce the law”, *The Australian*, 8 February 2019.

113 [2015] FCAFC 50 at [266].

easily learned and easily retained: *Hamilton v Mendes* (1761) 2 Burr 1198 at 1214: 97 ER 787 at 795. The rules to which Lord Mansfield referred did not depend on subtleties and niceties of expression or idea, rather they were easily learned and easily retained, because they were “the dictates of common sense, drawn from the truth of the case”: at 1214; 795. That was not a call for rules of unbending logical expression; rather, for rules (or principles) expressed in language that reflected the customs, norms and values of the society, or commerce, of the time.

Allsop CJ went on to state, “Sometimes, a rule can only be expressed at a certain level of generality, often involving a value judgment. To do otherwise, and to seek precise rules for all circumstances, may be to risk complexity, incoherence and confusion.”<sup>114</sup> Likewise, Braithwaite concluded that a “prudent” combination of rules and principles, with the latter to be followed in cases of contradiction, is the best prescription for high levels of certainty and predictability. As Irit Samet has observed,<sup>115</sup> this very closely resembles the relationship of common law and equity in the legal systems deriving from England. Indeed, if one takes the traditional New South Wales approach, of inferior courts with no, or very limited, equitable jurisdiction, but with superior courts, notably the Supreme Court and the Federal Court, with broad jurisdiction at common law and in equity, where the most complex litigation will be heard and determined, the resemblance is even closer.

## Conclusion

The legal system is a complex system.<sup>116</sup> Very regularly, legal analysis requires two distinct levels of analysis; obvious examples are distinctions **[158]** between common law and equity, between judge-made law and statute law and between rules and principles. Some of these dualities have been illustrated above. This is not the occasion to attempt to summarise in any detail the arguments presented by Havelock and Harding in the publication which prompted this paper. However, I would respectfully endorse Harding's (commendably understated) sentiment:<sup>117</sup>

“[A]s is so often the case in law, the question of equity's performance when measured against the value of commercial certainty is more complex and multi-faceted than is sometimes suggested.”

The form as well as the substance of this paper illustrates that proposition.

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114 [2015] FCAFC 50 at [268].

115 I Samet, *Equity: Conscience Goes to Market* (Oxford University Press, 2019), p 70.

116 In both the lay and technical senses of that term.

117 M Harding, “Equity and the Value of Certainty in Commercial Life” 147 at 164.