Common law, equity and statute: limitations and analogies

Private Law Seminar
University of Technology, Sydney

Mark Leeming*
14 November 2014

1. Introduction

This paper develops and expands some of the themes sought to be exposed in my article, "Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room",[1] which was in turn inspired by some of the exchanges at a presentation to this seminar given by Keith Mason in 2012.

The thesis, broadly stated, is that one signal difference between common law and equity is their reaction to statute, a topic which is worthy of further analysis.

It may be helpful at the outset to unpack at least two components of that thesis. The first is that it still makes sense to compare, contrast and analyse separate bodies of law called "common law" and "equity". The second is that it makes sense to analyse the temporal, or dynamic aspects of the legal system, in which statutes can have a gravitational as well as an inertial effect. The fact that a legal system has a temporal dimension is uncontroversial; the "fairy tale" that common law was there to be identified rather than made was exploded *even at common law* more than a generation ago.[2] More is said of the inertial effect of statutes below. But what of the first component?

---

* Judge of Appeal, Supreme Court of New South Wales; Challis Lecturer in Equity, University of Sydney.
I wish to acknowledge the assistance of my tipstaff, Ms Hannah Vieira, in the prepartion of this paper, parts of which expand on a note "How long is too long for an equitable claim?" (2014) 88 *ALJ* 621. I am also grateful for the questions and suggestions made by participants at the seminar. All errors are mine.

[1] (2013) 36(3) *UNSWLJ* 1002.

[2] See the uncontroversial mention of courts' law-making function in *Commonwealth Bank of Australia v Barker* [2014] HCA 32; 88 ALJR 814 at [19]; contrast Lord Reid's evocation of an Aladdin's cave where

(a) Is the premise that it is sensible to distinguish common law and equity sound?

Some lawyers would regard maintaining the continuing distinction between common law and equity – let alone undertaking analysis based on such a distinction – as a sterile, antiquated endeavour. That attitude is, perhaps, implicit in the opening sentence of Lord Toulson JSC's judgment last week in *AIB Group (UK) Plc v Mark Redler & Co Solicitors*:[3]

> 140 years after the Judicature Act 1873, the stitching together of equity and the common law continues to cause problems at the seams.

Another example was given by Keith Mason, in "The Distinctiveness of Law and Equity and the Taxonomy of the Constructive Trust":[4]

> No-one discusses the law of negligence by describing the tort as a common law wrong. And no-one expounds the rules on subpoenas or discovery by suggesting that we are dealing with equitable remedies. Historical differences between tracing 'at law' and 'in equity' are also passing into history and this will eventually see the adjectival labels disappearing as well.

It is easy to think of other examples, including some which are more pointedly expressed. As Keith (and others) have observed, this is an area where some commentators seem to have made large emotional investments.[5]

I think that there are at least two distinct difficulties with that position. The first is that producing a seamless legal system in which undoubted historical differences no longer matter is a very large goal. Those differences were not confined to procedure (extant in New South Wales until 1972) but extend to real and continuing differences in

---

the common law lay hidden awaiting discovery: "The Judge as Lawmaker" (1972) *Journal of Public Teachers of Law* 22.

[3] [2014] UKSC 58 at [1].

[4] In C Mitchell and W Swadling (eds), *The Restatement Third: Restitution and Unjust Enrichment* (Hart Publishing, 2013) 185 at 203.

[5] See K Mason, "The distinctiveness and independence of intermediate courts of appeal" (2012) 86 *ALJ* 308 at 324.

methodology and approach in equity and at common law. For example, the notion of (a judge) evaluating the whole of the facts in the case, so as to craft a nuanced order for relief is quite foreign to an approach of isolating issues for determination (by a jury) so as to determine the availability as of right of orders; that fundamental difference still informs different approaches in equity and at common law.[6] Another is the profound difference between common law and equity in their relationship with precedent and reasons for judgment, to which Sir George Jessel MR referred in *Re Hallett's Estate*,[7] as did Kirby J (for a different purpose) in *Garcia v National Australia Bank Ltd.*[8] This has ongoing significance for the approach taken to change in judge-made law: for example, the approach to recognising a novel tortious duty of care is quite different from altering equitable principle.[9] These subjects could readily be the subject of a separate paper. For present purposes, I contend that erasing those differences would require an extended legislative or judicial program of law reform. By way of example, it is far from clear that the much more substantive reforms championed by David Dudley Field in the nineteenth century have obliterated the distinction between law and equity in the United States of America.[10]

---

[6] See for example the statement in *Kakavas v Crown Melbourne Ltd* [2013] HCA 25 at [18] that "The invocation of the conscience of equity requires 'a scrutiny of the exact relations established between the parties' to determine 'the real justice of the case'", referring to *Jenyns v Public Curator (Q)* (1953) 90 CLR 113 at 118-119.

[7] (1880) 13 Ch D 696 at 710.

[8] (1998) 194 CLR 395 at [44].

[9] I have in mind at common law: *Gales Holdings Pty Limited v Tweed Shire Council* [2013] NSWCA 382; 85 NSWLR 514 (special leave refused); *Day v The Ocean Beach Hotel Shellharbour Pty Ltd* [2013] NSWCA 250; 85 NSWLR 335 (special leave refused); *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36 (allowing an appeal from (2013) 85 NSWLR 479); *Dansar Pty Ltd v Byron Shire Council* [2014] NSWCA 364, and in equity: *Lavin v Toppi* [2014] NSWCA 160 (special leave granted); *Beck v Henley* [2014] NSWCA 201 (application for special leave filed).

[10] See S Bray, "The Supreme Court and the New Equity" (2015) 68 *Vanderbilt L Rev* (forthcoming; presently available on SSRN), referring, inter alia but most relevantly for present purposes, to *Petrella v Metro-Goldwyn-Mayer Inc* (USSC, 19 May 2014). Cf K Mason in C Mitchell and W Swadling (eds), *The Restatement Third: Restitution and Unjust Enrichment* (Hart Publishing, 2013) 185 at 205 ("I have detected only a trickle of modern journal articles focusing directly upon 'Equity' in American legal literature. The silence speaks louder than anything in showing how the Americans have gone past the historical duality of law and equity.")

The second is that the goal of a seamless legal system where the distinction between common law and equity is a matter of academic debate only. Until and unless the High Court says to the contrary, the Australian legal system is one replete with "normative complexity", involving "the interaction between the rules of law, principles of equity, requirements of statute, and between legal, equitable and statutory remedies".[11] To that may be added the separate bodies of admiralty and ecclesiastical law, to which a Full Court of the Federal Court recently made reference.[12] If one were to be as blunt as Professor Ibbetson, one would say that "scholarly reformulations are sterile until and unless they become accepted as part of the legal fabric",[13] although that criticism understates the role that academic writings can play.

None of this is to deny that there should not be a process by which transparency and harmonisation are enhanced. I would respectfully adopt, in this context, Lord Reed JSC's conclusion in *AIB Group*:[14]

> Those structural similarities do not however entail that the relevant rules are identical: as in mathematics, isomorphism is not the same as equality. As courts around the world have accepted, a trust imposes different obligations from a contractual or tortious relationship, in the setting of a different kind of relationship.
> ...
> This does not mean that the law is clinging atavistically to differences which are explicable only in terms of the historical origin of the relevant rules. The classification of claims as arising in equity or at common law generally reflects the nature of the relationship between the parties and their respective rights and obligations, and is therefore of more than merely historical significance. As the case law on equitable compensation develops, however, the reasoning supporting the assessment of compensation can be seen more clearly to reflect an analysis of the characteristics of the particular obligation breached. This increase in transparency permits greater scope for developing rules which are coherent with

[11] *Bankstown City Council v Alamdo Holdings Pty Ltd* (2005) 223 CLR 660 at [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

[12] In *CMA CGM SA v Ship 'Chou Shan'* [2014] FCAFC 90 at [100] (Allsop CJ, Besanko and Pagone JJ).

[13] D Ibbetson, "Comparative legal history – a methodology" in A Musson and C Stebbings (eds), *Making Legal History* (Canbridge University Press, Cambridge, 2012) 131 at 140.

[14] [2014] UKSC 58 at [137]-[138].

> those adopted in the common law. To the extent that the same underlying principles apply, the rules should be consistent. To the extent that the underlying principles are different, the rules should be understandably different.

In a nutshell, historical differences continue to matter, but not merely because of history.

(b) The relationship between equity and statute

Common law saw itself as a free-standing body of law, into which statute was an unnecessary and unwelcome intrusion.[15] There may be seen to be something of an all-or-nothing response. One example is yesterday's decision by the High Court in *Hunter and New England Local Health District v McKenna*,[16] holding that a qualified statutory obligation to release a mentally ill person was inconsistent with the common law duty of care for which the plaintiff had contended. In other cases at common law, the position is less clear. For example, common law struggled in a coherent way to identify when breach of a statute whose prohibition was an offence gave rise to a cause of action sounding in damages, reflected in Glanville Williams' famous pragmatic description, "When [penal legislation] concerns industrial welfare, such legislation results in absolute liability in tort. In all other cases it is ignored".[17] The only presently relevant reason for these comments is to contrast the position with equity, which *necessarily* had a well-developed approach to responding to both common law and statutory rules.

For equity was, in large measure, supplemental. Equity could not be seen as a self-sufficient system of principle. Its premise was that there were other rules which called for softening, or adjustment, or supplementation. It ought to come as no surprise that

[15] However, there is sustained support for the conclusion that the pair are involved in a symbiotic relationship: *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [31]; *Commonwealth Bank of Australia v Barker* [2014] HCA 32; 88 ALJR 814 at [17].

[16] [2014] HCA 44.

[17] (1960) 23 *Modern Law Review* 233.

equity dealt with statutory intrusion into its doctrines quite differently from common law.[18]

An important aspect in the task of reconciling judge-made law with statute is one of coherence.[19] The 5th edition of *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* includes a passage directed to coherence in this context:[20]

> *Equity and statute*
> Statutes present a particular challenge to coherence. Unlike most judicial decisions, statutes introduce change and legal uncertainty swiftly and on occasion with little regard to the nuances in the existing body of law. Yet statutes almost always draw upon existing elements of the legal system. Equity is well placed to accommodate statutory change. The creation of the trust, the doctrines of part performance and of fraud upon a statute, the modern notion of illegality, clean hands and the application of statutes of limitation by analogy, all turned directly on statute and equitable reactions to statutory enactments. More generally, equitable doctrines and remedies readily lend themselves to dealing with property or rights or liabilities arising under statute (consider equitable assignments and priorities, contribution and marshalling), and, for reasons which may be worthy of closer analysis than has occurred to date, statute often invokes equitable notions.

(c) The level of detail at which the analysis is conducted

A final prefatory remark is that I do not consider that much can meaningfully be said without descending to the detail of the particular statute and the judge-made law which is derived from this. Indeed, this is a large reason why, in my view, these areas are under-analysed. Elsewhere, I have referred in some detail to the need to do so in order to understand the position of subrogation and part performance;[21] the present illustration is limitation statutes.

---

[18] To be clear, it is not suggested that common law and equity have different approaches to statutory construction. This paper is not about statutory construction, but on the impact of statutes on bodies of judge-made law.

[19] At common law, those questions have been addressed in *Miller v Miller* (2011) 242 CLR 446 at [16] and [74].

[20] J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, Sydney, 2015), xxiii.

[21] M Leeming, "Subrogation, Equity and Unjust Enrichment" in J Glister and P Ridge (eds), *Fault Lines in Equity* (Hart Publishing, Oxford, 2012), 27 and above, n 1, 1008-1010.

Limitation statutes seem like a good example. There is the immediately striking difference that damages at common law which are available as of right after 5 years and 11 months become unavailable after, say, 6 years; a very different approach obtains in equity. Moreover, those differences are deeply embedded in statute – see, for example, the availability of statutory damages and an account of profits for copyright infringement.[22]

Within the topic of equity's approach to limitation statutes, this paper touches upon three areas. The first is application of limitation statutes by analogy. The second is the availability of laches notwithstanding the existence of a limitation statute. The third is the concept of "concealed fraud". Each is addressed by reference to a 2014 decision: *Gerace v Auzhair Supplies Pty Ltd*,[23] *Lallemand v Brown*[24] and *Williams v Central Bank of Nigeria*.[25]

2. Application of limitation statutes by analogy

Two hundred and forty seven years ago, Lord Camden wrote in *Smith v Clay*:[26]

> Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing.
> Laches and neglect are always discountenanced, and therefore from the beginning of this jurisdiction, there was always a limitation to suits in this court.
> Therefore, in *Fitter v Lord Macclesfield*, Lord North said rightly that though there was no limitation to a bill of review, yet, after twenty-two years, he would not reverse a decree but upon *very apparent error*.
> "*Expedit rei publicae ut sit finis litium*" is a maxim that has prevailed in this court

---

[22] *LED Builders Pty Ltd v Masterton Homes (NSW) Pty Ltd* (1994) 54 FCR 196.

[23] [2014] NSWCA 181; 310 ALR 85 (application for special leave, filed).

[24] [2014] ACTSC 235.

[25] [2014] UKSC 10; [2014] 2 All ER 489.

[26] (1767) 3 Bro C C 646 [29 ER 743].

> in all times, without the help of an act of parliament.
> But, as the Court has no legislative authority, it could not properly define the time of bar, by a positive rule, to an hour, a minute, or a year ; it was governed by circumstances.
> But as often as parliament had limited the time of actions and remedies, to a certain period, in legal proceedings, the Court of Chancery adopted that rule, and applied to similar cases in equity.
> For when the Legislature had fixed the time at law, it would have been preposterous for equity (which, by its own proper authority, always maintained a limitation), to countenance laches beyond the period, that law had been confined to by parliament.
> And therefore in all cases where the legal right has been barred by parliament, the equitable right to the same thing has been concluded by the same bar.
> Thus, the account of rents and profits, in a common case, shall not be carried beyond six years.

That decision very much needs to be placed in context. The best report, that in Brown's Chancery cases, does not record any of the facts! That report was not taken down as the judgment was delivered, instead Lord Redesdale said of it that it was "the original of which I have seen in his own handwriting", taken from his notebook.[27] The facts may be found in the (otherwise) much briefer report in Ambler's Chancery Reports.[28] A beneficiary's claim against a trustee was resolved by decree issued in 1731, but only enrolled in 1764. A bill of review was filed in 1766. It was held that time ran from the time of the decree, not its enrolment, and that the (then) twenty year rule at law applied to the application for a rehearing in equity.

The historical position was as described by Jessel MR in *Re St Nazaire Company*.[29] In addition to a right of appeal to the Lord Chancellor from a decision of the Master of the Rolls or from the Vice-Chancellors created from 1813, there was also a right to apply for a rehearing of a final decision made by the judge himself or by one of his predecessors:[30]

---

[27] In *Hovenden v Lord Annesly* (1805) 2 Sch & Lefl 607.

[28] Ambl 645. These were, according to Holdsworth, not well regarded: *History of English Law*, Vol XII, 143.

[29] (1879) 12 Ch D 88 at 97-98.

[30] (1879) 12 Ch D 88 at 98. Sometimes the right of rehearing was exercised before the same judge, but "it was much more frequently an appeal from a Judge to his successor ... Indeed, the hope of every appellant was founded on the change of the Judge".

> At first that was an unlimited right ... it was afterwards limited by General Order to twenty years, and finally to five years, and that existed down to the time of the passing of the Judicature Act.

This is not merely of antiquarian interest; it is the foundation of the modern appeal by way of rehearing.[31]

Lord Redesdale said of that passage that "Lord Camden examined the whole question with that accuracy which peculiarly belonged to him".[32] It may be seen that there was a sophisticated and nuanced recognition of the relationship between the discretionary withholding of relief in equity for delay, and statute. (I should not be taken to be saying that the position was always so clearly expressed; the contrary is the case.)[33] For present purposes, what matters most is that Lord Camden perceived no scope for some residual discretion.

But there was much confusion in the nineteenth and twentieth centuries as to the relationship between laches and the applicability of a statute of limitations. One approach was for the limitation statute to apply *as part of* the law of laches, so that a "residual discretion" is retained. The modern starting point on this approach seems to have been J W Brunyate's influential text, *Limitation of Actions In Equity*,[34] to the effect that where a statute of limitations is applied by analogy, it does so as part of the law of

---

[31] See *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 108–9; *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 619–20, 625–8.

[32] In *Hovenden v Lord Annesly* (1805) 2 Sch & Lefl 607, a judgment which was delivered after several days' argument around the Chancellor's sickbed at home: see *Williams v Central Bank of Nigeria* [2014] UKSC 10; [2014] 2 All ER 489 at [14].

[33] This is an example of the often self-conscious selectivity of some types of legal history: see (for example) M Lobban, "The Varieties of Legal History" (2012) 5 *Clio@Themis: Revue électronique d'histoire du droit* 1 and P McHugh, "Law, History and the Tribes" in in A Musson and C Stebbings (eds), *Making Legal History* (Canbridge University Press, Cambridge, 2012) 164 at 167, echoing F Maitland's 1888 lecture, "Why the History of English Law is not Written".

[34] 1932, Stevens & Sons, London.

laches and "may reasonably allow any exceptions that are allowed in the law of laches".[35] That approach was applied fairly uncritically in the Supreme Court of Canada[36] and in the New South Wales Court of Appeal,[37] and in many other intermediate appellate decisions. It may be illustrated by a passage in *The Duke Group Ltd (in liq) v Alamain Investments Ltd*:[38] "before applying the statutory time limit by analogy, I must be satisfied that in all the circumstances it is just to do so".

The "residual discretion" approach was rejected, after full argument and analysis of the authorities in *Gerace v Auzhair Supplies Pty Ltd*.[39]

(a) Gerace v Auzhair

The appellants were three brothers who were the sole directors and members of the first respondent Auzhair. In 2002 and 2003, two lenders advanced funds to Auzhair, and received interest payments over the next six years. In around February 2005, the appellants and the lenders agreed to transfer the assets of Auzhair to the second respondent, Auzhair 1 Pty Ltd, a company in which both the brothers and the lenders were shareholders. In June 2005, Auzhair was deregistered on the application of one of the brothers, who declared that it had no liabilities. That was not so, because of its continuing indebtedness to the lenders, but it was not alleged that he had acted dishonestly. To the contrary, it was found that the brother believed that Auzhair's liability had been assigned along with its assets. The transaction was minimally documented. In fact, it seems that the *only* evidence explaining the transaction was a statement by one of the brothers, "We decided to establish a new company. We all discussed it, and decided to transfer everything to the new company".[40] It was not

[35] Ibid at 17.

[36] In *KM v HM* (1993) 96 DLR (4th) 289.

[37] In *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497.

[38] [2003] SASC 415 (appeal dismissed (2005) 91 SASR 167).

[39] [2014] NSWCA 181; 100 ACSR 465.

[40] See [2013] NSWSC 1 at [2].

seriously in dispute that in transferring the company's assets to Auzhair 1 Pty Ltd for little or no consideration, the appellants had acted in breach of fiduciary duty.

Auzhair was reinstated in 2010 on the lenders' application. It sued Auzhair 1 Pty Ltd and the three brothers, but only after more than six years had elapsed. Section 1317K of the *Corporations Act 2001* (Cth) provides a six year limitation period for claims for compensation for breaches of directors' statutory duties under ss 180-183. Auzhair only sued in equity, but the directors sought to apply the statutory limitation period by analogy to the equitable claims made against them. In opposition to this, it was pointed out that for most of that six year period, Auzhair had ceased to exist, so as to found an exercise of the residual discretion. That submission was accepted by the primary judge, but an appeal was allowed. Beazley P and Emmett JA agreed with the judgment of Meagher JA.

(b) Three threshold issues

It may be helpful to identify so as to put to one side three threshold considerations immediately. First, it was common ground on appeal that there had been no concealed fraud (as to which see further below).

Secondly, Auzhair's claim was confined to claims in equity's exclusive jurisdiction. If, say, relief by way of injunction or specific performance is sought in equity's auxiliary jurisdiction, but a claim at law for damages for nuisance or breach of contract would be statute-barred, then the analysis is different, not least because of the express reference to such equitable claims in many important limitation provisions,[41] which is probably the key to reconciling the divergent authorities.[42]

---

[41] See for example Limitation Act 1969 (NSW), s 23; Limitation of Actions Act 1974 (Qld), s 10(6)(b) and Limitation of Actions Act 1958 (Vic), s 5(8).

[42] This is outside the scope of this paper, but contrast *R v McNeil* (1922) 31 CLR 76 at 100 where Isaacs J said that Equity has "no more power to remove or lower the bar than has a Court of law" with the result in *Fitzgerald v Masters* (1956) 95 CLR 420 where specific performance was decreed of a contract for sale of land executed more than two decades earlier.

Thirdly, a limitation statute may apply *directly* to a claim in equity's exclusive jurisdiction. One example is a claim brought by a beneficiary against a trustee of an express trust for breach of trust. Section 25(2) of the *Judicature Act 1873* (UK) had confirmed that no such claim was "barred by any Statute of Limitations", thereby restating and not altering the existing law.[43] However, s 8 of the *Trustee Act 1888* (UK) reversed the position and made all limitation defences applicable to such claims save where the claim was founded on "any fraud or fraudulent breach of trust". This was part of legislative reforms designed to relieve honest trustees from what was perceived to be the harshness of equitable principles.[44] The 1888 provision is preserved in the legislation of South Australia, and continues in modified form in other Australian States and Territories.

(c) Rejection of the residual discretion approach

But where statute does not apply in its terms to an equitable claim, then there are two potentially conflicting equitable doctrines. On the one hand, a defence based on laches or acquiescence may be available. Alternatively, equity may apply a limitation statute by analogy, where (in Lord Westbury's words) "the suit in Equity corresponds with an action at law which is included in the words of the statute".[45] What is the relationship between the two?

Meagher JA's reasons in *Gerace* demonstrated that incorporating a limitation statute within the doctrine of laches does not accord with principle or High Court authority, notably *R v McNeil*. His Honour said:[46]

[43] See *Clay v Clay* (2001) 202 CLR 410 at [23].

[44] See *Williams v Central Bank of Nigeria* [2014] 2 All ER 489 at [22] (Lord Sumption SCJ).

[45] *Knox v Gye* (1872) 5 LR HL 656 at 674.

[46] [2014] NSWCA 181 at [70].

> The authorities referred to above, and in particular *R v McNeil*, show that in purely equitable proceedings, where there is a corresponding remedy at law in respect of the same matter and that remedy is the subject of a statutory bar, equity will apply the bar by analogy unless there exists a ground which justifies its not doing so because reliance by the defendant on the statute would in the circumstances be unconscionable. They do not support the proposition that equity retains any broader discretion whether to apply the bar.

The difficulty with any other course is readily stated: if a residual discretion were retained as to whether to apply a limitation statute by analogy, then equity "would not truly be acting by analogy and following the law".[47] That was the approach taken by all members of the High Court in *R v McNeil*, following what had been said in *Gibbs v Guild*.[48] It is implicit in the reasoning of Dixon J in *Cohen v Cohen*.[49] Consistently with this, one author had said, more than a century ago, that "The doctrine of laches, therefore, is confined to equitable claims which are subject to no statutory bar either expressly or by analogy".[50] In many cases, little may turn on the difference, but it will be seen that in *Gerace* it was decisive. But, as will be appreciated, the primary focus of this paper is on the conceptual relationship between equity and limitation statutes, as opposed to the practical consequences.

3. Shortening and lengthening the limitation period

(a) Laches before the limitation statute expires?

Section 27 of the *Limitation Act 1985* (ACT) applies to "an action on a cause of action in relation to … a fraudulent breach of trust". Somewhat counterintuitively, "action" is defined to include "any proceeding in a court" and "cause of action" is correspondingly defined to mean "the fact or combination of facts that gives rise to a right to bring a civil proceeding". Hence it is established that s 27 applies *directly* to some classes of claims in equity's exclusive jurisdiction, including claims based on the "limbs" of *Barnes v*

[47] Ibid at [74].

[48] (1882) 9 QBD 59 by Brett LJ at 68.

[49] (1929) 42 CLR 91.

[50] J Lightwood, *The Time Limit on Actions* (London, Butterworth & Co, 1909), p 255.

Addy,[51] limiting them to a period of 12 years "running from the date when the plaintiff, or a person through whom he or she claims, first discovers or may with reasonable diligence discover the facts giving rise to the cause of action", subject to the possibility of an extension where there is fraudulent concealment.

Whether laches was available *in addition* to that statutory defence was one of the issues determined in *Lallemand v Brown*,[52] in circumstances where it was said that the plaintiffs' deceased parents had orally promised to give a property to them, in circumstances where all the facts were known and no steps were taken until the promisors had died. Mossop M was taken to the statement by Wilberforce J in *In re Pauling's Settlement Trusts* that where there was an applicable statutory period of limitation "there is no room for the equitable doctrine of laches",[53] but observed that no regard had been given to a provision *specifically designed* to deal with the resolution of conflict between the statutory and equitable rules. Section 29 of the *Limitation Act 1929* (UK) (which has counterparts in the Australian Capital Territory and New South Wales)[54] provides that "Nothing in this Act affects any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise". His Honour also observed that identical statutory language in the Territory counterpart appeared in a materially different context, because the broad definition of "action" and "cause of action" meant that the Act applied directly to equitable claims.[55] Accordingly, his Honour found that laches was available:[56]

> the defence of laches is available notwithstanding the existence of a statutory limitation period if it is established that by reason of the delay in bringing proceedings the defendant has suffered prejudice which would make the granting of relief unjust.

---

[51] See *Morlea Professional Services Pty Ltd v Richard Walter Pty Ltd (in liq)* (1999) 96 FCR 217.

[52] [2014] ACTSC 235.

[53] [1962] 1 WLR 86 at 115.

[54] *Limitation Act 1969* (NSW), s 9; *Limitation Act 1985* (ACT), s 6.

[55] [2014] ACTSC 235 at [148].

[56] *Ibid* at [155].

It may be seen that had the Act merely applied by analogy, as it does in most other Australian jurisdictions, then it would seem to be necessary for a defendant to point to something more, such as release or an estoppel. It may also be seen that there is a nuanced relationship between statute and equity; small changes in the statutory scope result in large differences.

(b) Extending the statutory period - fraudulent concealment

Fraudulent concealment is an equitable doctrine applicable to equitable claims. But the doctrine is entangled with statute, and now applies to claims at law, because statute has made it applicable more broadly. As is explained in the joint reasons of the High Court in *Cornwell*,[57] the equitable doctrine was enacted, with modifications, in s 26(b) of the *Limitation Act 1939* (UK) and then s 32 of the *Limitation Act 1980* (UK); similar processes may be seen in the modern Australian statutes of limitation.

The traditional position was described in the 1969 (and therefore pre-Judicature Act, and pre-*Limitation Act* decision in *Metacel v Ralph Symonds Ltd*).[58] The question arose on a demurrer to a replication to the defendant's plea of the statute of limitations to common law claims in tort and contract arising out of the supply and installation of an automatic fire sprinkler system. The plaintiff's replication was that there had been concealed fraud; the defendant's demurrer was upheld, because concealed fraud was no answer to the defendant's pleading of the statute of limitations. As it was put, "the statute is absolute in its terms". Sugerman JA applied the reasoning of Isaacs J in *R v McNeil,* echoing the themes to which Lord Camden had referred two centuries before:[59]

> What right or power has any Court to disregard the condition as to time and by any rule or doctrine or its own add an alternative period in the case of fraud? ... The position may be shortly stated. Where a Court of equity finds that a legal

[57] (2007) 231 CLR 260 at [40]-[44].

[58] [1969] 2 NSWR 201, a demurrer which was argued over *two* days!

[59] (1922) 31 CLR 76 at 99-100.

> right, for which it is asked to give a better remedy than is given at law, is barred by an Act of Parliament, it has no more power to remove or lower that bar than has a Court of law. But where equity has created a new right founded on its own doctrines exclusively, and no Act bars that specific right, then equity is free. It usually applies, from a sense of fitness, its own equitable doctrine of laches and adopts the measure of time which Parliament has indicated in analogous cases, but, when a greater equity caused by fraud arises, it modifies the practice it has itself created and gives play to the greater equity.
> ...

As Sugerman JA said:

> Concealed fraud remains a special doctrine of courts of equity applicable where relief is sought in those courts and is not applicable in bar of the Statute of Limitations in a pure common law action.

However, now that most limitation statutes apply these provisions directly to common law claims, the position is quite different. The equitable defence has been expanded by statute to apply to a common law claim.[60] In order to determine the position, it is unavoidably necessary to have regard to that history.

The judgment of the United Kingdom Supreme Court in *Williams v Central Bank of Nigeria*[61] proceeds on a similar basis. The plaintiff claimed he had been defrauded by a solicitor, decades before, to which fraud the bank was a party. One of the questions was whether a person liable under the first "limb" of *Barnes v Addy* was a trustee, a term which was defined to include "constructive trustee", in which case a limitation period would not apply. As Lord Sumption JSC said:[62]

> [A] constructive trust of the kind alleged against the Bank is not a true trust. To explain why this is so, it is necessary to examine the rather complicated

[60] In 1967, the New South Wales Wales Law Reform Commission followed the 1939 Act, but expanded it to extend to concealment of the defendant's identity, and altered the language slightly for clarity: *LRC 3*, p 131.

[61] [2014] UKSC 10; [2014] 2 All ER 489.

[62] [2014] UKSC 10; [2014] 2 All ER 489 at [6]-[7].

> interaction between the successive statutes of limitation and the equitable rules regarding the limitation of actions against trustees.
>
> The combined effect of the definition sections of the *Limitation Act 1980* and the *Trustee Act 1925* is that in section 21 of the *Limitation Act* a trustee includes a "constructive trustee". Unfortunately, this is not as informative as it might be, for there are few areas in which the law has been so completely obscured by confused categorisation and terminology as the law relating to constructive trustees.

There followed a careful analysis of *both* the legislative history *and* the understanding of first limb liability (as well as the confused decisions). The details are outside the scope of this paper; for present purposes, I wish merely to observe that only by undertaking that analysis can a satisfactory answer be given.

4. Conclusion

I am not sure whether you would agree with Francis Pettigrew, who is quoted as saying "Limitation of actions – a subject I used to think dull, but never will again".[63] However, I do share the belief of Peter Handford (whose book cites Pettigrew in its preface) that:[64]

> "Limitation of actions may appear on the surface to be the blackest of black letter law, an endless succession of cases and statutory provisions, but in fact the rules cloak many policy issues of great complexity and the utmost social importance."

But, as you will have noticed, this paper is not really about statutes of limitations. It is primarily about the relationship between equity and statute. Common law lacks the unifying maxim that equity follows the law, the discretionary defence of laches and the doctrine of applying a limitation statute by analogy. Those aspects of equitable principle have, in a sophisticated way, which can be traced back centuries, allowed for a nuanced interplay between equity and statute. Moreover, the relationship is a two-way street. On the one hand, equity applies the statute by analogy, and in a way that turned on its precise terms and scope. On the other hand, statute has extended equitable doctrine such as fraudulent concealment and incorporated it into statute (the same process may be seen

[63] In the 1942 novel *Tragedy at Law* by Cyril Hare.

[64] P Handford, *Limitation of Actions* (Thomson Reuters, 3rd ed, 2012) preface to 2nd edition).

throughout the law).[65] That process in turn has an inertial effect, which is one reason why I have previously written that statutes were a leading driver of change *and* restraint in the legal system.[66]

Limitation legislation is a powerful example of the latter. Limitation statutes – which are quintessentially "lawyers' law", are rarely amended. Not least because a limitation statute gives a defendant a valuable right – a defence where one might otherwise not exist - they are apt to be difficult to change, and to be formulated in terms which reflect legal language at the time they were enacted. Hence the *Limitation Act 1969* (NSW) speaks archaically of claims in quasi-contract.[67] Hence also the complaint made by Sir Christopher Staughton and Clarke LJ in *Cia de Seguros Imperio v Heath (REBX) Ltd* that:[68]

> It is not obvious to me why it is still necessary to have special rules for the limitation of claims for specific performance, or an injunction, or other equitable relief. And if it is still necessary to do so, I do not see any merit in continuing to define the circumstances where a particular claim will be time-barred by reference to what happened, or might have happened, more than 60 years ago.

There is self-evident force in their Lordships' complaint, yet where as is so often the case the fine distinctions (especially in statute) reflect its history, there will commonly be one litigant who places those matters to the forefront, and it is no small thing to put those distinctions to one side so as to enhance simplicity. But whether or not, in any particular case, there is an occasion for change (whether legislative or judicial) turns on considerations beyond the scope of this paper, whose more limited purpose is to contend that it is worthwhile to analyse the relationship between equity and statute law.

---

[65] Above, n 1, 1010-1011.

[66] Above, n 1, 1003, 1022-23.

[67] See *Nu Line Construction Group Pty Ltd v Fowler* [2014] NSWCA 51.

[68] [2001] 1 WLR 112 at 124.