The Structure of Private Law and the Role of Primary Liabilities

The following is a summary of a Current Legal Issues Seminar presentation, made at the Queensland Supreme Court by Professor Ben McFarlane on 13 July 2016. The discussion of equitable estoppel is developed in more depth in 'Equitable Estoppel as a Cause of Action: Neither One Thing Nor One Other' in *Contract in Commercial Law* (eds Degeling et al, Lawbook Co, 2016).

1. Overview

Contract, torts, and property are traditionally seen as the three core categories of private law, and the law of each can be seen as a source of duties. Certainly, many private law claims are based on either the breach of such a duty by the defendant, or on the enforcement of a claimant's correlative right. In some recent academic work, however, Professor Stephen Smith has emphasised the important distinction between legal rules that impose duties and those which, instead, impose liabilities (see e.g. 'Duties, Liabilities, and Damages' (2012) 125 Harv L Rev 1727). The former, he explains "tell citizens how to act (and how others should act towards them)" whereas the latter "tell citizens what the state may do to them (and what they may cause the state to do to others)". Smith has argued, for example, that the breach of contract, or the commission of a tort, does not mean that a defendant is under an immediate duty to pay damages; rather, a liability arises, as the defendant's act means that a court now has the power to make an award of damages. It is only on the making of the award that a duty to pay damages can be said to arise.

The liability arising where a defendant breaches a contract or commits a tort may be seen as a secondary liability, as it depends on a breach by the defendant of a primary duty, imposed by the law of contract or of torts. As Smith has argued in relation to the law of restitution of unjust enrichment (see e.g. 'A Duty to Make Restitution' (2013) 26 Can J L Juris 157), however, it may also be possible to identify rules that impose what might be called a primary liability. If, for example, C makes an electronic transfer to D's bank account in the mistaken belief that C owes that sum to D, it is difficult to say that the mere fact of D's receipt of that benefit imposes an immediate duty on D to pay an equivalent sum to C: as Smith points out, the more natural description of such a situation is that D is *liable* to make restitution to C. As well as supporting that argument, the purpose of this presentation is to suggest that rules imposing such primary liabilities have an important, supplementary role to play in private law, alongside the duty-imposing rules of contract, tort, or property. The recognition of such primary liabilities is significant not only to give completeness to our view of private law, but also as the existence of such liabilities may be relevant in justifying the nature and content of the more familiar areas such as contract, torts, and property. In making that argument, three areas of law will be considered, each of which can usefully be seen as imposing a primary liability: equitable estoppel; unjust enrichment; and the law of equitable property rights. The focus here is on the first of those three areas, as its operation reveals some wider points about the nature of primary liabilities.

2 Equitable Estoppel

Notwithstanding its somewhat misleading name, it is clear that equitable estoppel can function, in some cases at least as a cause of action: *Thorner v Major* [2009] 1 WLR 776 and *Sidhu v van Dyke* (2014) 251 CLR 505 provide clear examples. In each case, the defendant was not simply precluded from denying the truth of a particular matter of fact, or mixed fact and law; rather,

equitable estoppel operated to give rise to an independent claim. This explains why, for example, statutory formality provisions applying to a contract for the sale or other disposition of an interest in land did not bar the claim in either case: the claim was not based on the existence of a contract, but rather on the existence of the estoppel equity. As Brennan J put it in *Waltons Stores v Maher* (1988) 164 CLR 387 at 433: "The action to enforce an equity created by estoppel is not brought 'upon any contract', for the equity arises out of the circumstances. This is not to say that there is an equity which precludes the application of the statute. It is to say that the statute has no application to the equity."

The concept of an equity by estoppel may appear to be somewhat mysterious. It is often said for example, that, even after the facts giving rise to the equitable estoppel have occurred, but before any court order in his or her favour, a claimant has only an "inchoate equity", rather than any more specific right against the defendant. The concept fits well, however, with the idea of a primary liability. Consider a case where C has relied on D's promise that D's land will be left, in D's will, to C, and such reliance means that C would suffer a detriment were D wholly free to renege on that promise. It is difficult to say that, in such a case, D is under an immediate duty to C. Certainly, it cannot be said that D is under a duty to honour the promise: there are a number of cases, in each of England and Australia, where a successful equitable estoppel claim has led neither to the enforcement of D's promise, nor to an award based on the value of D's promise (see e.g. *Jennings v Rice* [2003] 1 P & CR 8 (CA); *Henry v Henry* [2010] 1 All ER 988 (PC); *Sullivan v Sullivan* [2006] NSWCA 312). After all, it may be that, given the value of the land, and the limited nature of C's potential detriment (perhaps reduced by the receipt of counter-vailing benefits from D), it would be wholly disproportionate to give effect to the equity by requiring D to transfer the land to C.

A more satisfactory description of D's position, it is suggested, is that relevant reliance by C means that D comes under a liability to C: a liability that is concretized into a duty only if and when a court later makes an order in C's favour. The analysis of Hoffmann LJ (as he then was) in *Walton v Walton* (CA, 14 April 1994) – an unreported case later to have an important influence on the decision in *Thorner v Major* – is useful here. The first instance judge had dismissed C's proprietary estoppel claim on the basis that, whilst D had made a promise to C, on which C had relied, D (C's mother) had made that promise in a family context and without the required intention that the promise be legally binding. Hoffmann LJ recognised that this fact prevented a contractual claim, but allowed C's appeal on the basis of a critical distinction between such a claim and one based on equitable estoppel. Whereas a contractually binding promise "subject to the narrow doctrine of frustration, must be performed come what may", equitable estoppel instead "looks backwards from the moment when the promise falls due to be performed and asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept."

This emphasis on the "backwards-looking" nature of equitable estoppel accords well with certain key aspects of the operation of the doctrine in each of English and Australian law. For example, in his seminal judgment in *Grundt v Great Boulder Proprietary Gold Mines Ltd* (1937) 59 CLR 641, Dixon J made clear that, in assessing the detriment requirement of an estoppel claim, a court does not solely consider if the claimant has already suffered loss, as the "real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it." The inquiry is not, therefore, limited to the position existing immediately after the claimant's reliance, but can instead take in later events, such as the receipt of counter-vailing benefits by the claimant. Indeed, as suggested by Hoffmann LJ, other events, such as a change in the circumstances of the defendant, may be relevant, even if they are unrelated to the extent of the potential detriment of the claimant. As Neuberger J (as he then was)

once put it: "Estoppel is a doctrine designed to do justice, and, at least normally, it seems scarcely consistent with doing justice to ignore facts, which have occurred since the date upon which action was taken in reliance upon the estoppel, and which may well impinge significantly, or even determinatively, on the issue of unconscionability" (*PW & Co v Milton Gate Investments Ltd* [2004] Ch 142 at [201]). A good example is provided by the Queensland case of *Germanotta v Germanotta* [2012] QSC 116, which involved an alleged promise by the claimant's parents to leave him, free from debt, a one-third share of their farm assets. The estoppel claim was dismissed on other grounds, and so the discussion was strictly *obiter*, but McMeekin J noted (see [141]-[151]) that various unforeseen events (such as a "disastrous run of seasons" that had caused the farm business to incur significant debts, and a serious illness suffered by one of the parents) which went "to the very heart of the parents' capacity to carry out their promise" meant that any transfer from the parents would now be made "in radically different circumstances than were ever envisaged". It is worth noting that, in *Thorner v Major*, Lord Scott (at [19]) had doubts as to whether proprietary estoppel is flexible enough to take account of such changed circumstances: yet its backwards-looking nature means it is in fact ideally equipped to do so. On the liability-based model of the doctrine, a court adjudicating an equitable estoppel is not looking for a pre-existing duty to enforce, but is rather giving effect to a possible liability of the defendant, and so asks if it would *now* be unconscionable for the defendant to leave the claimant to suffer some detriment.

3 Unjust Enrichment

There is, of course, an ongoing debate as to the precise status and significance of unjust enrichment in each of English and Australian law. For example, it seems that the former system is more ready than the latter to regard unjust enrichment as a cause of action in itself, and thus capable of direct application in a particular case (see e.g. the analysis of Lords Clarke and Neuberger in *Bank of Cyprus UK Ltd v Menelaou* [2016] AC 176), rather than as a merely taxonomical concept (see e.g. the analysis of Gummow, Hayne, Crennan and Kiefel JJ in *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635 at [85]). Nonetheless, there are some points accepted in each of the two jurisdictions.

First, it is clear that unjust enrichment, like equitable estoppel, is distinct from the law of contract: as a result (as confirmed in e.g. *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at [28] by French CJ, Crennan and Kiefel JJ and in e.g. *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 710 by Lord Browne-Wilkinson) there is no need to perpetuate the former idea that a claim for money had and received rests on an implied contract between the parties. Again, as with equitable estoppel, part of that distinction with contract law can be said to lie in the fact that no immediate duty is placed on the defendant: as noted above, for example, it is difficult to say that a recipient of a mistaken payment must be under an immediate duty to pay the value of that sum to the claimant. Rather, as the first section of the United States Restatement Third: Restitution and Unjust Enrichment (2011) has it: "A person who is unjustly enriched at the expense of another is subject to liability in restitution."

Second, as with equitable estoppel, it seems that, when deciding how to give effect to any liability in unjust enrichment, a court can take into account events occurring after the facts initially giving rise to the claim. An echo of the flexibility of equitable estoppel is present in Lord Goff's statement as to the breadth of the change of position defence: "the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or to make restitution in full" (*Lipkin Gorman v Karpnale* [1991] 2 AC 548 at 580). That echo was amplified by the High Court of Australia in *AFS Ltd v Hills Industries Ltd* (2014) 253 CLR 560 where, indeed, an explicit analogy was drawn between the rationale of the

change of position defence and the relevance of detriment in an equitable estoppel claim. The focus in each case is not solely on past events, but rather on the injustice stemming from the disadvantage that *would* arise to one party if the other were permitted to act in a particular way.

4 Equitable Property Rights

The impact of equitable property rights on third parties has long been a contested area. In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, for example, the High Court of Australia rejected the view, supported by the New South Wales Court of Appeal, that a third party recipient of property transferred in breach of trust might be subject to a strict liability restitutionary claim by a trust beneficiary. The High Court, as the Court of Appeal of England and Wales had done in *BCCI v Akindele* [2001] Ch 437, preferred the orthodox view that the liability of such a third party depends on his or her knowledge of the breach of trust. Conversely, in *Shell UK Ltd v Total UK Ltd* [2011] QB 186, the Court of Appeal appeared to depart from orthodoxy when considering the different, but related, case in which the defendant is a stranger who physically interferes with trust property. The prevailing view, accepted at first instance, had been that the status of being a beneficiary of a trust does not give a party any direct claim against such a defendant: rather, any claim must be brought by the trustee, and cannot extend to consequential economic loss suffered by the beneficiary as a result of any particular intended use by the beneficiary of the trust property (see e.g. *The Aliakmon* [1986] AC 785). The Court of Appeal, however, permitted the recovery of such loss, provided that the trustee was joined to the beneficiary's claim against the defendant.

The reasoning of the Court of Appeal in the *Shell* case has been much-criticised (see e.g. J. Edelman, 'Two Fundamental Questions for the Law of Trusts' (2013) 129 LQR 66). One weakness is in the readiness of the court to regard the beneficiary of a trust as the "real owner" of the property, and thus to equate the position of the beneficiary with that of an unencumbered owner of an asset. It may be that the distinction between duty-imposing rules and liability-imposing rules would again be helpful in understanding the structure of the law. A key feature of a legal property right, such as a freehold or leasehold of land, or ownership of goods, is that the rest of the world is under an immediate, prima facie duty to the holder of the legal property right. A breach of that duty can lead variously to a claim in trespass, nuisance, negligence, conversion, or detinue. In contrast, it seems that the existence of an equitable property right, such as a beneficial interest under a trust, does not impose such an immediate general duty. In the recent case of *Akers v Samba Financial Group* [2017] UKSC 6, for example, Lord Sumption at [82] stated that: "An equitable interest possesses the essential hallmark of any right in rem, namely that it is good against third parties into whose hands the property or its traceable proceeds may have come, subject to the rules of equity for the protection of bona fide purchasers for value without notice." This ability of an equitable interest to bind successors in title of the party initially bound need not be evidence of any general *duty* imposed on the rest of the world; it can rather be seen as a liability, triggered only where a third party does in fact receive trust property or its traceable proceeds. Indeed, even after receipt, it seems, from decisions such as *Farah Constructions* and *BCCI v Akindele*, that a third party is not necessarily under a duty to the holder of the equitable interest: an innocent donee of trust property, who parts with that property and its traceable proceeds before acquiring knowledge of the trust is not, it seems, liable to the beneficiary of the trust. The best explanation for this may be that the liability of such a party is conditional on holding an asset (or its traceable proceeds), with knowledge of the initial equitable interest in that asset. If that is the case, there is a clear difference between the general duty imposed on the rest of the world by a legal property right and the general liability imposed by the existence of an equitable interest.

5 Conclusion: An Underlying Equitable Theme?

The suggestion put forward here is that a full picture of the structure of private law requires the recognition not only of the well-known categories of duty-imposing rules, such as the law of contract, of torts, and of legal property rights, but also of liability-imposing rules, such as those seen in equitable estoppel, unjust enrichment, and in relation to equitable property rights. It is significant that, of those three areas based on liability-imposing rules, the first and last are of course entirely equitable in origin, whilst the equitable foundations of unjust enrichment have also been emphasised by, for example, Gummow J in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 554-555.

Indeed, each of the three areas of law can be seen as fulfilling a characteristically equitable function: that of supplementing the duty-imposing rules by allowing a court to intervene in a case where, notwithstanding that there has been no breach of duty by the defendant, there are still grounds for holding that it would now be unconscionable for the defendant to act in a particular way. The risk, of course, is that if the contours of such liabilities are poorly defined, the law will become unacceptably uncertain. The benefits of such liabilities are, however, also important. Indeed, each may be seen as in some ways supporting certain primary, duty-imposing rules existing at common law. For example, the possibility of a claim for money had and received may be seen as relevant in justifying the strict primary rules that mean a right can be validly transferred from one party to another notwithstanding the transferee's mistake. Similarly, the harsh effect of rules of contract formation (including formality rules) may be mitigated by an equitable estoppel claim, which gives the claimant protection in a case where it would "shock the conscience of the court" (to use the phrase of Lord Walker in *Cobbe v Yeomans Row Management Ltd* [2008] 1 WLR 1752 at [92]) if the defendant were free to leave the claimant to suffer a detriment. A recognition of such liabilities may therefore assist in understanding the operation of the better-established duty-imposing rules.

This idea that liabilities may operate in a secondary way can also be seen in relation to equitable property rights. Core examples of legal property rights consist principally of a link between an individual and an independent resource, such as a physical thing, and such a right can be acquired by an individual's unilateral action, for example by taking possession of a physical thing. In contrast, an equitable interest always involves at least two parties: there must, for example, be a trustee and a beneficiary, and the subject matter of the trust is not any independent resource but is rather a right held by the trustee. An equitable interest is thus secondary in the sense that it must relate to another right: the right held by the trustee. It is the effect on the trustee's conscience of particular facts that encumbers the trustee's title with the trust; and it is only where a third party's conscience is similarly affected that the protection of the beneficiary will continue. The standard model of legal property rights, whereby the same, general duty is immediately imposed on the rest of the world is therefore out of place when considering equitable interests. This helps to explain why, for example, the rules governing the acquisition of such interests vary from those applying to legal property rights and why, as confirmed in e.g. *Farah Constructions*, the protection accorded to such interests differs from that provided to legal property rights.