

THE DENNING SOCIETY LECTURE 2018

BY LORD BRIGGS OF WESTBOURNE

EQUITY IN BUSINESS

1. Almost exactly 20 years ago Lord Millett (then Millett LJ) published in the Law Quarterly Review a seminal article entitled “Equity’s Place in the Law of Commerce”.¹ Its main theme was that, although equitable doctrines, remedies and principles could not be confined to the realm of family and friendship from which they had originated, their uncontrolled extension into the commercial field, and their unthinking application by common lawyers unversed in the detail of their checks and balances, was in danger of doing more harm than good. It would undermine both the desirable certainty of English commercial law and the valuable role performed by equity in regulating the conduct of professional trustees and other true fiduciaries, practicing in the commercial sphere. He suggested that these developments had, even among those calling themselves equity lawyers, given rise to a worrying perception that there simply was not that level of agreement about fundamental principle which ought to underlie the application of equity in an ever more complex business world.

¹ Sir Peter Millett, “Equity’s Place in the Law of Commerce” (1998) 114 LQR 214.

2. Despite Lord Millett's heroic efforts to put this right, both in and out of court, I think that this worrying perception remains, 20 years on. Most judges who pronounce on the question agree at least that equitable principles and remedies need to be kept from getting out of control in the market place. There continues to be a view among some commercial lawyers, including commercial judges, that equity has arrogated to itself far too great a role in the commercial field. The most pointed reminder to me of that more rigorous commercial view came in the dissenting judgment of my good friend Dame Elizabeth Gloster (then Gloster LJ) in *UBS v Kommunale Wasserwerke Leipzig*,² at para 347, where she observed that by the invocation of equitable principles the majority (including me) were impracticably and unrealistically introducing into commercial transactions the moral standards of the vicarage.
3. I am not even going to attempt, in a single address, to provide that missing consensus about basic principle. As Lord Walker and many other distinguished equity judges have warned (in his case in *Cobbe v Yeoman's Row*³), the trouble with broad over-arching principle is that it can only be expressed at such a high level of generality that it provides little useful guidance in the factually complicated world of real people, real events and real transactions. Rather, I am going to have a look at some aspects of equity's role in the law of business and commerce where there have been occasions in the last 20 years to remedy Lord Millett's perceived lack of agreement about principle, in a way that keeps equity to its proper role. I want to consider how successful we, that is judges,

² *UBS AG v Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA Civ 1567; [2017] 2 Lloyd's Rep 621.

³ *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55; [2008] 1 WLR 1752.

academics and advocates, have been in doing do. The result has I think been, to adopt another expression in daily use in the vicarage: 'like a curate's egg, good in parts'.

4. The starting point is to recognise that, even in as short a period as 20 years, the role of equity in the business world has, necessarily and inevitably, increased rather than receded, or even stood still. In the period preceding 1998 Lord Millett pointed to the growing role of professional fiduciaries in an economy increasingly focussed upon services, including financial services, and to the need, not met by regulation, to impose upon them higher standards of conduct than those likely to flow from what he called the combined drivers of "success, self-interest, wealth, winning and not getting caught" (quoting Lord Sacks).⁴ Chief Justice Mason had said much the same in a lecture in 1993.⁵ Those factors have marched on since then, reaching their apogee in the causes and outcomes of the 2008 crash. 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.
5. Let me give two Lehman-related examples. They each demonstrate the pervasive role of equity in the commercial field, side by side with a lack of understanding or agreement about its principles. First, the global settlement

⁴ Millett (n 1), 216.

⁵ Sir Anthony Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 LQR 238.

practice of the Lehman group internationally involved 'hub companies' in each time zone (such as Lehman Brothers International Europe, or LBIE for short in London) buying, selling and lending securities to and from the street for the economic benefit (to use a neutral term) of a large number of their affiliates worldwide. When in 1993 Lehman set up a largely computerised process for the daily handling of those holdings within the group, by millions of twice daily repos (a process called Rascals), the designers did so on the assumption (which turned out to be wrong in law) that the pre-existing regime which they were seeking to digitise already conferred proprietary beneficial interests in the underlying securities in favour of the affiliates, rather than just an economic stake, reflected in debt accounting obligations of the hub companies. The replication of those arrangements by the Rascals system therefore proceeded under a common assumption by all concerned, nowhere expressly recorded in writing in any transactional document, that it continued to confer beneficial interests under trusts of which the hub companies were trustees. The result was, applying settled equitable principles, that common intention trusts arose for the first time, from the Rascals process, which governed the beneficial interests in all the securities held by the hub companies. When, two weeks after the start of the administration of LBIE, the administrators discovered the Rascals computer in London still cheerfully doing thousands of twice daily transactions and ordered it to be switched off, the terms of those trusts then governed the question who owned the securities when the music stopped. It took a long and expensive piece of litigation, ending in the Court of Appeal, to

determine what those trusts were, and the principles by which, not only their terms, but their very existence, should be tested.⁶

6. The second example is even more stark. The fiduciary basis upon which LBIE in London held securities for its customers required, in accordance with basic equitable principle, that it segregate its own house funds from those which it held on trust for its customers. LBIE completely failed to recognise, (as did its regulators and auditors), that securities held for its affiliates also needed to be segregated, since they were also its customers for that purpose. The result was a shocking shortfall in the segregated fund which should have been available for its customers when LBIE collapsed, aggravated by the fact that a large part of what had been segregated was deposited in an overseas affiliate which itself went bust at the same time. The result was a huge dispute as to who was entitled to share, and in what proportions, in the wreckage of the segregated fund, eventually resolved by a bare majority in the Supreme Court on a basis which Lord Walker (the only pure equity lawyer on the panel) regarded as not only completely wrong, but as incomprehensible.⁷

7. You will all have experience, or easily think, of other examples, particularly in the ripe field of commercial fraud and misconduct, where equitable principles have been found to prevail, but where litigation has revealed a lack of agreement, at a fundamental level, about what those principles are, or how they work. A conspicuous example is the question whether the recipient of a

⁶ See *Re Lehman Brothers International (Europe) (in administration)* [2010] EWHC 2914 (Ch) ('Rascals case').

⁷ See *Lehman Brothers International (Europe) (in administration) v CRC Credit Fund Ltd* [2012] UKSC 6; [2012]

bribe holds it on trust for his principal, only recently resolved after much judicial and academic controversy, in *FHR v Cedar Capital*.⁸ I want to concentrate on a small number of areas where the debate about principle has been precisely concerned with the question how to set bounds upon the role of equity in business and commerce, so as to keep its important role from getting out of hand. They are:

- a. The *Pallant v Morgan*⁹ equity, which I will use as a detailed case study.
- b. The solicitors' equitable lien.
- c. Relief from forfeiture.
- d. Rectification.

The *Pallant v Morgan* Equity

8. One of the unfortunate habits of lawyers, which continues to make the law (including equity) impenetrable to anyone other than themselves, is their tendency to label remedies, principles and rules by reference to the reported case in which they were first formulated, or the section of the CPR in which they are laid down. Words and phrases like *Mareva*, *Walsh v Lonsdale* and Part 36 unlock whole warehouses full of meaning to lawyers, but the doors remain firmly bolted to everyone else. The *Pallant v Morgan* equity is one of the more recent additions to the library of legal key -phrases, even though the decision itself was made and reported as long ago as 1953, before I was born. The case only contributed the label for a distinct equity many years later, I think first

⁸ *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45; [2015] AC 250.

⁹ [1953] Ch 43 (Ch).

from Megarry J at an interlocutory hearing in *Holiday Inns Inc v Broadhead*¹⁰ in 1974, when I was still reading history and singing for my supper at university. I suspect that the judge who decided *Pallant v Morgan*, Harman J (father of Sir Jeremiah), would be most surprised that this should have happened. He thought he was just following *Chattock v Muller*,¹¹ reported in 1878, with the encouragement of the then leading textbook on Specific Performance, namely Fry (6th ed.), in an *a fortiori* case on the facts.

9. The plaintiff and the defendant had agreed informally that the defendant would bid at auction, and that the plaintiff would not bid, for a property which they both wished to buy and that, if successful, the defendant would then share it with the plaintiff in proportions to be derived from what turned out to be an unworkable formula. The defendant bid successfully and then sought to keep the whole of the property for himself. Harman J regarded this as a fraud. The defendant was to be treated as having bid on behalf of both of them, and therefore as holding the property on trust. In default of an agreed workable sharing ratio, it was held for them in equal shares.

10. The reason why recourse has had to be made to a case name for this equity is, I suspect, because no-one has since been able to agree upon the principled basis for its existence, still less upon the boundaries which circumscribe its legitimate application. The trouble started at the very beginning of the new millennium, in January 2000, when the Court of Appeal, led by Chadwick LJ, had a go at

¹⁰ (1974) 232 EG 951.

¹¹ (1878) 8 Ch D 177.

defining its basis and scope, in *Banner v Luff*.¹² Looking for an underlying principle, he said that it was:

“an example of the wider equity to which Mr Justice Millett referred in *Lonrho Plc v Fayed (No 2)* [1992] 1 WLR 1, at pages 9H-10A:

“Equity will intervene by way of constructive trust, not only to compel a defendant to restore the plaintiff's property to him, but also to require a defendant to disgorge property which he should have acquired, if at all, for the plaintiff. In the latter category of case, the defendant's wrong lies not in the acquisition of the property, which may or not have been lawful, but in his subsequent denial of the plaintiff's beneficial interest. For such to be the case, however, the defendant must either have acquired property which but for his wrongdoing would have belonged to the plaintiff, or he must have acquired property in circumstances in which he cannot conscientiously retain it against the plaintiff.”

11. Recognising that, thus stated, this principle said nothing useful about scope, or boundaries, Chadwick LJ then laid down five (now well-known) *probanda*, warning that they should not be treated as an exhaustive definition, since:

“Equity must never be deterred by the absence of a precise analogy, provided that the principle invoked is sound.”

In outline, the *probanda* were that:

¹² *Banner Homes Holdings Ltd v Luff Developments Ltd* [2000] Ch 372 (CA).

- 1) There was a pre-acquisition agreement or understanding, although pre-acquisition might not be essential;
 - 2) Which did not amount to an enforceable contract (either because of incompleteness or lack of intention to contract);
 - 3) To the effect that the non-acquiring party should obtain an interest in the property being acquired by the other party, from which the acquiring party had not resiled to the knowledge of the non-acquiring party before acquisition took place;
 - 4) That the non-acquiring party had suffered some detriment, such as not making a competing bid, or thereby conferred some advantage on the acquiring party;
 - 5) In circumstances making it inequitable for the acquiring party to retain the whole of the property for himself.¹³
12. That was a case of an informally agreed joint venture between Banner and Luff for the development of land, which Luff then acquired, and sought to keep for himself. The trial judge (Blackburne J) had refused Banner a remedy because he found that the parties understood that there needed to be a formal written contract before legal relations arose, before the conclusion of which either side was free to resile. This did not deter the Court of Appeal from equitable intervention by way of constructive trust. Both parties were, be it noted, experienced business persons, and the joint venture was plainly commercial in nature.

¹³ Ibid, 397F-399D.

13. *Banner v Luff* was distinguished in 2002 by the Court of Appeal in *London & Regional Investments v TBI* on the basis that the negotiations for a joint venture had been expressly 'subject to contract'.¹⁴ This was, it was said, quite different from a mere 'no contract' case such as *Banner v Luff*, and the express use of that well-known label was sufficient to prevent a conclusion that the acquiring party's conduct in resiling from the joint venture was unconscionable.¹⁵ The parties were, again, experienced in business.

14. *Cobbe v Yeoman's Row*¹⁶ decided by the House of Lords in 2008 was, like *Banner v Luff*, a 'no contract' rather than subject to contract case, and again between experienced business dealers. But the informal agreement relied upon did not precede the defendant's acquisition of the relevant property, which was a block of flats, ripe for development. The deal was that the claimant would secure planning permission, and then the defendant would sell the property to him, for a specified sum, with an arrangement to share overage on the on-sale after its development by the claimant. The claimant obtained the necessary planning permission, but the defendant then refused to sell to him, otherwise than at a greatly increased price. The evidence showed that the defendant had decided to take this course before the claimant obtained planning permission, but kept quiet about it. It was common ground, at all levels, including the House of Lords, that this conduct was unconscionable, by any standard.

¹⁴ *London & Regional Investments Ltd v TBI Plc* [2002] EWCA Civ 355, [42] (Mummery LJ).

¹⁵ *Ibid*, [42]-[50] (Mummery LJ).

¹⁶ n 3.

15. Following *Banner v Luff* the trial judge Etherton J treated the case as essentially one of proprietary estoppel, and upheld Mr Cobbe's claim to a beneficial interest in the property under a trust.¹⁷ The Court of Appeal agreed, reinforcing the distinction between 'no contract' and 'subject to contract' cases.¹⁸

16. It was in the House of Lords that concern about the potential for this equity to undermine commercial certainty first clearly arose. Lord Scott (giving the speech with which the majority agreed) started by citing this well-known dictum by Deane J in *Muschinski v Dodds*¹⁹:

"The fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, starting from the conceptual foundations of such principles ... Under the law of this country - as, I venture to think under the present law of England ... proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion, subjective views about which party 'ought to win' ... and the 'formless void' of individual moral opinion ..."²⁰

Echoes of Lady Gloster's vicarage, you might think.

¹⁷ [2005] EWHC 266 (Ch).

¹⁸ [2006] EWCA Civ 1139; [2006] 1 WLR 2964.

¹⁹ (1985) 160 CLR 583, 615.

²⁰ *Cobbe* (n 3), [17].

17. Lord Walker, concurring in the result, but with slightly different reasons, also relied on that passage, and added:

“Equitable estoppel is a flexible doctrine which the Court can use, in appropriate circumstances, to prevent injustice caused by the vagaries and inconstancy of human nature. But it is not a sort of joker or wild card to be used whenever the Court disapproves of the conduct of a litigant who seems to have the law on his side. Flexible though it is, the doctrine must be formulated and applied in a disciplined and principled way. Certainty is important in property transactions.”²¹

Later, referring to the *Pallant v Morgan* line of cases, he continued:

“In my opinion none of these cases casts any doubt on the general principle laid down by this House in *Ramsden v Dyson* (1866) LR 1 HL 129, that conscious reliance on honour alone will not give rise to an estoppel. Nor do they cast doubt on the general principle that the court should be very slow to introduce uncertainty into commercial transactions by over-ready use of equitable concepts such as fiduciary obligations and equitable estoppel. That applies to commercial negotiations whether or not they are expressly stated to be subject to contract.”²²

And he concluded:

²¹ Ibid, [46].

²² Ibid, [81].

“In my opinion the Court of Appeal's decision, if it were to stand, would tend to introduce considerable uncertainty into commercial negotiations, and not only in the field of property development ... Equity has some important functions in regulating commercial life, but those functions must be kept within proper bounds.”²³

He ended by referring to Lord Millett’s article in the LQR.²⁴

18. Their lordships then proceeded to reject Mr Cobbe’s proprietary claim, leaving him to a much less valuable *quantum meruit*.²⁵ They clearly did not outlaw *Pallant v Morgan* claims altogether, but there has been much debate about the metes and bounds which they erected, in order to avoid the damage to commercial certainty about which they were primarily concerned. Nor has any clear consensus emerged as to the principled basis for the *Pallant v Morgan* equity, either from *Cobbe* itself or from the succession of Court of Appeal cases which have ensued, right through to this year. What follows is a necessarily potted summary.

19. In *Cobbe*, Lord Scott drew a sharp distinction of principle between proprietary estoppel and constructive trust as the basis for the *Pallant v Morgan* equity, regarding it as the creature of the latter.²⁶ Although he did not spell out why, it seems to me that, unless (heaven forbid!) it was to be a remedial constructive

²³ Ibid, [85].

²⁴ Ibid, [85].

²⁵ Ibid, [42]-[45] (Lord Scott), [93] (Lord Walker).

²⁶ Ibid, [30].

trust, it therefore depended upon the informal joint venture arrangement preceding the acquisition of the property by either party. Otherwise, there was nothing to impress the property with a trust when acquired by the defendant. There being no pre-acquisition agreement, Mr Cobbe's case therefore depended in Lord Scott's view upon proprietary estoppel. But there could be no estoppel where business counterparties knew that, pending a binding written contract, either side was free to withdraw, regardless whether they used the phrase 'subject to contract' in their dealings. It has since been said that this decision largely confines proprietary estoppel to the family, or at least non-business sphere. Lord Scott added *obiter* that the failure of Parliament to exempt proprietary estoppel from s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 has killed it off altogether, whether or not in a business context.²⁷ Whether that is right or not goes beyond the scope of this address.

20. Lord Walker drew no such clear classification between proprietary estoppel and constructive trust, and appears to have considered that, in *Banner v Luff*, Chadwick LJ regarded the equity as a species of the former.²⁸ But in his view Mr Cobbe's case trespassed across a boundary fencing off any kind of equitable claim, namely that enshrined in the famous dictum of Lord Cranworth in *Ramsden v Dyson*:

"If any one makes an assurance to another, with or without consideration, that he will do or will abstain from doing a particular act, but he refuses to bind

²⁷ Ibid, [29].

²⁸ Ibid, [78].

himself, and says that for the performance of what he has promised the person to whom the promise has been made must rely on the honour of the person who has made it, this excludes the jurisdiction of Courts of equity no less than of Courts of law."²⁹

Since honour was how Mr Cobbe had described the bond between the parties, that was the end of the matter.³⁰

21. Both Lords Scott and Walker clearly regarded the *Pallant v Morgan* equity as confined to failed joint ventures, and they had no difficulty in treating the arrangements between the parties before them as a joint venture in that sense. That general description is likely to apply to any arrangement where, for mutual profit, one party contributes the relevant property while the other provides relevant business expertise or experience. It is therefore a bit surprising that neither of them cast any doubt on either the reasoning or the result in *Banner v Luff*, although they both referred to it. It was a failed joint venture case in which the commercially experienced participants clearly assumed that there would have to be a written contract between them before legal relations were engaged. That was the precise basis upon which Blackburne J had dismissed the claim at trial. The only real point of distinction was that in *Banner v Luff* the joint venture arrangement preceded the acquisition of the property by either of them, but Chadwick LJ had made it clear that this was not an essential feature of the equity.

²⁹ *Ramsden v Dyson* (1866) LR 1 HL 129, 145.

³⁰ *Cobbe* (n 3), [91] (Lord Walker).

22. The next milestone in this tortuous story is *Crossco No.4 v Jolan*, in 2011.³¹ It was about a negotiated demerger of a previously united family business, part of which went wrong. It was not in substance about a pre-acquisition joint venture arrangement and, in any event, the claim to a *Pallant v Morgan* equity failed for other reasons on the facts.³² But there was an interesting disagreement about the principled basis of the *Pallant v Morgan* equity, with real importance for its potential effect in a business context. All three members of the Court of Appeal agreed that because of the non-disapproving way in which *Banner v Luff* was dealt with in *Cobbe*, they remained bound by it. The majority (Arden LJ and McFarlane LJ) felt reluctantly constrained not only by the result, but by the reasoning, which (in their view) established that a *Pallant v Morgan* constructive trust must be an institutional constructive trust established by common intention, as per *Gissing v Gissing*, but living and breathing in a business rather than domestic context.³³

23. Etherton LJ thought that common intention trusts of that type were, because of their policy basis, confined to the domestic sphere, by *Stack v Dowden* and *Jones v Kernott*. He said:

“In a commercial context, it is to be expected that the parties will normally take legal advice about their respective rights and interests and will normally reduce their agreements to writing and will not expect to be bound until a contract has been made: see, for example, Lord Walker in *Cobbe* at [68] and [81]. They do

³¹ *Crossco No.4 Unltd v Jolan Ltd* [2011] EWCA Civ 1619; [2012] 1 P & CR 16.

³² *Ibid*, [107]-[109] (Etherton LJ), [123] (McFarlane LJ), [131]-[132] (Arden LJ).

³³ *Ibid*, [122] (McFarlane LJ), [129]-[130] (Arden LJ).

not expect their rights to be determined in an "ambulatory" manner by retrospective examination of their conduct and words over the entire period of their relationship. They do not expect the court to determine their respective property rights and interests by the imputation of intentions which they did not have but which the court considers they would have had if they had acted justly and reasonably and thought about the point."³⁴

24. In his view, the principled basis for the *Pallant v Morgan* equity lay in breach of fiduciary duty. In other words, it would arise only if, at the time of the acquisition of the property by the defendant, he owed some fiduciary duty to the claimant which prohibited him from acquiring the whole beneficial interest for himself. That might arise from a prior agency, or from a partnership, but only exceptionally from a commercial joint venture. In his view, *Pallant v Morgan* itself was an agency case.³⁵

25. Now is not the time to engage with the question whether the common intention trust has any place in the business sphere, a subject about which many (if not most) equity lawyers are likely to harbour strong, even passionate, opposing views. But even if it does have a place (as was held in the *Rascals* case³⁶), that does not, of itself, mean that Sir Terence's analysis of the *Pallant v Morgan* equity is wrong. Nonetheless it may harbour its own uncertainties, and capacity for equitable mission-creep. If its main sphere of operation is the commercial joint venture, by what yardstick do we decide which joint ventures

³⁴ Ibid, [87].

³⁵ Ibid, [88].

³⁶ n 6, [243]-[247] (Briggs J).

do, and which do not, impose fiduciary duties upon the participants? And what fiduciary duties? That is another contentious question worth a lecture in itself, probably centred around two recent cases about *Ross River*, in 2007 and 2013.³⁷ Lord Millett would probably say it's not a question of imposition of duty, but of what they have agreed. But, if (as has to be assumed) their agreement is incomplete, subject to contract or otherwise unenforceable, does that take you much further?

26. This year has seen two further essays into this conundrum by differently constituted Courts of Appeal. In the first, *Farrar v Miller*,³⁸ the parties were already both indirectly interested in the property in issue, through shareholdings in companies, although the joint venture arrangement between them may be said to have preceded a relevant further acquisition. The appeal concerned striking out and permission to amend, rather than conclusions made at a trial. Nonetheless the Court of Appeal loyally adhered to the view of Chadwick LJ in *Banner v Luff* that a pre-acquisition agreement was only typical, rather than essential, in creating the equity.³⁹ Furthermore they acknowledged it as at least arguable that the same facts might support all three claims: proprietary estoppel, constructive trust and breach of fiduciary duty.⁴⁰ Kitchin LJ (now Lord Kitchin) based his approach to the underlying principle on the even

³⁷ See *Ross River Ltd v Waveley Commercial Ltd* [2013] EWCA Civ 910; [2014] 1 BCLC 545 and *Ross River Ltd v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch); [2008] 1 All ER 1004.

³⁸ [2018] EWCA Civ 172.

³⁹ *Ibid*, [23]-[24] (Kitchin LJ).

⁴⁰ *Ibid*, [32] (Kitchin LJ).

more general dictum of Millett LJ (in *Paragon Finance Plc v D B Thakerar & Co*⁴¹) that:

“A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another.”⁴² (Emphasis added.)

27. The second, most recent case (as far as I am aware), was *Generator Developments v LIDL*,⁴³ another case where the alleged joint venture agreement preceded the acquisition of the relevant property. In upholding the trial judge’s refusal to afford the claimant a *Pallant v Morgan* equity, Lewison LJ came much nearer to recognising the strictures laid down in *Cobbe* as applying in a *Pallant v Morgan* context than in any of the intervening cases in the Court of Appeal. He treated the absence of a pre-acquisition agreement in *Cobbe* as by no means decisive,⁴⁴ and cast real doubt both on the analysis and part of the five *probanda* in *Banner v Luff*.⁴⁵ But there were enough conventional reasons for dismissing the appeal that his dicta would struggle to amount to a sufficient *ratio*, on their own, to displace *Banner v Luff* and the succession of Court of Appeal cases in which it has been approved and held to be binding.

⁴¹ [1999] 1 All ER 400 (CA).

⁴² *Ibid*, 409 (Millett LJ); *Farrar* (n 38), [42] (Kitchin LJ).

⁴³ *Generator Developments Ltd v LIDL UK GmbH* [2018] EWCA Civ 396.

⁴⁴ *Ibid*, [76].

⁴⁵ *Ibid*, [78].

28. So, where does this story leave the conscientious advisor, whose client has been deprived of an expected interest in property subject to an intended joint venture, where the conduct of his counterparty has been at least dishonourable? Perhaps another airing in the Supreme Court is due but not, please (as was tried unsuccessfully in *Farrar v Miller*), only on the fragile pleaded platform attacked by a strike-out application. There is not often any substitute for the full tapestry of facts found at a trial.
29. I am now going to leave the *Pallant v Morgan* equity and look, much more briefly, at two other areas of equitable intervention in business relations where, during the last 20 years, the search for boundaries by reference to principle may be said to have been, perhaps, a little more coherent. The underlying theme is not so much that new boundaries have been formulated, but that existing principles sufficiently provide them already, and that those principles should be firmly adhered to.

The Solicitor's Equitable Lien

30. This equitable tool, really an equitable charge rather than a lien in the strict sense, was formulated by courts of equity as long ago as the 18th century, to remedy a glaring deficiency in the common law retaining lien as a means whereby the successful plaintiff's solicitor acting on credit could ensure that he got paid his fees. This was a business context, even if the litigation in which the solicitor acted was a purely family matter. From the earliest times it was designed to promote access to justice, by encouraging solicitors to pursue meritorious claims for clients who lacked the means to pay fees up front. The

deficiency in the common law retaining lien was that it depended upon the solicitor having valuable property of the client in his hands (such as the proceeds of a paid judgment debt, recovered securities or title deeds) when the proceedings ended and he sought payment. His client might collude with the defendant to cheat him out of his fees by the defendant paying the claimant direct, either after judgment or following a settlement agreement.

31. Equity could not treat the solicitor as entitled to a share in the fruits of the litigation: that would be maintenance or champerty, although that fetter may now have been removed. But it could, and did, treat those fruits as a fund, to which the solicitor had a proprietary claim by way of security for payment of the client's debt to him. Then, if there was collusion to cheat the solicitor of his fees, or if the defendant had notice of the solicitor's interest in the fund, before it was paid direct to the plaintiff, equity could intervene by acting *in personam* against the defendant, by making him pay the fees amount (if necessary a second time) direct to the plaintiff's solicitor.

32. It is of course true that, at a high level of generality, the incentive for equity's intervention lay in the recognition of unconscionable conduct by the defendant, but this was not, on its own, a sufficient basis for intervention by the recognition and then enforcement of an equitable charge. There had to be an underlying debt (owed by the plaintiff to the solicitor), since otherwise there was nothing to secure. There had to be a fund, to which the security could attach, namely the fruits of the litigation. Equity would recognise the chose in action constituted by an unpaid judgment debt as a fund, or part of a fund, for that purpose. Fees in excess of the amount or value of the fund were

irrecoverable by this means. The defendant had to have prior knowledge or notice of the solicitor's equity, before his conscience could be bound. The defendant's personal liability to the solicitor arose from dealing with that fund inconsistently with the solicitor's proprietary interest in it, usually by paying the plaintiff direct.

33. These checks and balances worked without criticism or much comment for many years, but in *Gavin Edmondson Solicitors v Haven Insurance*⁴⁶ they came under review in the context of modern ways of funding litigation by no win no fee agreements, specifically the 'CFA Lite', coupled with the voluntary use of the online RTA Portal as the means of settling small PI claims under a structure of fixed fee stage payments to claimants' solicitors. The *casus belli* was a policy decision by a particular motor insurer to settle with claimants and pay direct, after the claimant had retained a solicitor who had posted details of the claim on the Portal.

34. The problem with the traditional equitable lien, so thought the Court of Appeal,⁴⁷ was that the CFA Lite retainer agreement imposed no contractual liability on the claimant for the solicitor's charges. But they decided to ignore this obstacle. Their analysis was that the solicitors had an entitlement to payment under the Portal scheme, of which the defendant's insurers had notice, or that the claimant had such an entitlement which the solicitors could enforce using the claimant's name.⁴⁸ They recognised that success for the

⁴⁶ *Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd* [2018] UKSC 21; [2018] 1 WLR 2052.

⁴⁷ [2015] EWCA Civ 1230; [2016] 1 WLR 1385.

⁴⁸ *Ibid*, [29] (Lloyd-Jones LJ).

solicitors would involve an extension of the equitable principle, but saw no reason why it should not apply, so as to provide a remedy for the unconscionable conduct of the insurer.⁴⁹

35. Happily (in terms of deterring unconscionable conduct) the Supreme Court was able to detect in the CFA Lite retainer a sufficient contractual liability of the claimant for the solicitor's fees, to be able to recognise and enforce the equitable lien on strictly traditional grounds, without acceding to the solicitor's invitation, supported by the Law Society as intervener, to deploy an equitable form of intervention on a much wider and unprincipled basis. The tempting submission was that:

“the flexibility of the equitable remedy for the protection of solicitors was apt to respond to any instance of unconscionable conduct by the insurer, including breach of the RTA Protocol, all the more so because of the strong public policy in enforcing the scheme, designed as it was to balance the competing interests of its stakeholders while ensuring access to justice for the victims of road accidents at proportionate cost.”⁵⁰

36. The Supreme Court was having none of this. Giving the leading judgment, I said:

“I acknowledge that equity operates with a flexibility not shared by the common law, and that it can and does adapt its remedies to changing times. But equity nonetheless operates in accordance with principles. While most equitable remedies are discretionary, those principles provide a framework

⁴⁹ Ibid, [31] (Lloyd-Jones LJ).

⁵⁰ n 46, [56] (Lord Briggs).

which makes equity part of a system of English law which is renowned for its predictability... It is simply wrong to seek to distil from those cases a general principle that equity will protect solicitors from any unconscionable interference with their expectations in relation to recovery of their charges.”⁵¹

37. Goodness knows what we might have done if we had not been able to detect a contractual liability for the fees, or (like the trial judge) had found that the insurer did not have notice of the lien. I can only hope that we would have comforted ourselves with the reflection that hard cases make bad law.

Relief from Forfeiture

38. My second short example of equity suitably confined by long standing coherent principle is relief from forfeiture. This ancient form of equitable intervention takes the form, not of creating an equitable security, but of treating certain common law rights, however expressed, as if they were no more than security for performance a lesser obligation, and then restraining their use where the underlying obligation could be enforced or satisfied by less draconian measures. Its main operation in modern times lies in the now mainly statutory provision of relief from the forfeiture of leases, and in restraining foreclosure by mortgagees, by enforcing the equity of redemption.

39. The recent decision of the Supreme Court in the conjoined appeals *Cavendish Square v Makdessi* and *Parking Eye v Beavis*⁵² is rightly regarded as a watershed case about the common law doctrine of contractual penalties, even if, rightly or

⁵¹ Ibid, [57]-[58].

⁵² *Cavendish Square Holding BV v Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67; [2016] AC 1172.

wrongly, it is regarded by some other (overseas) common law jurisdictions as a step in the wrong direction. However that may be, equity lawyers might do well to note with caution Lord Neuberger's and Lord Sumption's comprehensive joint historical introduction, in which they point out that the penalties doctrine shares common equitable ancestry with relief from forfeiture.⁵³ If the penalties doctrine can be modernised by a new broom which erects legitimate business purpose as the basis for upholding penalties, why should not a similar revolutionary change not be applied to the basis for upholding forfeitures, including foreclosures. A similar fate has already befallen and curtailed the anti-deprivation principle, leaving it a mere shadow of its former self: see *Belmont Park Investments v BNY Corporate Trustee Services*.⁵⁴

40. The need for caution arises not merely from common equitable ancestry. Both doctrines have from the earliest times treated the offending item (penalty, forfeiture or foreclosure) as in substance a security for the performance of a primary, but less draconian, obligation. But there is some reason to hope that the equitable relief may already have acquired sufficient metes and bounds to enable it to survive without radical reform in the modern common law business world, unlike its common law stable-mate. That hope comes from the recently reported but earlier decision of the Privy Council in *Cukurova Finance v Alfa Telecom*,⁵⁵ on appeal from the Eastern Caribbean Court of Appeal. Four

⁵³ *Ibid*, [3]-[10], esp. [10].

⁵⁴ *Belmont Park Investments PTY Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC 38; [2012] 1 AC 383.

⁵⁵ *Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd (No.3-No.5)* [2013] UKPC 2, [2013] UKPC 20, [2013] UKPC 25 (reported together in [2016] AC 923).

members of the Committee were also part of the seven-judge court which later decided *Cavendish Square*.

41. The *Cukurova* case concerned a contractual power to appropriate shares, charged by equitable mortgage to secure repayment of a loan, entitling the chargee (after the borrower's default and the acceleration of the due date for payment) to take over beneficial ownership of the shares on having their then value applied in reduction of the loan. The chargee's real purpose in making the secured loan had always been, in anticipation that the borrower would default, the acquisition of control over the company in which the shares were held. Default and acceleration duly occurred, the lender gave notice of appropriation, but the borrower obtained alternative finance for the whole loan and sought relief in equity. The power to appropriate was neither a foreclosure nor a forfeiture in a literal sense, but it was sufficiently analogous with both to make equitable relief in principle available. This was because, flatly contrary to the lender's subjective intention, the power to appropriate was, viewed objectively, inserted by way of security for performance of the primary obligation to repay the loan.

42. The principles delimiting this form of equitable intervention, fully applicable to commercial cases, were extracted from Lord Wilberforce's classic summary in *Shiloh Spinners v Harding*:

"it remains true today that equity expects men to carry out their bargains and will not let them buy their way out by uncovenanted payment. But it is consistent with these principles that we should reaffirm the right of courts of equity in appropriate and limited cases to relieve from forfeiture for breach of

covenant or condition where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of that result. The word 'appropriate' involves consideration of the conduct of the applicant for relief, in particular whether his default was wilful, of the gravity of the breaches, and of the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach."⁵⁶

To this the Board added the caveat, extracted from *The Scaptrade*,⁵⁷ that equity acted only in relation to proprietary or possessory rights, not mere contractual obligations.⁵⁸

43. The rival arguments facing the Privy Council were (i) that the unconscionable collateral purpose of the lender was itself sufficient to justify the intervention of equity and (ii) that there could be no equitable relief at all in the absence of bad faith, of which the lender had been acquitted. Applying settled principle based upon English law the Board of five senior Supreme Court Justices steered a traditional path between those extremes, granting relief on conventional grounds, fully cognisant of the commercial context in which the dispute arose. Collateral purpose was never, in their view, a sufficient reason on its own to

⁵⁶ *Shiloh Spinners Ltd v Harding* [1973] AC 691, 723-4.

⁵⁷ [1983] 2 AC 694 (HL).

⁵⁸ *Cukurova (No.3)* (n 55), [89] (p.956), [94] (p.957).

inhibit the enforcement of security rights in accordance with their terms.⁵⁹ In a fiduciary context the position is the opposite: see *Eclairs Group v Jkx Oil & Gas*.⁶⁰ But, following Dillon LJ in *BICC v Burndy*,⁶¹ they held that the mere fact that the transaction is commercial in nature does not preclude relief from forfeiture of possessory or proprietary rights rather than purely contractual rights.⁶²

See also *On Demand v Michael Gerson (Finance)* where Lord Millett said that: “any other [result] would restrict the exercise of a beneficial jurisdiction without any rational justification.”⁶³

Rectification

44. I return now to another not so good part of the curate’s egg, namely rectification. This is an aspect of equity’s armoury where recent decisions (i.e. since 1998) may be said positively to have widened, rather than restricted or merely confirmed, its scope in the commercial environment, and with what many regard as serious and (probably) unintended consequences in terms of reducing business certainty. This change is capable of being the subject of very different lengths of analysis. For a long and admirable review, read chapter 3 of the second edition of *Hodge on Rectification*. At the tail end of this address I

⁵⁹ *Ibid*, [91]-[97] (pp.956-7).

⁶⁰ *Eclairs Group Ltd v Jkx Oil & Gas plc* [2015] UKSC 71; [2015] Bus LR 1395.

⁶¹ *BICC Plc v Burndy Corp* [1985] Ch 232, 252A-C.

⁶² *Cukurova (No.3)* (n 55), [94] (p.957).

⁶³ *On Demand Information Plc v Michael Gerson (Finance) Plc* [2002] UKHL 13; [2003] 1 AC 368, [29].

merely want to focus on the consequences of the new doctrine which I would say, *pace* Lord Hoffmann, effected by *obiter dicta* what many judges and academics regard as an earth-shattering change in a previously quiet and untroubled area of the law.

45. Prior to July 2009, when the House of Lords handed down judgment in *Chartbrook v Persimmon Homes*,⁶⁴ rectification required a common (or sometimes unilateral) mistake as to the drafting of the parties' agreement, such that it failed to reflect their prior and continuing common intention about the matter in question, of which there was some outward expression of accord. Under this formula, the reference to common and continuing intention was to the parties' true i.e. subjective intention, albeit it would usually be proved and tested by what they had previously written, said or done. A defendant to a rectification claim could therefore succeed by showing that the concluded agreement did in fact reflect his intention, provided that he had not acted unconscionably, e.g. by concealing a mistake about the non-implementation in the document of his counterparty's different intention, of which he was aware.
46. In his speech in *Chartbrook* (and not for the first time) Lord Hoffmann proposed a critical change in the nature of the necessary mistake. Previously he had been overruled on this very point by his colleagues (in *Britoil v Hunt Overseas Oil*).⁶⁵ No longer was the signed contract to involve a mistaken departure from actual common intention, but rather a mistaken departure from the deemed common intention to be arrived at from the purely objective construction of the parties'

⁶⁴ *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101.

⁶⁵ *Britoil Plc v Hunt Overseas Oil Inc* [1994] CLC 561 (CA).

last expression of accord about the matter in question.⁶⁶ The result is that a party can now obtain rectification where previously he could not, in particular in a case where, in fact, and as in *Chartbrook*, the parties were never truly *ad idem* about the matter in issue.

47. Let me illustrate this by a simple example. Party A wishes during commercial negotiations to achieve a particular result 'X' about a matter in issue. Party B wishes to achieve a different result 'Y' about the same issue. In a draft contract, each party believes that he has achieved his objective. On its true construction the draft prescribes result Y. The agreement as signed (without further negotiation on the matter in issue) then uses slightly different words which, on their true construction, prescribe result X, which has, all along, been A's objective. But B is dissatisfied about the construction of the signed agreement and sues for rectification. Neither side has behaved unconscionably towards the other. They both separately thought that both the draft and the agreement as signed achieved their different objectives. There was never any consensus between them on the substance of the point. A was wrong about the meaning of the draft, and B was wrong about the meaning of the contract as signed. Their only common mistake was their assumption that the agreement as signed meant the same as the draft. But on the new formulation of the equity, B gets rectification, and achieves his objective. And it would make no difference if there had been several earlier drafts which, on their true construction, prescribed result X. The party benefited by the final draft takes all. On the

⁶⁶ See *Chartbrook* (n 64), [59]-[65] (Lord Hoffmann).

doctrine as previously understood, B would have failed, as the claimant did in *Chartbrook*, both at trial and in the Court of Appeal, because there never was any consensus about the matter in issue, nor unconscionable conduct by A, and because the agreement as signed reflected A's intention.

48. Now you may ask, (as many commentators have asked), why in justice or in equity should a party with a final draft in his favour prevail over the counterparty with the benefit of the agreement as signed, in the absence of any true common intention about the point in issue, or any unconscionable conduct? But the question I want you to ask yourselves is different: why should that new and different outcome serve the promotion of certainty in business dealings?

49. Both Prof Paul Davies⁶⁷ and Marcus Smith⁶⁸ (now Mr Justice Smith, but speaking pre-judicially) have suggested that the *Chartbrook* approach will lead to more, rather than less, contracts being rectified. Commercial parties frequently have lengthy negotiations about complex contracts, running to many drafts. Equally frequently they do not in fact reach a true (i.e. subjective) consensus on important points. That is, as Lord Hoffmann himself acknowledged in the same case, precisely why we construe contracts objectively, and exclude evidence of the parties' negotiations. That process serves the cause of certainty in English law. The parties negotiate, and prepare

⁶⁷ Paul S Davies, "Rectification versus interpretation: the nature and scope of the equitable jurisdiction" (2016) 75(1) CLJ 62; Paul S Davies, "Rectifying the course of rectification" (2012) 75(3) MLR 412.

⁶⁸ Marcus Smith, "Rectification of Contracts for Common Mistake, *Joscelyne v Nissen* and Subjective States of Mind" (2007) 123 LQR 116.

drafts, on a subject to contract basis, intending only to be bound by the final, signed version, whatever it means on its true construction. If they never reached a common intention which differs from the meaning of the signed contract, objectively construed, and no unconscionable advantage has been taken by one party over the other, why is certainty served by permitting a claim for rectification to succeed where previously it would have failed?

50. My concern that, in this field, equity may have taken a course which detracts from commercial certainty is borne out by the messy outcome of the first case in which the Court of Appeal applied this new doctrine, *Daventry DC v Daventry & District Housing Ltd.*⁶⁹ The Chancery trial judge (Vos J) refused rectification, and one Chancery member of the Court of Appeal (Etherton LJ) agreed with him. But rectification was ordered on appeal by Lord Neuberger MR and Toulson LJ. They all agreed to apply Lord Hoffmann's objective test, although that distinguished (and sadly now deceased) common law judge Lord Toulson questioned whether it was correct, for exactly the same reasons as flow from the AB / XY example which I have given.⁷⁰

51. It became very clear that the adoption of an objective approach to the identification of the prior common intention by no means excluded the pleading and forensic analysis of the parties' subjective beliefs and intentions, because the claimant still needed to show, and the defendant deny, that the departure in the agreement as signed from the accord derived from construing the final draft was a mistake, rather than a negotiated change of position.

⁶⁹ [2011] EWCA Civ 1153; [2012] 1WLR 1333.

⁷⁰ *Ibid*, [104] (Etherton LJ), [117], [176]-[182], [185] (Toulson LJ), [195]-[196] (Lord Neuberger MR).

Furthermore it is evident that the majority in the Court of Appeal were heavily influenced by their very dim moral view of the conduct of the defendant's principal negotiator, a point upon which they differed at least in degree from the trial judge and Etherton LJ. So the morals of the vicarage may be said by some to have had their sway, even there.

Conclusions

52. I want finally to explore the question whether this one long and three short forays into the operation of equitable remedies in the commercial field tells us anything in general about how the working of equity should be defined and delimited, so as to avoid undermining commercial certainty. I think that the lessons to be learned may include the following.

53. First, defining the underlying equitable principle too broadly, or at too high a level of abstraction, helps no-one, even if it may generate a comfortable glow of legal uniformity in the mind (or heart) of the speaker and of the incautious listener. To say, as Lord Millett did, in the *Paragon* case, that "a constructive trust arises whenever it would be unconscionable for the legal owner of property to assert his own beneficial interest and deny the beneficial interest of another" (emphasis added) begs more questions than it answers. Lord Millett was using that compendious expression not by way of definition, still less for setting metes and bounds, but as the loose description of a cake which he intended then to cut into two very distinct slices. Unconscionable conduct may be a minimum condition, but never a sufficient condition, for the intervention of equity. In my respectful view its use in *Farrar v Miller* in connection with the

boundaries of the *Pallant v Morgan* equity led potentially to an uncontrolled invasion of equity into commerce. So, in practice, would the Court of Appeal's approach to the equitable lien in *Edmondson v Haven*, if the Supreme Court had not nipped it in the bud.

54. Of course equity is the creature and the enforcer of good conscience, of which the unconscionable businessman should, like anyone else, tread in fear, in particular when entrusted with someone else's property or affairs as a fiduciary. Recourse to basic principles like unconscionable conduct does sometimes help, in particular in preventing equity being reduced to a set of arcane rules, and becoming detached from its fundamental purpose. This detachment of equitable relief from its purpose of enforcing the dictates of conscience may have happened in relation to rectification. It appears that the super-imposition of common law contractual construction principles upon rectification has blurred the line between the objective approach of the common law to construction and the previously more subjective (and conscience-driven) equitable jurisdiction for rectification. Equity has lost its way in rectification because it has forgotten that the defendant with a clear conscience should, in general, be immune from equitable relief. The irony is that, in doing so in the context of rectification, its recent unprincipled intervention in the commercial sphere has reduced, rather than increased, commercial certainty.

55. For the same reason broad, general 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.

56. Rather, the imposition of appropriate metes and bounds needs to be based upon sound principles derived, usually incrementally, from the way in which equity actually works to provide a remedy in recognised classes of commercial cases. The comparative workability of the law on relief from forfeiture and the solicitors' equitable lien, when compared with the less satisfactory state of the law on the *Pallant v Morgan* equity and rectification, can arguably be explained on the basis that the former two doctrines have clearly defined threshold conditions, which are themselves properly rooted in principle. In the case of relief from forfeiture, the minimum requirement is a proprietary or possessory interest, regardless of whether the context is familial or commercial: see *Cukurova*. This requirement flows from treating forfeiture of that interest as only a security for the performance of some lesser obligation.

57. As to the solicitors' equitable lien, the requirements are a sufficient contractual liability for the solicitors' fees on the client's part, together with a fund in which the solicitor can assert a proprietary security interest of which the defendant has notice. These requirements flow directly from identifying the lien as a form of equitable charge. Importantly, they prescribe minimum conditions for the application of equity, without operating in a rigid manner. In both cases, the

requirements derive from principle, while leaving some, but not too much, room for flexible development.

58. In contrast, the authorities on the *Pallant v Morgan* equity illustrate how a genuine attempt to identify flexible metes and bounds can go wrong, when it is insufficiently anchored in a principled examination of how the particular equity works. Chadwick LJ's five *probanda* in *Banner v Luff* were an heroic attempt to make what turned out to be bricks without straw, based on only a tiny handful of cases. Upon later analysis they could not be explained in terms of how the equity actually worked. Was it based on (i) estoppel, (ii) constructive trust, and if so institutional or remedial, or (iii) breach of fiduciary duty, and if so, by reference to what criterion for the identification of such duties in a joint venture relationship, short of a conventional agency? Then, in *Cobbe*, their Lordships really just evaded the problem of definition by making the assumption, without explaining why, that the absence of a pre-acquisition agreement made all the difference. The result was a forceful assertion of the need for commercial certainty, but no explanation how, in a genuine pre-acquisition scenario, it was to be achieved.

59. There is therefore a need to formulate with considerable clarity and specificity the principles which, cumulatively, justify equity's intervention in a particular type of commercial context, subject to a baseline or overarching requirement of unconscionable conduct, operating at a higher level of generality. The general requirement serves only to prevent the misapplication of equitable remedies where they have no role at all to play, rather than providing an exhaustive test

for the scope of their application, in an environment much more hostile than a vicarage, or even a bishop's palace.