"From the Bench – case law update"

Australian appellate decisions

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Introduction

Just over half a century ago, Sir Victor Windeyer gave a paper at the 13th Dominion Law Conference in Dunedin. It was titled "Unity, Disunity and Harmony in the Common Law".[1] It was a momentous time. It was three years after the radical change effected by *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[2] expanding negligence to cases of pure economic loss outside a contractual relationship. It was also three years after the even more radical change effected by *Parker v The Queen*,[3] in which the High Court of Australia declared it was no longer bound by decisions of the House of Lords. Windeyer's title reflects those developments. His paper includes this passage:[4]

> The greatest quality of our system of law is in its capacity for development, "in response", as Lord Radcliffe put it, "to the developments of the society in which it rules". And that is the point, for it rules in different societies whose ways, conditions and needs differ. Why then is uniformity still spoken of as good in itself?

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1 It was published in [1966] *New Zealand Law Journal* 193 and was republished earlier this month in a collection edited by The Hon Bruce Debelle, *Victor Windeyer's Legacy – Legal and Military Papers* (Federation Press 2019), 114.

2 [1964] AC 465.

3 (1963) 111 CLR 610; [1963] HCA 14.

4 See n 1 at 123.

Probably the two most important decisions of the High Court of Australia in the last year, so far as concerns the law of banking and financial services, were handed down in June 2019. On 12 June 2019, in *ASIC v Kobelt* [2019] HCA 18, the High Court divided 4:3, with five separate judgments, on the application of federal statutory unconscionability provisions to loans between an unsophisticated lender and unsophisticated borrowers. A week later, in *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20, the High Court unanimously, in three separate judgments, resolved aspects of a decades-old dispute concerning the nature of a trustee's right of indemnity and its interrelationship with trust creditors' claims in insolvency, which in large measure is confirmatory of the weight of earlier authority.

A session earlier today has addressed the latter decision, as did a "webinar" on 19 August 2019, organised by the University of Sydney, the Ross Parsons Centre and the academic committee of the Banking and Financial Services Law Association.[5] In light of the possibility that some members of the audience have already immersed themselves in the *Carter Holt Harvey* decision, the fact that others are free to do so if they wish, and, most importantly, the difficulty of finding new things to say, my focus has skewed to *ASIC v Kobelt.* That was the decision which prompted the quotation from Sir Victor Windeyer.

This papers also mentions, but more briefly, four other appellate cases which may be of interest to this audience, including:

- The decision of the New South Wales Court of Appeal in *Global Consulting Services Pty Ltd v Gresham Property Investments Ltd* [2018] NSWCA 255 (6 November 2018), on when an arrangement falling short of a contract between co-obligors will be such as to disentitle the ordinary right of contribution in equity.
- The decision of the Victorian Court of Appeal in *Burness v Hill* [2019] VSCA 94 (1 May 2019), notable for a conventional review of marshalling of securities, and for an application of a poorly understood instance of the separate rule in equity whereby a release is construed by reference to the subjective knowledge of the releasor.
- The decision of the New South Wales Court of Appeal in *Lauvan Pty Ltd v Bega* [2019] NSWCA 36 (28 February 2019), insofar as it concerns the requirement for a written drawdown notice on a finance facility and the construction and extent of the authority of the

5 See https://youtu.be/tp8_NNEd7ZQ. The presenters were Professor Jason Harris, Dr Allison Silink and Ms Carrie Rome-Sievers.

borrower's agent.

- The decision of the Victorian Court of Appeal in *JPA Finance Pty Ltd v Gordon Nominees Pty Ltd* [2019] VSCA 159 (2 July 2019), on whether strict or substantial compliance was relied upon in order for a financier to exercise a right of termination of a call option, and the circumstances when relief against forfeiture and penalties is available.

Statutory unconscionability: *ASIC v Kobelt* [2019] HCA 18

This finely divided appeal from the Federal Court sitting in South Australia concerned whether a small financier had supplied credit to disadvantaged borrowers contravening Australian federal laws proscribing "statutory" unconscionability.

Overview of facts

Mr Kobelt traded under the name "Nobbys Mintabie General Store", some 1,100 km north of Adelaide, approximately half way between Coober Pedy and Alice Springs. Many of his customers were indigenous. ASIC sued him on two bases. One was that his (unlicensed) provision of credit to purchasers of motor vehicles contravened s 29 of the *National Consumer Credit Protection Act 2009* (Cth). Mr Kobelt was found to have contravened that section, at first instance and on appeal, and special leave was refused at the hearing.[6] It is important to note that that procedural aspect influenced the decision, because ASIC acknowledged that the expensive terms of credit Mr Kobelt offered purchasers of motor vehicles was of limited significance to ASIC's case of unconscionability. Somewhat unusually, the examination of the relationship was circumscribed; normally equity would look "to every connected connected circumstance that ought to influence its determination upon the real justice of the case".[7]

The point which was litigated in the High Court of Australia was whether Mr Kobelt had engaged in unconscionable conduct contrary to s 12CB of the *ASIC Act 2001* (Cth), for conduct known as the "book-up" system, which was described at trial as follows:[8]

> since at least 1 June 2008 in requiring, as a condition for his provision of credit to purchasers of cars or goods at Nobbys, that the customers provide him with a debit card linked to a bank account into which their income is paid together with the customer's personal identification number (PIN) relating to the card, and his later conduct in using the

6 *Australian Securities and Investments Commission v Kobelt* [2018] HCATrans 252.

7 Cf *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113; [1953] HCA 2, citing *The Juliana* (1822) 2 Dids 504 at 522; 165 ER 1560 at 1567.

8 *Australian Securities and Investments Commission v Kobelt* [2016] FCA 1327 at [4].

> card and the PIN periodically to withdraw all or nearly all of the monies in the account in reduction of the customer's debt. With one exception, each of the customers in question is an indigenous resident on the APY Lands or in adjacent regions.

Space prevents a description of all the nuances of the evidence. It seems probable that the delivery of the card and the PIN amounted to a breach of contract induced by Mr Kobelt, but nothing seems to have been made of this. The customers were poor and had low levels of literacy and numeracy. Most received Centrelink payments. Mr Kobelt did not know the balance of the account and appears to have adopted a "trial and error" approach each pension payment day to withdraw as much as he could. The customers' indebtedness to Mr Kobelt was "unsophisticated" and his record keeping "rudimentary". It was said that:[9]

> Such records as he kept of book-up transactions were illegible or only barely legible. Entries were so cramped and chaotic that it was difficult to understand fully the state of the running accounts of the 117 book-up customers at any given time. Customers were not given any record of withdrawals or account statements. There was no evidence that any customer had asked to examine Mr Kobelt's records of book-up transactions. Had such an inquiry been made, the customer would have had considerable difficulty understanding the entries and no means of checking their accuracy. There was no suggestion, however, that Mr Kobelt maintained his records dishonestly, nor was it part of ASIC's system case that the withdrawal of funds from customers' accounts was not authorised. And Mr Kobelt's Anangu customers had a basic understanding of his book-up credit system.

The "book-up" process was also selective. It seems to have been applied only to Mr Kobelt's indigenous customers.

Overview of the litigation and the legislation

The trial occupied 14 days in June and July 2015, and a very long judgment of 627 paragraphs delivered in November 2016. Mr Kobelt was found to have contravened the section. However, his appeal on this point was unanimously allowed.[10] Special leave was granted.[11] ASIC's appeal was dismissed, with the High Court dividing 4:3.[12]

The decision is important for what it holds. It is arguably more important for what was *not* decided.

9 [2019] HCA 18 at [31].
10 *Kobelt v Australian Securities and Investments Commission* [2018] FCAFC 18; 352 ALR 689.
11 *Australian Securities & Investments Commission v Kobelt* [2018] HCATrans 153.
12 *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18.

No case was advanced that Mr Kobelt was exercising any form of undue influence upon his customers. No case was advanced that Mr Kobelt's conduct was dishonest. Nor was it said that the transactions were other than voluntary. On the majority view, the consensual nature of a pattern of honest conduct was a powerful factor underlining the reasoning of the majority. In contrast, the minority was conscious that the nature of unconscionability in equity and under statute presupposes a fraud-free, consensual transaction. That is to say, what for the majority was close to dispositive was for the minority merely the starting point of the inquiry.

An understanding of the statute is essential to understand the division in the High Court. No case was advanced that Mr Kobelt's conduct contravened s 12CA of the *ASIC Act*, which dovetails with s 12CB. It provides:

> **12CA Unconscionable conduct within the meaning of the unwritten law of the States and Territories**
> (1) A person must not, in trade or commerce, engage in conduct in relation to financial services if the conduct is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.
>
> (2) This section does not apply to conduct that is prohibited by section 12CB.

Further, no case was advanced at general law that Mr Kobelt's conduct was unconscionable in equity such as to give rise to equitable remedies.

Section 12CB, which ASIC did rely upon, is very elaborately worded, and should – together with s 12CC(1) be reproduced relatively fully:

> (1) A person must not, in trade or commerce, in connection with:
>
> (a) the supply or possible supply of financial services to a person (other than a listed public company); or
>
> (b) the acquisition or possible acquisition of financial services from a person (other than a listed public company);
>
> engage in conduct that is, in all the circumstances, unconscionable.
>
> …
>
> (3) For the purpose of determining whether a person has contravened subsection (1):

(a) the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and

(b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

(4) It is the intention of the Parliament that:

(a) this section is not limited by the unwritten law of the States and Territories relating to unconscionable conduct; and

(b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and

(c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:

(i) the terms of the contract; and

(ii) the manner in which and the extent to which the contract is carried out;

and is not limited to consideration of the circumstances relating to formation of the contract."

Section 12CC(1) made provision for a large number of matters to which the court could have regard for the purpose of determining whether a person had contravened s 12CB.[13]

The High Court judgments

Kiefel CJ and Bell J, in a joint judgment, emphasised the absence of unconscientious advantage obtained by Mr Kobelt and that there were advantages to the "book-up" system to the customers. Keane J agreed and went further. His Honour said that ASIC "did not establish that the respondent exploited his customers' socio-economic vulnerability in order to extract financial advantage from

13 The matters included (a) the relative strengths of the bargaining positions of the supplier and the service recipient; (b) whether, as a result of conduct engaged in by the supplier, the service recipient was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; (c) whether the service recipient was able to understand any documents relating to the supply or possible supply of the financial services; (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the service recipient or a person acting on behalf of the service recipient by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the financial services; (e) the amount for which, and the circumstances under which, the service recipient could have acquired identical or equivalent financial services from a person other than the supplier, and (l) the extent to which the supplier and the service recipient acted in good faith.

them."[14] Keane J doubted there was relevant inequality of bargaining power:[15]

> The appellant's case of inequality of bargaining power between the respondent as supplier and his customers failed to come to grips with the existence of the countervailing market power of customers inherent in their numbers and social solidarity, as well as the existence of competing suppliers. The countervailing power exercisable by customers meant that they were able collectively to 'punish' the respondent if he sought to insist on predatory terms. For all the lack of financial sophistication of the respondent's customers, there is no reason to think that they lacked awareness of the power which, if exercised, could inflict serious damage on the respondent's business.

The judgment of the fourth member of the majority, Gageler J, is more finely balanced. His Honour said that the considerations pointed both ways. He accepted that factors favouring a conclusion of unconscionability were Mr Kobelt's strength of bargaining power, that Anangu customers were treated differently from non-Anangu customers, that there were other means by which he could have provided credit to customers, that there was no need to withdraw almost all of the customers' funds and that the charges were very high.[16] Against this, it was to be borne in mind that there was not said to have been any undue influence on the customers, there was no absence of good faith, and that customers could always cancel their cards or change the account into which money was deposited. Accordingly, the Anangu people had voluntarily entered into the "book-up" agreements, and chose to continue them, and were not precluded from making that choice by reason of vulnerability.

The minority considered that Mr Kobelt's conduct contravened s 12CB because it amounted to taking advantage of his customers' special disadvantage in ways that were discriminatory and unfair. They emphasised that conduct may be unconscionable even if voluntary; after all the 17th century "catching bargains" of expectant heirs from which the doctrine springs were consensual. The essence of the taking advantage was that Mr Kobelt (a) took essentially all of his customers' money; (b) failed to keep records; (c) charged a very high effective rate of interest; and (d) tied customers to Mr Kobelt's store.

The minority considered that Mr Kobelt went beyond what was reasonably necessary to protect his legitimate interests by requiring customers to hand over their cards and PINs and by withdrawing the whole or nearly the whole of the balances in their accounts each payday. There were other

14 At [115].
15 At [129].
16 At [98]-[99].

mechanisms available to him, including (a) applying to be a "Participant" in the Commonwealth Government's "Centrepay" system (which authorised Centrelink to pay part of their benefits to participants); (b) entering into a direct debit arrangement with the purchasers; (c) retaining possession of the customers' key cards but not their PINs and (d) arranging garnishee deductions from customers' wages to pay off their debts.

Nettle and Gordon JJ observed:[17]

> Vulnerable persons may be unable to protect their own interests. If a person, unable to protect their own interests, voluntarily enters into a transaction, this does no more than remove the conduct from it being the subject of relief on the ground of undue influence where the elements, and methods of proof, are quite different. It is because it is a transaction that is voluntarily entered into by someone under a special disadvantage that unconscionability, including statutory unconscionability, developed, in order to ensure that persons who are vulnerable and unable to protect their own interests are not the victim of conduct by a stronger party in unconscientiously taking advantage of that vulnerability. And that is what Mr Kobelt's book-up system did.

Their Honours relied on a series of factors, four of which might be thought to be generally applicable: (a) the power imbalance between the parties; (b) the lack of transparency and understanding of the transactions; (c) the fact that all money was taken out deliberately before the customer could access it, and the customer's spending was controlled by Mr Kobelt; (d) the system tied customers – who had to pay significantly higher prices than those paying with cash – to Mr Kobelt's store.

They added at [260]:

> Where else and with what other customer would it be regarded as acceptable that the terms of the arrangement go entirely undocumented; that the credit provider not be required to, and not, render invoices, receipts or reconciliations; and that the credit provider not maintain financial accounts sufficient even for two experienced accountants, who gave evidence at trial, to determine how much had been advanced and how much had been paid? Surely, anywhere else with any other customer, such an arrangement would be regarded as unconscionable. It is no answer to say that the customers were Anangu people. It is no answer to say that the customers agreed.

Edelman J regarded the split in the case as attributable to a division between the "narrow" and "broad' approach to the concept of unconscionability. His Honour politely criticised the absence of

17 At [238].

a "close focus" on the consequences of that difference. Ultimately his Honour concluded that unconscionability was established on either approach. Even on the narrow basis:[18]

> One might ask how it was possible that Mr Kobelt was only able to impose and implement upon the pleaded 117 customers the extraordinarily harsh conditions of his single system of credit. It is difficult, perhaps impossible, to escape the conclusion that this was only possible because his customers lived in remote communities, were highly vulnerable, and accepted the conditions and implementation because, as appalling as those conditions were, the system was better than no credit at all.

Consequences of the High Court's decision

What emerges which might be of relevance to less unusual financing transactions? First, one part of the joint judgment of Kiefel CJ and Bell J might be understood as holding, by reference to what was said in *Kakavas v Crown Melbourne Ltd* and *Thorne v Kennedy,* that a conclusion of statutory unconscionable conduct required not only that the innocent party be subject to special disadvantage, but that the other party must unconscientiously take advantage of that special disadvantage.[19] However, both those cases were explicitly speaking of unconscionable conduct in equity,[20] and it is to be borne in mind that ASIC did *not* sue in equity or under s 12CA. Their Honours went on to state that, having regard to the parties' submissions, the appeal was not the occasion to determine whether it was necessary to find a special disadvantage which was taken advantage of.[21] Their Honours added:[22]

> "Among other values, that of certainty in the conduct of commercial transactions is reflected in the legislative choice to fix the standard of conscience in s 12CB(1). Any consideration of 'lowering the bar' from that standard should only be undertaken in a case in which the proposition is squarely raised and argued."

There is much to be said in support of the proposition that s 12CB has "lowered the bar". Section 12CB must be read with s 12CA. Section 12CA picks up, and transforms into a federal norm of conduct, the equitable principle as developed in Australia.

Secondly, the legislative history is to my mind both complex and compelling. It is so complicated that its force may be insufficiently appreciated. A considerable advantage from Edelman J's

18 At [312].
19 At [15].
20 At [15].
21 At [48].
22 At [50].

judgment is that the legislative history has been reproduced in a widely available summary.[23] The following is a brief summary:

- The first step was the enactment of s 52A of the *Trade Practices Act* in 1986, following the broad approach to unconsionability in equity given in *Commercial Bank of Australia v Amadio*.[24]
- Secondly, after some years, in which a breach of the statute merely gave rise to *discretionary relief* largely resembling that available in equity, legislation provided that a breach gave rise to a *right* to *damages*;[25]
- Thirdly, although originally confined to "consumer" transactions, the section was expanded to transactions involving business,[26] and was no longer limited to transactions under a specified pecuniary limit.[27]
- Fourthly, throughout this period, federal law has contained *separate* proscription against corporations contravening the equitable standard at general law, namely, s 12CA (see also s 20 of the Australian Consumer Law).
- Finally, a paragraph was inserted to provide that:

  > It is the intention of the Parliament that this section is not limited by the unwritten law relating to unconscionable conduct.

Edelman J stated at [295]:

> This legislative history clearly demonstrates that although Parliament's proscriptions against unconscionable conduct initially built upon the equitable foundations of that concept, over the last two decades Parliament has repeatedly amended the statutory proscription against unconscionable conduct in continued efforts to require courts to take a less restrictive approach shorn from either of the equitable preconditions imposed in the twentieth century, by which equity had raised the required bar of moral disapprobation. In particular, statutory unconscionability permits consideration of, but no longer requires, (i) special disadvantage, or (ii) any taking advantage of that special disadvantage. Like other open-textured criteria, such as "unfair" or "unjust", there is no clear baseline moral standard for what constitutes "unconscionable" conduct within s 12CB of the ASIC Act. Nevertheless, the history of development of that statutory proscription demonstrates a clear legislative intention that the

23 At [283]-[295]. I have set out that history in a chapter to appear in J Goudkamp and A Robertson (eds), *Form and Substance in the Law of Obligations* (Hart Publishing, 2019), a paper originally presented in Melbourne in July 2018.

24 (1983) 151 CLR 447; [1983] HCA 14.

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

26 Once again, following amendments in 1998 introducing "business" unconscionability in s 51AC.

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

> bar over which conduct will be unconscionable must be lower than that developed in equity even if the bar might not have been lowered to the "unreasonableness" and "unfairness" assessments in the various categories in nineteenth century equity.

It is, to say the least, reasonably arguable that the separate, not to mention elaborately drafted, provisions proscribing what is commonly referred to as "statutory unconscionability" are broader than the norm developed in equity. However, that is left undetermined by *Kobelt.*

Thirdly, a sharp difference of view emerges between the members of the majority. A deal of ink has been spilt in this country on whether a conclusion of unconscionability involves a finding of "moral obloquy." This was suggested by one reading of a 2005 decision,[28] but was against the weight of subsequent authority,[29] and contrary to the views, among others, of Professor Baxt.[30] ASIC's submission seems to have been that the idea of moral tainting was unhelpful or a distraction from the statute. Kiefel CJ and Bell J considered that "the submission does not go anywhere".[31] The other members of the majority considered that it was important, but themselves took divergent views. Gageler J had accepted a role for moral obloquy in an earlier decision,[32] but candidly acknowledged he had thought further about that language:[33]

> "Moral obloquy" is arcane terminology. Without unpacking what a high level of moral obloquy means in a contemporary context, using that arcane terminology does nothing to elucidate the normative standard embedded in the section. The terminology also has the potential to be misleading to the extent that it might be taken to suggest a requirement for conscious wrongdoing. My adoption of it has been criticised judicially and academically. The criticism is justified. I regret having mentioned it.
>
> What I meant to convey by the reference was that conduct proscribed by the section as unconscionable is conduct that is so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience. To that view of the statutory standard I adhere.

The fourth member of the majority, Keane J, proceeded on the basis that "moral obloquy" was a

28 *Attorney General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557; [2005] NSWCA 261. Cf *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* [2018] NSWCA 15 at [278].

29 See, without seeking to be exhaustive, *PT Ltd v Spuds Surf Chatswood Ltd* [2013] NSWCA 446 at [101]-[102]; *Colin R Price & Associates Pty Ltd v Four Oaks Pty Ltd* [2017] FCAFC 75 at [52]; *Commonwealth Bank of Australia v Kojic* [2016] FCAFC 186; 341 ALR 572 at [54]-[60], [69]-[72] and [88] and *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* [2018] NSWCA 15 at [278].

30 See R Baxt, "What place does "moral obloquy" have in the evaluation of statutory unconscionable conduct?" (2014) 88 *ALJ* 396; "Continuing 'Furore' over Moral Obloquy and Unconscionability" (2017) 91 *ALJ* 809.

31 At [59].

32 *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 at [188].

33 At [91]-[92] (citations omitted).

necessary element in "the exploitation or victimisation that is characteristic of unconscionable conduct" and was "also required for a finding of unconscionability under s 12CB".[34]

Fourthly, it is interesting to pause to consider the effect of 30 years of statutory innovation seeking to pick up and extend an equitable concept. Insofar as the purpose was to extend the notion of an unconscionable catching bargain to business transactions (the so-called "business unconscionability" introduced in the late 1990s) it is easy to see the need for legislation. But the *Kobelt* litigation falls squarely within the classic consumer unconscientious conduct at the heartland of the equitable doctrine. What might have happened if statute had not intruded as it has, and if regulators had not preferred to litigate the novel statutory forms of the doctrine, rather than ordinary equitable principle?

Finally, Gageler J noted that it was "unsatisfactory but unsurprising to me that the Court should find itself closely divided on the resolution of the appeal".[35] His Honour observed that that was of itself a reason to refuse special leave:[36]

> Hard cases test and sometimes strain legal principle. They do not always lend themselves to elucidation of legal principle in a way that can be predicted to provide precedential guidance of the systemic usefulness generally to be expected from a decision of an ultimate court of appeal.

On the other hand, the fact that the case is finely balanced, and has attracted five separate and divergent judgments is, on one view, nothing to be ashamed of, but a reflection of one of the ways in which the common law legal system accommodates change. The legislation is important and unresolved. It is desirable that the Australian legal system has the benefit of a range of views.

Sir Owen Dixon favoured individual judges writing separate judgments, and claimed that he did so for 20 years.[37] His view mirrored that of Lord Reid in *Broome v Cassell & Co Ltd*:[38]

> With the passage of time I have come more and more firmly to the conclusion that it is never wise to have only one speech in this House dealing with an important question of law.

That said, there is plainly also a role – to which Dixon came to adhere – for joint judgments, notably, when the times come for synthesis of the variously articulated views in a complicated area.

34 At [119].
35 *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18 at [95].
36 Id.
37 P Ayres, *Owen Dixon* (Melbourne University Press 2003) p 263 see also p 293.
38 [1972] AC 1027 at 1084.

It is especially appropriate at this conference which spans the Tasman to refer to the remarks with which Windeyer concluded his paper:

> The law that we profess and would keep is the law of England. We in Australia and New Zealand share in it It is not a law of rigid unyielding rules. It is in Coke's words "sociable and copious". We can see that it remains sociable. We know that, because from the old field new corn may be grown and grown by us, it will remain copious and sufficient for our needs in the future.

There is a place for both joint and several judgments in achieving that end.

Equitable contribution: *Global Consulting Services Pty Ltd v Gresham Property Investments Ltd* [2018] NSWCA 255; 365 ALR 143

The facts are complicated, but turn on a refinancing of a development of the former Pentridge Prison by a highly leveraged developer. Three matters may be of interest.

First, there is the way in which equity's traditional preference for substance over form did not permit an analysis to pierce the corporate veil when identifying the particular corporate entities which had provided guarantees for the purpose of determining whether they were under a coordinate obligation: at [53]-[59]. This was an application of what had been said in *HIH Claims Support Ltd v Insurance Australia Ltd*:[39]

> "The authorities show that no court has departed from the requirement that the equity to contribute depends on obligors bearing a common burden, the basis for co-ordinate liabilities in respect of the one loss. A proposition upon which the appellant wishes to rely – namely, that equity looks to substance rather than form – has never been invoked successfully to achieve a departure from, or modification of, that requirement."

The second is the discussion of the ways in which parties may lose a prima facie right to contribution. Obviously enough, two guarantors can formally agree amonst themselves that one is primarily and the other only secondarily liable. The appeal turned on the circumstances where a right to contribution might be lost where there was a "common intention" falling short of agreement to the contrary.[40]

Thirdly, there was also discussion of the relationship between that exception and the question whether when one party receives all the benefit of a transaction, and the other none, there is a right to contribution, a point associated with *Official Trustee in Bankruptcy v Citibank Savings Ltd*.[41]

39 (2011) 244 CLR 72; [2011] HCA 31 at [47] (citations omitted).
40 See at [65]-[67].
41 (1995) 38 NSWLR 116 at 119.

Marshalling and releases: *Burness v Hill* [2019] VSCA 94

The unanimous decision of the Victorian Court of Appeal is a convenient restatement of uncontroversial principles governing marshalling of securities, and applies a poorly known rule of equity concerning the construction of a release.

Love had borrowed substantial amounts from the Commonwealth Bank of Australia, secured by registered mortgages over three properties, A, B and C. Love's solicitor Hill had a second mortgage over property A to secure Love's indebtedness to Hill. The bank exercised its power of sale in 2011 and sold Property A for some $10 million, which was insufficient to discharge Love's indebtedness to the bank. In the meantime, Hill sued Love in the County Court of Victoria and, in 2013, reached an agreement whereby judgment would be entered in the amount of $2.2 million, with execution stayed for up to a year. The agreement contained a generally worded release. In 2014, the bank sold Property B, but once again the sale proceeds were insufficient to discharge Love's indebtedness to it. Hill thereafter lodged a caveat over Property C, asserting a right to be subrogated to the bank's mortgage, and later commenced proceedings seeking an entitlement to be paid the $2.2 million judgment debt plus interest and costs from the proceeds of sale. The bank sold Property C in 2016 and used part of the proceeds to discharge Love's indebtedness. The remaining $6 million was paid into court. Love was made bankrupt in 2016, and died a few months later.

Was Hill entitled to be repaid in full from the proceeds of sale? Two points (out of the many which were argued) may be of interest. First, Love's trustees in bankruptcy submitted that Hill had no right to marshal, because his debt was the judgment debt created in 2013, which did not exist at the time Property A was sold. The trustees relied on the fact that when a final judgment is entered, "the rights and obligations in controversy, as between those persons, cease to have an independent existence: they 'merge' in that final judgment". But that did not mean that there was no debt at the relevant time so as to sustain the equitable doctrine. Rather, what mattered was that, at the time the doubly secured creditor enforced its security, the junior creditor's mortgage secured a debt.

Secondly, the trustees submitted that Hill had no right to marshal because there had been an arrangement, albeit one falling short of an enforceable contract, between the bank and Hill, pursuant to which Property A was sold first. The Court did not accept that it was sufficient to find that Property A was sold pursuant to a non-binding arrangement. A much narrower test applies. What

seems to be essential in order to defeat the right is that the senior creditor is *obliged* to proceed against the doubly secured property; contrast the position with contribution.

The compromise of the County Court proceedings had included a release of Love by Hill "from all claims, suits, demands and actions the parties now have; or but for these terms would in the future have, arising out of this proceedings and the allegations, acts, facts or matters the subject of this proceeding." It was accepted that neither Hill nor Love knew that Hill had a marshalling claim. This proved to be highly significant. The Court of Appeal applied a poorly known doctrine whereby a release is *construed* in equity as not extending to matters not known to the parties. As put by Dixon CJ, Fullagar, Kitto and Taylor JJ in *Grant v John Grant & Sons Pty Ltd*: "[W]hatever construction is to be given by law to the deed, in equity it would be restrained according to the knowledge and intent of the parties respectively claiming and denying the benefit of the release." Their Honours went on to state that "[f]rom a very early time the Court of Chancery applied its special doctrine to the unconscientious reliance upon the general words of a release". The way in which equity differed from common law was stated by Pollock, and approved and applied in the joint judgment. Courts at law would put a restricted construction on general words when it appeared on the face of the instrument that it could not have been the parties' real intention, however, "Courts of equity went farther, and did the like if the same conviction could be arrived at by evidence external to the instrument." That contrasts with the ordinary rule of construction, and seems no longer to be the law in the United Kingdom.[42] The principle is stated in *John Grant* although it scarcely leaps out of the page, and was applied in very clear terms by the Victorian Court of Appeal:

> "The trustees' second contention challenges that finding, on the basis that the trial judge erred in taking Hill's subjective intention into account in construing the words of the release. The emphasised words in the summary of the equitable principle in Grant ... are directly inconsistent with the second contention; which must therefore fail. Specifically, the trial judge was justified in referring both to Hill's subjective intention and the fact that Hill was ignorant of his marshalling claim at the time he entered into the terms of settlement."

I have elsewhere sought to explain how this principle was supported in 19th century decisions, and whether it may be reconciled with conventional principles of contractual construction.[43]

Implied authority and need for writing: *Lauvan Pty Ltd v Bega* [2019] NSWCA 36

42 *Bank of Credit and Commerce International SA (in liq) v Ali* [2002] 1 AC 251; [2001] UKHL 961.
43 M Leeming, "Marshalling Securities and Construing Releases in Equity" (2019) 93 *ALJ* 626.

Mrs Bega appealed from a decision that she was liable to non-bank lenders for $1,000,000 pursuant to a refinancing arrangement executed in a rush. It seems that an elaborate suite of documents was hastily modified in order to provide for a short-term advance secured over Mrs Bega's home, to pay down debt on a property development in which her husband had participated. No formal draw-down notice was issued, and no funds were ever received in her bank account. It was held, favourably to her, that a request or direction was required in order for an advance to be made under the facility. Her submission that a drawdown noticed signed by her was required and could not be waived by the lender was rejected. This turned on a conventional approach to identifying whether a term was for the benefit of one or both parties. It seems clear her husband (an undischarged bankrupt) and another investor undertook all of the refinancing negotiations. It was held that both had authority to request the drawdown, and that there was no need for any written instrument conferring such authority.

Substantial compliance and relief against forfeiture: *JPA Finance Pty Ltd v Gordon Nominees Pty Ltd* [2019] VSCA 159

A lender, JPA Finance, had acquired, in forgiveness of existing debt, 20% of the units of the Travel Inn Motel Unit Trust. JPA then granted a call option over those units for a two year period. The option deed conferred a right of termination by written notice if an Insolvency Event occurred, including a failure to comply with a statutory demand. The deed also provided that any notices "must" be in writing and addressed to "Gordon Nominees Pty Ltd c/- [the firm of solicitors]". Noting that the deed also required Gordon Nominees to pay JPA Finance's legal costs of the refinancing, JPA served a notice saying those costs were some $26,000. Ultimately, JPA's solicitors served a statutory demand, which was not paid, although the $26,000 was paid into Gordon Nominees' solicitors trust account. JPA then purported to exercise the right of termination, addressing its notice to "Oren Polichuk c/- [the firm of solicitors]". A trial judge found that the notice was not valid, because it did not strictly comply with the provision of the deed and amounted to a penalty, and granted relief against forfeiture.

The Victorian Court of Appeal emphasised that there was no "rule" that strict as opposed to substantial compliance was required, but that in all cases the question was one of construction of the contract.[44] No decision had gone so far as to focus upon the title of the address, as opposed to the

44 At [60], [69].

place to which the notice was sent. And the literal approach would be highly technical and merely destructive of the parties' bargain.[45] Noting that the call option fell short of a proprietary right, the Court assumed, favourably to the respondent, that equitable relief might be available,[46] and helpfully collected the following principles after a review of the authorities:[47]

> First, equitable relief against forfeiture may be available in two kinds of situation. The first situation is where there is a contractual stipulation for forfeiture which is directed at securing an object of the transaction, where that object can be attained by means other than forfeiture, such that insistence on forfeiture would constitute a penalty. The second situation is where a party is entitled at law to terminate a contract and forfeit the relevant interest but it would be unconscientious to do so, whether because of fraud, mistake, accident or surprise or because of other unconscientious conduct such as taking advantage of a special vulnerability in order to derive an unjust enrichment. Both kinds of case may be characterised as 'unconscientious', on the basis that it is unconscientious to take advantage of a penal forfeiture, but the two are often treated separately, keeping the label 'unconscientious' for the latter situation.
>
> Secondly, the Court should not intervene so as to interfere with the contractual rights of the parties merely because it thinks it would be fair or reasonable to do so because subsequent events have rendered one party's situation more favourable.
>
> Thirdly, equity will not intervene if forfeiture has resulted simply from one party's inadvertence, or that party's wilful default.
>
> Fourthly, the question of unconscientious conduct may be addressed by reference to the five 'subsidiary questions' identified by Mason and Deane JJ in *Legione* ..."[48]

The right of termination arose upon the occurrence of an Insolvency Event, rather than the non-payment of an amount due, hence securing JPA's entitlement to deal with a party which was not liable to be wound up. Accordingly the trial judge erred in ordering relief against forfeiture.[49] The Court also rejected the alternative claim that it had been unconscientious for JPA to rely upon its legal right.[50]

45 At [72]-[73].
46 At [82].
47 At [98]-[102].
48 Those principles were (1) Did the conduct of the vendor contribute to the purchaser's breach? (2) Was the purchaser's breach (a) trivial or slight, and (b) inadvertent and not wilful? (3) What damage or other adverse consequences did the vendor suffer by reason of the purchaser's breach? (4) What is the magnitude of the purchaser's loss and the vendor's gain if the forfeiture is to stand? (5) Is specific performance with or without compensation an adequate safeguard for the vendor?
49 At [103]-[104].
50 At [108]-[110].