Obligations III Conference
T C Beirne School of Law, Customs House
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"Discretion and Remedies"

The Hon P de Jersey AC,
Chief Justice

The judicial oath obliges the judge to render justice according to law, and that is designed to avoid what Brennan J termed "judicial idiosyncrasy" (*Gollan v Nugent* (1988) 166 CLR 18, 35). Curiously proximately to the achievement of the fusion of law and equity in England, the then Lord Chief Justice, Sir Alexander Cockburn, observed in 1878 that a Judge "cannot set himself above the law which he has to administer, or make or *mould it to suit the exigencies of a particular occasion*" (*Martin v Mackonochie* 3 QBD 730, 775). It suits my present purpose to quote the form of expression employed by Cockburn CJ, and I overlook for now the circumstance that he was refused a peerage by Queen Victoria "upon the ground of the notoriously bad moral character of the Chief Justice" (Oxford Dictionary of National Biography, vol 12, p 329).

Many would contend courts of ultimate authority not infrequently "mould" remedies to suit the exigencies of particular cases, and especially so if the remedy be equitable; though not perhaps with the boldness of Lord Denning who admonished judges to "develop the law…so that the litigants…can have their differences decided by the law *as it should be and is*, and not by the law of the past" (the Rt Hon Lord Denning: *The Discipline of Law*, Butterworths, 1979, p 40).

A propensity to "mould" cannot however be allowed to erode the touchstone of certainty.

Some recent cases in this country, concerning equitable remedies, have provoked the query whether certainty is being maintained. The decision which has aroused probably the most intense critical comment is *Bridgewater v Leahy* (1998) 194 CLR 457, which I raise with circumspection because I was the trial Judge who regrettably got it wrong. I raise it because it provides the most interesting fairly recent illustration I can offer of the theme of this paper.

I will return to more detail of the case. For the moment, I mention the view held by a number of commentators that its circumstances lay "at the very boundary of what constitutes unconscionable

conduct" (cf. eg *Dr Joachim Dietrich* (1999) 73 ALJ 112); and as to the extraordinary width of the discretionary exercise remitted to the Supreme Court for the readjustment of the parties' interests.

It is inevitable subjective notions of fairness strongly influence such determinations. Gibbs CJ in *Amadio (Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, 460) described an unconscientious transaction as one where the party seeking to enforce it has taken "unfair" advantage of the other. So did Mason J (p 467) and Deane J (p 474). As long ago as seven decades past, Dixon J in *Thompson v Palmer* (1933) 49 CLR 507, 547 identified the object of estoppel *in pais* as preventing an "unjust" departure from an assumption adopted by another, which the court picked up in *Legione v Hateley* (1982-3) 152 CLR 406, 430-1. Views on what is "fair", what is "just", will certainly differ, whether the source be lay or judicial.

Courts have therefore struggled to establish frameworks which guide these determinations. Hence claims, as in *Muschinski v Dodds* (1985) 160 CLR 583: "the view that the court can disregard legal and equitable rights and simply do what is fair…is contrary to established doctrine in Australia" (per Gibbs CJ, pp 594-5); and, "the flexible remedy of the constructive trust is not so formless as to place proprietary rights in the discretionary disposition of a court acting according to vague notions of what is fair" (per Brennan J, p 608).

Yet as Deane J was constrained to acknowledge in that case (p 616), "general notions of fairness and justice…remain relevant to the traditional equitable notion of unconscionable conduct…". Relevant, one may ask, even predominant?

In August 1622 at Gray's Inn, Robert Callis Esq, sergeant at law, delivered his famous reading "on the Statute of Sewers, 23 Hen. 8, c5", in which he identified various degrees of discretion. The second and third are apposite:

> "(b) *Legalis discretio* is that which Sir E. Coke meaneth and setteth forth in *Rooke's* and *Keighley's Cases* (…and this is merely to administer justice according to the prescribed rules of law);

> (c) the third discretion is where the laws have given no certain rule…and herein discretion is the absolute judge of the cause, and gives the rule" (Callis 112, 113)."

(Stroud's Judicial Dictionary, 4th ed, Sweet and Maxwell, p 792)

The goal of the courts must be, and is, the establishment of a framework from which the rights of parties may reliably be discerned. The fear being expressed, is that we may be veering into Callis's third category, where there is "no certain rule", and discretion is the "absolute judge of the cause".

It is moot however whether this is a legitimate concern, or one which simply betrays a rather naïve misunderstanding of the reasonable and progressive basis of equity. The opening sentence of the current edition (4th) of Meagher, Gummow and Lehane's "Equitable Doctrines and Remedies" (Meagher, Heydon and Leeming, Butterworths, 2002, p 3) cautions that "equity can be described but not defined". Flexibility is the virtue of discretionary equitable remedies, moulded to suit "ever-varying circumstances" (supra, p 91). It is interesting to note that it is this State – the first Australian colony to fuse law and equity, through the Queensland Parliament's *Judicature Act* of 1876 – which has thrown up the case (*Bridgewater v Leahy*) topically prompting the question whether the equitable discretion may have become unhelpfully flaccid.

Uncertainties emerging from the general law may impact on statutory regimes as well. An example is s 51AC of the *Trade Practices Act*, inserted in 1998. That provision outlaws "unconscionable conduct" by a corporation in the supply of goods or services. It is not a statutorily defined term, but the statute lists circumstances to which a court may refer in determining whether conduct has been unconscionable. The list includes some cast in very broad terms, such as whether "any unfair tactics" were used against the consumer, and the extent to which the parties "acted in good faith".

Driven to explain the statutory concept of unconscionability, the Federal Court has said it is conduct "irreconcilable with what is right or reasonable" (*Hurley v McDonalds Australia Ltd* (2000) ATPR 41-741); something morally wrong, "serious misconduct or something clearly unfair or unreasonable" (*ACCC v Simply no Knead (Franchising) Pty Ltd* (2000) 104 FCR 253).

The legislation leaves it to the courts to elucidate these elusive concepts, and to the extent that has been possible, the scope for subjective interpretation looms large. I empathise with my Federal colleagues, but is the client left clearly enlightened about what may or may not occur?

Some of the issues which could arise in a commercial context are of serious complexion, highly relevant to day-to-day operations. For example, would good faith oblige a mortgagee bank, in possession of a valuation at a figure substantially lower than a customer purchaser is intending to pay for a property, to disclose that valuation to the customer? Could threatening to exercise a legally accrued right, in order to encourage the other party to renegotiate a transaction, ever fall into the bad faith category? A rigorous insistence on legal rights may be considered tough, but could it ever evidence a lack of bona fides?

What is "fair" and what is "just" in the abstract sense, is informed by well-established community values. Some will argue that if these are to be identified, who better than a Judge to do so. But while I am obviously not suggesting courts are not in touch with their communities, the fact remains that Judges are not necessarily well-equipped to determine prevailing community values and social attitudes.

In *Dietrich v R* (1992) 177 CLR 292, 319, Brennan J identified the "contemporary values" which should relevantly inform the judicial process, as not "the transient notions which emerge in reaction to a particular event or which are inspired by a publicity campaign conducted by an interest group. They are the relatively permanent values of the Australian community." Lord Steyn has spoken in the House of Lords of the fashioning of rights by reference to what a Judge "reasonably believes the ordinary citizen would regard as right" (*McFarlane v Tayside Health Board* (2000) 2 AC 59, 82).

The question remaining is how those relevant values are to be gauged.

The significance of my present focus, *Bridgewater v Leahy*, falls to be assessed in the context of preceding decisions of the High Court, especially *Amadio* and *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395. While seen as dramatic in their day, those cases nevertheless reflected a

reasonably certain and predicable development in the law, with the obligations of lenders helpfully mapped out. Significantly for the present, unconscionability under this body of law was not – in my respectful view – left to be determined by reference to only generalized notions of unfairness (cf. "Women's Guarantees and all-moneys clause", J Pascoe (2004) vol 4, no 2 QUTLJJ 245, 246).

Amadio concerned contracting parties subject to a special disability, of which the lender was aware, enlivening the lender's obligation to ensure the transaction was properly explained. *Garcia* concerned a wife giving a guarantee of her husband's borrowings, from which she gained no financial benefit. That lender was obliged to ensure she understood the transaction, an instance of what was for a time colourfully termed "sexually transmitted debt".

Those decisions were modern expressions of long-standing authority: in the former case, *Blomley v Ryan* (1956) 99 CLR 362, and for the latter, *Yerkey v Jones* (1939) 63 CLR 649. They exemplified the incremental development of the common law. *Amadio* has attracted the commendation of Lord Peter Millett, in the course of his criticism of *Barclays Bank plc v O'Brien* (1994) 1 AC 180 because it "substituted an inappropriate bright line rule for a proper investigation of the facts", and "failed the vulnerable in the process". His Lordship preferred the alternative *Amadio* approach of relieving against unconscionable bargains ("Equity's Place in the Law of Commerce" (1998) 114 LQR 214, 200).

Those cases bring me to *Bridgewater v Leahy*. The facts in brief were these. Bill York sold grazing land to his nephew Neil, and Neil's wife, for almost $700,000, and by deed forgave the payment of all but $150,000 of that price. Neil had suggested he purchase the property for $150,000. The Yorks had four daughters and no sons. Neil had worked on Bill's land for many years. Bill was anxious the land not be broken up after his death, and was deeply committed to Neil. When he entered into the sale transaction, Bill, although 84 years old, was medically certified as capable of making decisions about his personal affairs. His will predated the sale by three years. He was then of full testamentary capacity. He died a year after the sale. In his will, Bill gave Neil the option to purchase certain properties for $200,000. That property included the land sold under the later transaction. Neil exercised the option. The residuary estate was left to the daughters. Bill's widow

and his daughters made a family provision application, but it was dismissed for want of prosecution. On the face of things, Bill acted with rational determination to achieve what he wanted, and without connivance Neil accepted the role of beneficiary. The regrettable "victims" were Bill's widow and daughters, whom he had chosen, in his testamentary role, to leave in a disadvantaged position.

The majority of the Justices held it was unconscientious for Neil and his wife to retain the full benefit of the deed of forgiveness. The relevant "special disadvantage" identified by the majority was not within the traditional category. That includes poverty, sickness, infirmity of body or mind, drunkenness, illiteracy (see *Blomley v Ryan*, p 405). Here it was essentially Bill's emotional dependence on Neil: "he had an 'enormous affection' for Neil (and) 'fully trusted him'" (p 492). "The relationship between Bill and Neil meant that, when Neil raised the question of using the proceeds of sale of the Injune land (which yielded the $150,000 Neil offered for the transferred land), they were meeting on unequal terms. Neil took advantage of this position to obtain a benefit through a grossly improvident transaction on the part of his uncle." (p 493)

The circumstances founding the conclusion of unconscionability in this case have caused commentators to question whether the court pushed the doctrine too far. Dr Dietrich (supra p 116) asked "was the unconscionability finding driven by the substantively and objectively unequal outcome, as opposed to any obvious procedural unfairness". Another commentator (Anne Finlay: "Can we see the Chancellor's footprint?: *Bridgewater v Leahy*" (1999) 14 JCL 265) suggests a "weakening" of the test for special disability. She argues that:

> … "reduced to its simplest, in *Bridgewater v Leahy* it seems we had an elderly man, though not one lacking in critical faculties, with a long-term close business and personal relationship with a nephew. Because the nephew suggested a course of behaviour, a sale at undervalue, which ultimately benefited the nephew and because there was no independent advice, but evidence that it would not have made any difference, the majority found unconscionable conduct. Yet the transaction achieved exactly what the man wanted: his farming property to stay in family hands without being broken up and undervalue alone has never been the basis for equitable intervention. Additionally the nephew had sold his own land, something which his uncle had asked him to do. With respect, the majority decision emphasises the fact of the relationship rather than clear evidence of

> an abuse of that relationship. It is tempting to suggest that the majority disapproved of the transaction because the man's immediate family did not benefit as much as they might have done had the gift not apparently put some of the property beyond a challenge to the will under the family provision legislation."

See also Tina Cockburn: "The Boundaries of Unconscionability and Equitable Intervention: *Bridgewater v Leahy* in the High Court" (2000) 8 APLJ 143; Peter Wilson: "Unconscionability and fairness in Australian equitable jurisprudence" (2004) 11 APLJ 1; and Prue Vines: "Challenging the testator's mind by challenging lifetime transactions: *Bridgewater v Leahy* as backdoor probate law?" (2003) 10 APLJ 53.

There is risk that, as with a view endorsed by the High Court in *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 245, "too broadly defined (unconscionability) may become, in the words of Professor Julius Stone, a 'category of meaningless reference'". One is reminded of Sir Anthony Mason's observation in 1994 that "the quest for a precise definition which identifies the characteristics of the fiduciary relationship, and other relationships which attract equitable relief, continues without evident sign of success" ("The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 LQR 238).

The uncertainty thrown up by *Bridgewater v Leahy* is on one view unsurprising, in that of the nine judges involved from trial to High Court appeal, four found unconscionability, whereas five did not.

Another aspect of *Bridgewater v Leahy* of possibly greater fascination is what flowed from the finding of unconscionability. The court remitted the proceeding to the Supreme Court of Queensland for it to determine, effectively, how much more than $150,000 in the overall context, Neil should have paid for the land, while allowing for Bill's legitimate wish to benefit Neil by his will, in context of the reasonable claims of the widow and daughters on the estate. The majority Justices specifically invited the Supreme Court (p 496) to give consideration to the question what provision could have been made for Bill's widow and daughters under Part 4 of the *Succession Act* (notwithstanding that the application had been dismissed for want of prosecution) (p 497), hearing further evidence as necessary (p 494). The court made a complementary declaration that the deed

of forgiveness have "no effect as to the forgiveness of the amount" to be found by the Supreme Court upon the remission.

The majority's approach assumed the capacity of the court to secure "practical justice" through readjustment of the parties' positions. Interestingly, this form of relief was not the subject of submissions from the parties. The dissenting Justices' view was (p 473) that:

> "There would be no practical justice as between the estate of the late Bill York, on the one hand, and Neil and Beryl York on the other, in severing the 1988 transaction and simply setting aside the forgiveness of debts. That would produce practical, and substantial, injustice."

The difficulty of the complex exercise remitted to the Supreme Court is confirmed by the subsequent history of the claim. The Judge to whom the case was committed (not this writer) convened a number of directions hearings with counsel for the parties. They did not produce any consensus as to what was the real issue, or the detail of any practicable means for its examination, and the parties eventually settled the claim out of court.

Yet it must be acknowledged the relief envisaged by the majority of the Justices in the High Court was premised on well-established authority: no less than the House of Lords in *Erlanger v New Sombrero Phosphate Company* (1878) 3 App Cas 1218, where Lord Blackburn said (p 1278) that "the practice has always been 'for a court of equity to give relief which is 'practically just'."

The lacuna is any reasonably precise delineation of how the court is to proceed, and one can readily accept Lord Blackburn's ultimate and rather discouraging conclusion (pp 1279-80), that:

> "…from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry."

The High Court had confronted this approach earlier than *Bridgewater v Leahy*, in *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102, quoting with apparent approbation an observation in Story's *Commentaries on Equity Jurisprudence* that the "interference of a court of equity is a matter of mere discretion…": in this context, some would say, a substantial understatement.

There are of course limits to what a court of equity may accomplish in these areas, and they are covered, without the need for any embellishment from me, in Meagher, Gummow and Lehane (supra, p 92). But I imagine what in the end may confound a practitioner seeking reasonable certainty when advising in the office, is exemplified by the very complexity of the exercise committed to the Supreme Court upon the High Court's remission in *Bridgewater v Leahy* (cf. Cook: "Setting aside pre-death dispositions: a new approach in probate law", April 1999, LIJ, p 72).

The wrinkles wrought by that case aside, it must be acknowledged the High Court has resisted attempts to engraft equitable doctrines inappropriately onto other, well-established, common law landscapes.

In *Tanwar Enterprises Pty Ltd v Cauchi* (2004) 217 CLR 315, the High Court rejected a contention that a vendor of real property was acting unconscionably when exercising a right to terminate a contract upon the purchaser's default in completing in accordance with an essential time stipulation (where, by the time of termination, the purchase could have completed).

The question re-emerged in *Romanos v Pentagold Investments Pty Limited* (2003) 217 CLR 367, 375 where the High Court observed "equity does not intervene in such a case to reshape contractual relations in a form the court thinks more reasonable or fair where subsequent events have rendered the situation of one side more favourable than that of the other side".

In *ACCC v Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, Gleeson CJ emphasized (pp 64-5) that, absent exploitation of a specially disadvantaged party, the other will not behave unconscionably by robustly asserting his or her superior bargaining position. The Chief Justice said this:

> "A person is not in a position of relevant disadvantage, constitutional, situational, or otherwise, simply because of inequality of bargaining power. Many, perhaps even most, contracts are made between parties of unequal bargaining power, and good conscience does not require parties to contractual negotiations to forfeit their advantages, or neglect their own interests…
>
> Unconscientious exploitation of another's inability, or diminished ability, to conserve his or her own interests is not to be confused with taking advantage of a superior bargaining position…"

He spoke uncritically in this context of parties to commercial negotiations using their bargaining power to "extract concessions from other parties", observing "that is the stuff of ordinary commercial dealing". On one view it is odd the arguable reach of equity has meant such confirmations are necessary.

The quest for certainty is exemplified in the United Kingdom by *Royal Bank of Scotland plc v Ettridge* (2002) 2 AC 773, where the British courts' "concern for future certainty…(drove) them to the incredibly precise and detailed requirements of Lord Nicholls' speech…" (Peter Wilson, supra, p 18). Their Lordships thereby revised the position they had considered responsible only eight years earlier in *Barclays Bank plc v O'Brien*. Time will tell whether the consequences of any uncertainty in Australian law warrant further, even drastic revision by the High Court of the positions presently established in our relevant jurisprudence.

The late Peter Birks, remembered with respect by many attending this conference, quoted a view expressed by Bagnell J in "Equity in the modern law: an exercise in Taxonomy" (1996) 26 WALR 1, 23 (cf. *Cowcher v Cowcher* (1972) 1 WLR 425, 430). Bagnell J was a Judge of the Family Division in England for six years until his death in 1976. As a matter of presently irrelevant history, I note that like Cockburn CJ, from whom I quoted at the outset of this paper, Bagnell J died in office.

The complete passage in the judgment of Sir William Bagnell from which Professor Birks quoted reads as follows:

> "In any individual case the application of these propositions may produce a result which appears unfair. So be it; in my view, that is not an injustice. I am convinced that in determining rights, particularly property rights, the only justice that can be attained by mortals, who are fallible and are not omniscient, is justice according to law; the justice which flows from the application of sure and settled principles to proved or admitted facts. So in the field of equity the length of the Chancellor's foot has been measured or is capable of measurement. This does not mean that equity is past childbearing; simply that its progeny must be legitimate – by precedent out of principle. It is well that this should be so; otherwise, no lawyer could safely advise on his client's title and every quarrel would lead to a law suit."

I respectfully adopt that as an appealingly expressed yardstick.