Abstracts

Frontiers of Commercial Equity Conference

Thursday 18 May 2017

1. Justice Mark Leeming: 'Overlapping Claims at Common Law and in Equity - An Embarrassment of Riches?'

A feature of the English legal system received in Australia is the fact that there have been overlapping claims at common law and in equity (as well as in ecclesiastical law and admiralty) for centuries. The jurisdictional warfare between King's Bench and Court of Chancery (framed in terms of common injunctions), and King's Bench and the High Court of Admiralty (framed in terms of jurisdiction) are familiar examples. But there were also competing common law actions between the superior common law courts themselves, as well as with their competitors the various local courts, which in some respects were more advanced than the superior courts at common law (for example assignments of choses in action and enforcement of executory contracts). This competition on the part of *courts* for business informed the structure of the *law*, especially when the latter came to be refined and reformulated in the nineteenth century.

The Australian colonial Supreme Courts, whose jurisdiction was defined in terms of the superior courts at Westminster, inherited those overlapping claims. This paper considers ways in which those historical foundations continue to inform the structure of the modern Australian legal system, and the strengths and weaknesses of that structure.

2. Ms Jessica Hudson: 'Equitable ownership and restitution of misapplied trust property'.

Equitable ownership is sometimes relied upon as providing a reason why the trust beneficiary has a claim for restitution of misapplied trust property from a third party recipient. According to this view, the beneficiary has a claim for recovery of the trust property because she is the equitable or 'true' owner of the property. This paper interrogates the concept of equitable ownership and argues that it is a descriptive label applicable where a beneficiary has the power to call for the trust property from the trustee. Equitable ownership has no fixed normative meaning and does not explain the beneficiary's claim for restitution of misapplied trust property from a third party recipient. The paper goes on to consider the implications of this argument for our understanding of the nature and scope of the trust beneficiary's proprietary claim.

3. Panel discussion

(a) Prof Elise Bant (co-authored with Prof Michael Bryan): 'Outflanking Barnes v Addy? The revival of recipient strict liability'

The High Court in *Farah Constructions Pty Ltd v Say-Dee Constructions Pty Ltd* (2007) 230 CLR 89 made clear that the equitable liability of a recipient of property under the first limb of *Barnes v Addy* was not strict and was not an application of restitution for unjust enrichment. A point often overlooked, however, is that legislation provides important examples of recipients of property from fiduciaries (and others) coming under a strict duty to restore property or its value to the party entitled. More recently, the New South Wales Court of Appeal in *Fistar v Riverwood Legion & Community Club Ltd* [2016] NSWCA 81 and the Full Federal Court in *Great Investments v Warner* [2016] FCAFC 85 recognised that strict common law and equitable liability will in some cases render reliance on 'knowing receipt' liability superfluous.

This paper examines how legislative and doctrinal strict liability sometimes operates concurrently with equitable liability for 'knowing receipt' and argues that there are good reasons why strict liability restitution (whether based on unjust enrichment or on other grounds) should be recognised in private law.

(b) Associate Prof Man Yip: 'Third Parties' Liability for Receipt of Misapplied Corporate Assets: The Relevance of Knowing Receipt?'

It has been assumed, and rarely challenged, that the first limb of *Barnes v Addy* (also commonly referred to as a claim for knowing receipt) is applicable to receipt of property misapplied by fiduciaries other than a trustee. In *Great Invesments Ltd v Warner* [2016] FCAFC 85, the Full Federal Court of Australia said that where a company seeks to recover assets, whether transferred with or without authority, from third party recipients, a claim for knowing receipt is unnecessary or irrelevant. The case concerned company assets transferred without authority and the Court held that the recipient was under strict liability to make restitution.

This paper examines one aspect of the Federal Court's pronouncements laid down in Great Investments—essentially, the question concerning the applicability of the knowing receipt principles to cases involving receipt of misdirected corporate assets. This article argues, by reference to the fundamental differences between the corporate framework and the trust framework, that the knowing receipt principles cannot be extended to every case involving receipt of misdirected corporate assets.

4. Prof Simone Degeling and Associate Prof Michael Legg: 'Fiduciaries in Australian Federal Class Actions'.

The Federal Court of Australia Act 1976 (Cth) Part IVA enacts the Australian federal class actions regime which has as a central objective increased access to justice by permitting litigation to be brought by one plaintiff on behalf of a group of claimants who share a common interest. Such litigation may be financed through the activities of a third party corporate or potentially non-corporate litigation funder. The statute thus regulates, either directly or indirectly, the conduct of lawyers, litigation funders and others. We argue that equitable fiduciary obligations are also engaged and, to varying extents, have a mandate to supervise the activities of these actors. This paper thus examines the fiduciary obligations which may systemically arise in Australian federal class actions and considers the compliance risk which thereby results.