OPENING ADDRESS BY THE HON. JUSTICE K.M. HAYNE, AC AT THE CENTRE FOR COMMERCIAL LAW CONFERENCE 2002 "COMMERCIAL LAW – PRIVATE BUSINESS/PUBLIC CONCERN" MONDAY, 30 SEPTEMBER 2002 AUSTRALIAN NATIONAL UNIVERSITY

The publicity material for this Conference said that its theme covered "contemporary issues, such as the insurance crisis and the problem of unpaid workers' entitlements" but was "also intended to cover longstanding issues, such as the extent to which commercial law should be regulated or left to private agreements". Several questions were posed. "Is there a need for government regulation of commercial dealings? What form should that regulation take? Even if commercial law is regarded as essentially private, is there nevertheless a place for 'public' concepts, such as good faith etc?"

I do not intend to trespass upon any of the particular fields which the several speakers intend to cover. Rather, I want to invite attention to another way in which the topics which you are to consider may be viewed.

In 1927, Atkin LJ said[1] that to introduce consideration of equitable concepts dividing legal and beneficial interests in property

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1 *In re Wait* [1927] 1 Ch 606 at 640-641.

to the sale of goods would introduce "disastrous innovations" into what he identified as "well settled commercial relations". One wonders what his Lordship would have made of the subsequent emergence of retention of title clauses of the kind considered in *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In liq)*[2].

By contrast, more than 70 years later, Sir Anthony Mason observed that equitable doctrines based on unconscionable conduct had played a prominent part in, and made an important contribution towards, the breaking down of the more rigid rules of common law[3].

These differing views represent radically different approaches to commercial law. It would do justice to neither approach to attempt to encapsulate them in some snappy catch phrase like "the freedom of private contract versus the imposition of minimum standards of behaviour". The problems that are presented, and the solutions that must be adopted in response to those problems, are much more complicated and subtle than such a simple antinomy suggests.

In 1978, Atiyah developed the thesis that modern law had moved away from the application of general principles towards what

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2 (2000) 202 CLR 588.

3 Mason, "The Impact of Equitable Doctrine on the Law of Contract", (1998) 27 *Anglo American Law Review* 1 at 28.

he described as a search for individualised justice[4]. Perhaps this trend can now be seen most clearly in statute law. More and more statutes provide for discretionary solutions guided by very broad aspirational statements of principle. And the fields in which there is statutory regulation grow ever wider as each increasingly large volume of statutes is published. Behind much of this legislation lie certain unexpressed premises – that every case is different but that there are some generally accepted standards of fairness against which every case should be tested. The consequence is, as Chief Justice Gleeson has pointed out[5]: "we can no longer say that, in all but exceptional cases, the rights and liabilities of parties to a written contract can be discovered by reading the contract." To lawyers of Atkin's generation this would have been heresy. How has it come about?

There are two principal influences at work. First, there is the influence to which I have already referred – the ever increasing importance of statute. The significance of this shift from common law to statute cannot be overestimated. It is, I think, the most fundamental change that has occurred in the law in the last 40 years and it is a change that is still happening. As I have said, many

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4 Atiyah, *From Principles to Pragmatism*, (1978) at 15 referred to in Gleeson, "Individualised Justice – The Holy Grail", (1995) 69 *Australian Law Journal* 421.

5 Gleeson, "Individualised Justice – The Holy Grail", (1995) 69 *Australian Law Journal* 421 at 428.

statutes use as their criteria of operation terms like "fair" or "just" or "unconscionable". The second influence is the application, some would say the intrusion, of equitable principles to commercial dealings. It is to the second of these influences that I wish to devote a little attention this morning.

Sir Peter Millett, now Lord Millett, identified[6] three reasons for concluding that "[e]quity's place in the law of commerce, long resisted by commercial lawyers, can no longer be denied"[7]. First, there is the increasing complexity and professionalisation of commercial life and the fact that on each side of a commercial transaction there will very likely be relationships of trust and confidence. Secondly, he considered that "there has never been a greater need to impose on those who engage in commerce the high standards of conduct which equity demands"[8] – loyalty, fidelity, integrity, respect for confidentiality, and the disinterested discharge of obligations of trust and confidence. The third factor he identified was the profession's discovery of the apparent advantages of alleging breaches of trust or fiduciary duty with the result that a statement of claim was to be considered seriously deficient if it did not contain reference to those concepts.

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6 Millett, "Equity's Place in the Law of Commerce", (1988) 114 *Law Quarterly Review* 214 at 216-217.

7 (1998) 114 *Law Quarterly Review* 214 at 216.

8 (1998) 114 *Law Quarterly Review* 214 at 216.

In Australia, the same may be said of references to Pt V of the *Trade Practices Act* 1974 (Cth). No pleading is regarded as sufficient without some reference to misleading or deceptive conduct. But in Australia, too, frequent reference is made to breach of trust or fiduciary duty in connection with commercial transactions. Two examples of that, which have reached the High Court, are *Hospital Products Ltd v United States Surgical Corporation*[9] and *Pilmer v The Duke Group Ltd (In liq)*[10].

Leaving aside the particular content of the two decisions that I have just mentioned (for the reasons of the Court must speak for themselves) it is, I think, the common experience of judges sitting in commercial lists that expressions like "fiduciary" and "unconscionable" are sprinkled through pleadings or submissions much as caster sugar is sprinkled upon a bowl of strawberries in the hope that the consumer may find the dish more palatable. All too often the attachment of the label "fiduciary" ignores the dictum of Frankfurter J[11]: "to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what

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9 (1984) 156 CLR 41.

10 (2001) 75 ALJR 1067; 180 ALR 249.

11 *Securities and Exchange Commission v Chenery Corporation* 318 US 80 at 85-86 (1942).

respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?" As Finn said in his seminal work on fiduciary obligations[12]: "[i]t is not because a person is a 'fiduciary' or a 'confidant' that a rule applies to him. It is because a particular rule applies to him that he is a fiduciary or confidant for its purposes". That is, a fiduciary is not subject to fiduciary obligations because he or she is a fiduciary; it is because he or she is subject to fiduciary obligations that he or she is a fiduciary. And, of course, it is always necessary to bear steadily in mind that not every breach of duty by a fiduciary is a breach of fiduciary duty.

Yet, to a greater or lesser extent these basic principles of law are ignored or discarded when parties seek to apply equitable doctrine to commercial relationships. The language of equity is applied but sometimes without close attention to the content of the principles that it seeks to invoke.

There is a connection between the appeal to equitable principles, as if they entitled the provision of relief in any and every case to which some pejorative adjective like "unfair" could be applied, and the debate about discretionary remedialism. That debate is said to reflect a contest between precision and predictability in the law and what is seen as individualised and

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12 Finn, *Fiduciary Obligations*, (1977) at 2.

substantive justice rooted in broad common values of society. Often enough those values are said to be reflected in the concept of unconscionability. As you know, Professor Birks condemns discretionary remedialism. For him, "[t]he lawyer who deals in 'unconscionable behaviour' is rather like the ornithologist who is content with 'small brown bird' ... Like 'fair' or 'just', the word 'unconscionable' is so unspecific that it simply conceals private and intuitive evaluation"[13].

In part this debate about discretionary remedialism may well be overtaken by the legislature. Legislation like Pt IVA of the *Trade Practices Act* 1974 (Cth) and the *Contracts Review Act* 1980 (NSW) depends for its operation upon terms like "unconscionable", "unconscionable, harsh or oppressive". But the use of these terms in legislation leaves many questions to be answered. How are those principles to be applied? What is their content? Is their content sufficiently identified by saying that conduct is "unconscionable" if it would "offend society"[14]? Are these doctrines to be applied only in cases where there is some relevant disparity in bargaining power between parties? How is one to measure bargaining power?

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13 Birks, "Equity in the Modern Law: An Exercise in Taxonomy", (1996) 26 *Western Australian Law Review* 1 at 16-17. See also Birks, "Three Kinds of Objection to Discretionary Remedialism", (2000) 29 *Western Australian Law Review* 1; cf Evans, "Defending Discretionary Remedialism", (2001) 23 *Sydney Law Review* 463.

14 Mason, "The Impact of Equitable Doctrine on the Law of Contract", (1998) 27 *Anglo American Law Review* 1 at 12.

I do not say that these are questions that cannot be answered but it is important to recognise that the broad and general specification of standards to be applied does not provide the answer to any inquiry – it presents the starting point for much deeper and more difficult inquiries requiring the articulation of what it is about a particular event or transaction that warrants the application of the relevant description.

Apart from the problems of first identifying the content of rules expressed in this general way, and then determining the circumstances in which they are to be applied, there is a further set of problems to which proper attention may not always be given. There are cases where what is done by a person is clearly contrary to community standards. Usually, if that conduct is significant, it is classified as criminal or as a civil wrong. Those cases apart, the condemnation of particular kinds of conduct as unworthy or inappropriate not only assumes that the standard against which it is to be judged can be identified, it also assumes that all of the obligations of and pressures on the individual concerned have been identified. Neither is self-evidently true. If the behaviour is not criminal and is not a civil wrong, is it clear that society condemns it? Before condemning a particular kind of conduct, are we sure that we know enough of the circumstances in which it was done?

Thus, in a commercial context, what, if any, weight is to be given to the fact that a company director, and those employed by a company, are bound to pursue the commercial advantage of that company. Reducing the proposition to its simplest and crudest terms, if there is a profit to be made, they should seek to maximise it. Specifying limits to that obligation by saying "maximise profit, but only where it is fair to do so" affects not only those who are the parties to a transaction that is impugned, it affects all those who have some interest in the fortunes of the company concerned – employees, creditors, shareholders. The policy questions thus presented have more than one dimension. Debate about them may not always recognise that fact.

It is, I think, now far too late to long for those simpler days when introducing equitable principles into well-settled principles of commercial relations could be described as a disastrous innovation. It is too late because it has happened and it is too late because society, and the transaction of business in society, either has become more complicated or we have come to recognise better the complications that attend their regulation. No longer can business transactions be seen as matters wholly for private agreement in which the only functions of the law are to facilitate and enforce bargains. But the injection of public standards or public regulation of such transactions must recognise that it is not sufficient to sprinkle qualitative descriptions of behaviour leaving parties, lawyers and courts to debate what effect is to be given to them. It is necessary

to look carefully at all of the questions that arise. For legislators there will be a wide range of policy issues to consider. For lawyers the statement of a standard in broad and qualitative terms presents many questions which must be identified and answered.

Today's Conference will, I am sure, assist in identifying the relevant questions and assist in the debate about the answers that should be given to them.