

2026 Australian Catholic Students Association Keynote

Address

"Conscience and Unconscionable Conduct"

13 May 2026

1. Professor Neoh, organisers, distinguished guests and students, it is a great privilege to have been asked to speak tonight at the Australian Catholic Students Association ACT conference launch. The theme of tonight's address is the impact of Christian theology on jurisprudence. I propose to address one fundamental example – the influence of theology on the doctrine of unconscionable conduct.

2. I do so as no theologian; indeed, my critics would say I can hardly do so as a lawyer. In the 1980s when I was a law student my parish priest gave a sermon in which he rightly condemned the majority of his parishioners as "spiritually mediocre". I was a member of that majority; I had not been fired by the greatest of all revolutions: Christianity. I confess that not much has changed for me since, as I now gaze upon an increasingly secular western world. Indeed, it is a world where those who wield power – in Australia by each of its three branches of government – often now scoff at and reject Christian faith. The west now proclaims it has no need of the gospel; it has no need of the sacrifice of Christ. In that world – mediocre by nature – I nonetheless profess my faith. I go to mass each week. I do so in the hope that God will forgive my own spiritual mediocrity.

3. Let me return to the equitable doctrine of unconscionability. I do so with gratitude for the work of my associate Alice Baker in preparing this speech.
4. One of the apparent paradoxes of the modern legal system is that, in our increasingly secularised society, courts and the Parliament seek to measure conduct against a standard of "unconscionability", a standard of objective morality, developed in the intellectual tradition of the scholastic works of St Jerome, St Bonaventure and St Aquinas (amongst others). The purpose of tonight's address is to trace the intellectual lineage of "conscience" from its emergence in the medieval Court of Chancery, through to modern times, and to elucidate its meaning in modern case law. That intellectual history has widespread ramifications for the modern law of equity. Of course, too much should not be made of the influence of Catholic social and theological thought – "conscience" has no doubt evolved over the centuries to respond to different challenges and has been influenced by a number of factors and sources of law. Yet, its origins in the intellectual thought of the scholastics continue to influence the meaning of "unconscionability" today – a departure from that conscience would involve a radical departure from history and precedent.

Origins of Chancery

5. Let me next turn to the early history of Chancery. In the 12th century, the common law of England had begun to emerge.¹ The King's royal justice had slowly begun to overtake local courts. By the 13th century, there emerged two principal courts, the King's Bench and the Common Bench. However, as Maitland has explained there was also a "reserve of justice in the king" for "those who [could not] get relief elsewhere"; in practice much of that work fell to the Chancellor.² The Chancellor was the keeper of the King's conscience.³
6. In the early period following the Norman conquest, the Chancery was, in broad terms, a department of the State, headed by the Chancellor. The Chancery carried out a substantial administrative role, in authenticating documents with the Great Seal of England.⁴ To commence proceedings in a common law court, a litigant was required to obtain a writ from Chancery. Until the mid-13th century, the Chancery would create new writs if a matter fell outside the existing common law forms of action, but the 1258 *Provisions of Oxford* limited that power, such that a new writ required

¹ N Manousaridis, 'The Common Law Courts: Origins, Writs, and Procedure' in *Historical Foundations of Australian Law: Volume 1* (Federation Press, 2013) 28 at 28.

² F Maitland, *Equity: Two Courses of Lectures* (Cambridge University Press, 1913) at 3.

³ T A O Endicott 'The Conscience of the King: Christopher St. German and Thomas More and the Development of English Equity' (1989) 47(2) *University of Toronto Faculty of Law Review* 549 at 550.

⁴ J H Baker, *Introduction to English Legal History* (Oxford University Press, 5th ed, 2019) at 107.

the approval of the King's council. In this way, the Chancellor was associated with the administration of justice.⁵

7. There was also the "Latin Side" of Chancery, a juridical function, that considered matters relating to Chancery staff, royal grants, petitions against the Crown and Crown property rights.⁶ This jurisdiction of Chancery grew into the Court of Chancery.⁷

8. The Court of Chancery heard two broad kinds of petition. First, until the late 15th century, the Chancery heard petitions from litigants who complained that due to weakness, poverty or abuse of position, they could not obtain a remedy in the common law courts. Second, the Chancery heard petitions where the strict procedures and forms of action in the common law were seen to lead to injustice – or to be "against conscience".⁸

9. Indeed, by the 15th century, "conscience" had become a hallmark of the Court of Chancery.⁹ Contemporaries from this time

⁵ J H Baker, *Introduction to English Legal History* (Oxford University Press, 5th ed, 2019) at 107.

⁶ F Roughley 'The Development of Conscience in Equity' in *Historical Foundations of Australian Law: Volume I* (Federation Press, 2013) 139 at 141-142.

⁷ F Roughley 'The Development of Conscience in Equity' in *Historical Foundations of Australian Law: Volume I* (Federation Press, 2013) 139 at 142.

⁸ J H Baker, *Introduction to English Legal History* (Oxford University Press, 5th ed, 2019) at 113-114. F Roughley 'The Development of Conscience in Equity' in *Historical Foundations of Australian Law: Volume I* (Federation Press, 2013) 139 at 142.

⁹ D Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at 13.

referred to it as a Court of Conscience.¹⁰ However, as Klinck has observed, it is one thing to say that "conscience" was the hallmark of Chancery, and quite another to give content to that concept.¹¹

10. The medieval Chancellors of England were clerics. Indeed, in the 136 years prior to the end of St Thomas More's tenure in 1532, almost all the Chancellors were bishops, archbishops or cardinals, with a good understanding of ecclesiastic administration, and varied educations in theology, civil law and canon law.¹² As Haskett has observed:¹³

" If, then, we accept that training and experience affect the work an individual undertakes, the conclusion is clear: armed with an extensive knowledge of civil law and perhaps canon law as well, formed by the university and tempered with experience as functionaries in ecclesiastical administration, the bishop-chancellors did not need to invent the principles informing their work in the court."

Conscience in medieval theology

11. By the time that Chancellors invoked a doctrine of "conscience", the scholastics had developed a detailed understanding of the concept of "conscience" as a process of moral reasoning. It seems

¹⁰ W P Baildon (ed), *Select Cases in Chancery, A.D. 1364-1471* (Selden Society, 1896) at 121, case 123.

¹¹ D Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at 15.

¹² T S Haskett, 'The Medieval English Court of Chancery' (1996) 14 *Law and History Review* 245 at 260.

¹³ T S Haskett, 'The Medieval English Court of Chancery' (1996) 14 *Law and History Review* 245 at 260.

probable that the early Chancellors referred to "conscience" in that sense. The 5th century writings of St Jerome on the *Book of Ezekiel* conceptualised moral reasoning as involving two processes: synderesis and conscience.¹⁴ This distinction was maintained and developed throughout the Middle Ages by moral philosophers, including St Thomas Aquinas and St Bonaventure.¹⁵

12. At a crude level, synderesis is an innate faculty by which people perceive moral law, as objectively laid down by God. St Aquinas associated synderesis with *reason* and explained that "'synderesis' is said to be the law of our mind, because it is a habit containing the precepts of the natural law, which are the first principles of human actions".¹⁶ St Bonaventure took a slightly different approach, characterising synderesis as the 'spark of conscience', grounding synderesis in a *will* to do good, rather than in *reason*.¹⁷ It is similar, I believe, to that unattainable glimmer that is known as "inscape" and which so infected the poetry of Gerard Manly Hopkins.

¹⁴ See T Aquinas, *Summa Theologica*, translated by Fathers of the English Dominican Province (Benziger Bros, 1947) at 540.

¹⁵ See generally T C Potts, *Conscience in Medieval Philosophy* (Cambridge University Press, 1980).

¹⁶ See T Aquinas, *Summa Theologica*, translated by Fathers of the English Dominican Province (Benziger Bros, 1947) at 1350; D Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at 32.

¹⁷ D Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at 13, 32-33.

13. Conscience, by contrast, involved the application of the knowledge afforded by *synderesis*.¹⁸ Potts has thus explained that "we might say that *synderesis* consists of *rules*, whereas *conscientia* is concerned with their application (including misapplication)".¹⁹

Early references to "conscience" in Chancery

14. One of the early Chancellors of England was St Thomas Becket. St Thomas is perhaps most well-known for his martyrdom. In 1170, following a dispute with King Henry, he was notoriously murdered inside Canterbury Cathedral. The murder shook European Christendom to its core, and was recorded in great detail by eyewitnesses of the time. More recently, it has been popularised in T.S. Eliot's play *Murder in the Cathedral*.

15. However, St Thomas Becket is important for our purposes tonight for another reason. Havelock credits St Thomas with setting the law of the Church as the standard against which the Chancellor was to measure conscience.²⁰ Havelock attributes the development of the concept of "conscience" in equity to the Chancellorship of St Thomas Becket, recounting that on one winter day King Henry II and St Thomas were riding through the streets of London and saw a

¹⁸ J C Campbell, 'The Development of Principles in Equity in the Seventeenth Century' in P R Anstey (ed), *The Idea of Principles in Early Modern Thought: Interdisciplinary Perspectives* (Routledge, 2016) 45 at 45 and 48.

¹⁹ T C Potts, *Conscience in Medieval Philosophy* (Cambridge University Press, 1980) at 18.

²⁰ Rohan Havelock, 'The Evolution of Equitable "Conscience"' (2014) 8 *Journal of Equity* 128 at 132.

cold beggar. The King asked if St Thomas should give the beggar his cloak – St Thomas is said to have replied "Great indeed, and you, as King, ought to have a disposition and an eye for such things".

Thereafter, the King told St Thomas "You indeed shall have the grace of this charity!", wrestled the cloak from him and gave it to the beggar, who left praising God.²¹

16. An analysis of the plea rolls reveals that it was only in the late 15th century that a close association developed between "conscience" and the Court of Chancery. Yet, even before that time, litigants in Chancery referenced in their petitions an objective moral standard grounded in Christianity. For example, the selection of petitions collected by the Selden Society dated 1364-1471 are brought "as right and reason demand, for God and in way of charity" or "for God and in way of holy charity".²²

17. As the 15th century progressed, "conscience" was frequently invoked in the Court of Chancery.²³ However, its meaning was rarely explained. There are no explicit references to the theological scholastic concept of "conscience" in Chancery. On one view, as Hedlund has observed, prior to the Reformation, it probably was not

21 Rohan Havelock, 'The Evolution of Equitable "Conscience"' (2014) 8 *Journal of Equity* 128 at 132, citing F Barlow, *Thomas Becket* (Weidenfeld and Nicolson, 1986) at 45.

22 W P Baildon (ed), *Select Cases in Chancery, A.D. 1364-1471* (Selden Society, 1896) at 124 case 129, 49 case 45. See also Rohan Havelock, 'The Evolution of Equitable "Conscience"' (2014) 8 *Journal of Equity* 128 at 132-133

23 D Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at 13-14.

necessary to do so, and after the Reformation, it was not possible to do so.²⁴

18. However, there is one notable case in the Exchequer in 1453, in which Fortescue CJ expounds upon the meaning of conscience. That case concerned a feoffment of land to the feoffor's daughter – or in modern terms a trust. The father and feoffor sought to revoke the feoffment and give the land to another daughter, when that first daughter would not marry according to her father's wishes. Several judges considered the issue. However, the reasons of Fortescue CJ are notable for his explanation of the meaning and requirements of "conscience".

19. Fortescue CJ began by explaining that "[w]e are not arguing the law in this case, but the conscience". His Lordship then explained that the feoffor cannot change his will unless there is a special reason, such as, for example "if I will that one of my sons shall have land, and then he becomes a thief". Critically, Fortescue CJ concluded by stating:²⁵

"And "conscience" comes of con and scioscis. And so together they make "to know with God" to wit: to know the will of God as near as one reasonably can. For a man can have land by our law, and by conscience he shall be damned, etc."

²⁴ Richard Hedlund, 'The Theological Foundations of Equity's Conscience' (2015) 4 *Oxford Journal of Law and Religion* 119 at 132.

²⁵ *Stratham's Abridgment of the Law: Vol 1*, trans M Klingelsmith (Boston Book Company, 1915) at 392-393, discussed in D Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at 15-17.

20. As Klinck has observed:²⁶

"This observation is significant for various reasons – notably, that it makes judgment in conscience an effort to discern and do God's will. This fairly firmly places the measure of conscience in the law of God, and suggests that the judge in conscience is attempting, in some sense, to know, as God knows".

On one view, it seems that Fortescue CJ is acknowledging a natural law, "the will of God", which conscience is to apply "to know". That proposition bears striking parallels to scholastic conceptions of synderesis and conscience.

21. Other early reports of the cases in Chancery appeal to "conscience", without expressly stating its meaning; however, in the context it seems likely that the Chancery and litigants were referring to that same conception of "conscience", in the tradition of the scholastics. For example, in an undated petition in the Selden Society collection of selected cases from 1364-1471, a litigant appeals "in honour of God and on account of righteousness" for a writ to bring the defendants before "the Court of Conscience" to answer "as reason and conscience demand", so that the litigant is not left without a remedy, "which God forbend".²⁷ With the references to the demands of "reason and conscience" and "on account of righteousness", that

²⁶ D Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at 17.

²⁷ W P Baildon (ed), *Select Cases in Chancery, A.D. 1364-1471* (Selden Society, 1896) at 121, case 123.

litigant appears to be appealing to a natural law so that he is not left without a remedy.

The Reformation and "conscience" in Chancery

22. However, this meaning of "conscience" has not remained static throughout history. Following the Reformation, there were subtle shifts in the role of Chancery and the conception of conscience, yet it remained implicitly moored to its origins in the intellectual tradition of the scholastics. The most significant change was connected with the publication, shortly before the Reformation of the celebrated protestant Christopher St German's, *Doctor and Student, or a Dialogue between a Doctor of Divinity and a Student in the Laws of England*.²⁸ This treatise of English equity sought to explain the nature of equity's jurisdiction, and its relationship with the common law.

23. As McNair has observed, St German, in his exposition on conscience, "loosely" followed the scholastic understanding of conscience – involving synderesis "a universal principle that never erreth"²⁹ and conscience is the application of that principle.³⁰ That understanding of conscience, loosely in the scholastic tradition,

²⁸ St German, *Doctor and Student, or a Dialogue between a Doctor of Divinity and a Student in the Laws of England: of the Grounds of the Said Laws and of Conscience* (15th ed, 1751) at 40-41, 44.

²⁹ St German, *Doctor and Student, or a Dialogue between a Doctor of Divinity and a Student in the Laws of England: of the Grounds of the Said Laws and of Conscience* (15th ed, 1751) at 44.

³⁰ M Macnair, 'Equity and Conscience' (2007) 27(4) *Oxford Journal of Legal Studies* 659 at 661-662.

presupposed a natural law which gained its authority from objective morality.

24. However, St German added a new gloss on "conscience" in his capacity as a lawyer – that of articulating the relationship between conscience and positive law. St German explained that there is the Law of Reason, arising from "natural reason", the Law of God, flowing from "Revelations of God" and the Law of Man. St German sought to ground the Law of God and Man in the Law of Reason, and placed "conscience" within that structure.³¹ Conscience required the Law of Reason and the Law of God to be followed; the Law of Man was also to be followed, to the extent that it did not conflict with the law of nature. In that way, as Fiona Roughley S.C. has explained, St German saw Chancery as operating "to ensure that the common law fulfils the true calling of the law of the realm".³²

25. St German also adopted Aristotelian concept of "epikeia" to explain how conscience facilitated the Law of Man, and ensured that the common law was applied consistently with its intended purpose and effect.³³ Epikeia posits that laws are framed in broad terms, which may lead to injustice in particular cases, and in that

³¹ F Roughley 'The Development of Conscience in Equity' in *Historical Foundations of Australian Law: Volume I* (Federation Press, 2013) 139 at 148-149.

³² F Roughley 'The Development of Conscience in Equity' in *Historical Foundations of Australian Law: Volume I* (Federation Press, 2013) 139 at 148.

³³ F Roughley 'The Development of Conscience in Equity' in *Historical Foundations of Australian Law: Volume I* (Federation Press, 2013) 139 at 149.

circumstance, the law should be applied according to the intention of the drafter. St German explains this by reference to the case of giving alms to a "valiant beggar"; a statute of Edward III had prohibited almsgiving to beggars, to address the labour shortage following the plague. Yet St German explained that a person would be excused if they have gifted clothing to a beggar to save the life of a beggar, languishing in cold weather and wearing only light clothing.³⁴

26. As Roughley has observed, in mooring epikeia to Chancery's function, St German "was, in effect arguing that the objectives underpinning the common law, not Papal decrees, should govern the consciences of Englishmen".³⁵

27. In the years before St German, Chancellor Cardinal Wolsey had asserted that conscience was superior to the law. Cardinal Wolsey is quoted as remarking "*Hoc volo, sic jubeo*", or in English "my will is my decree". By contrast to that approach, St German imagined a very different role for the Chancery, shifting from a Court of Conscience in the broad sense, to a Court that operated to ensure that the common law fulfilled its purpose. St German was critical in transforming the Chancery from a Court which more freely applied the natural law, to a Court of principles in equity – conscience began to adopt a more

³⁴ St German, *Doctor and Student, or a Dialogue between a Doctor of Divinity and a Student in the Laws of England: of the Grounds of the Said Laws and of Conscience* (15th ed, 1751) at 50, explained in T A O Endicott 'The Conscience of the King: Christopher St. German and Thomas More and the Development of English Equity' (1989) 47(2) *University of Toronto Faculty of Law Review* 549 at 563.

³⁵ F Roughley 'The Development of Conscience in Equity' in *Historical Foundations of Australian Law: Volume I* (Federation Press, 2013) 139 at 150-151.

technical meaning, grounded in human law, but with an intellectual heritage from the ecclesiastics. That is because by the time of St German, natural law and conscience – in the scholastic sense – had long shaped the law of equity and those precepts of "conscience" were "ingrained" into equity.³⁶

Earl of Oxford's case

28. The *Earl of Oxford's Case*,³⁷ coming several decades after the Reformation and St German's treatise on equity, illustrates that the precepts of theology, natural law and the scholastic understanding of "conscience" continued to pervade the Court of Chancery's work. That case concerned a dispute between the Earl of Oxford and Magdalene College Cambridge regarding land in London. In the reign of Henry VIII, Lord Audley had been given seven acres of land in the parish of St Botolph-without-Aldgate which included a garden referred to as the Covent Garden of Christchurch as a reward for his role in ridding Henry of Anne Boleyn; when Magdalene College was re-founded, Audley gifted this land to the college as its key endowment. However, during the reign of Queen Elizabeth I, the college was in significant debt to Benedict Spinola, but was prevented from selling the estate by a statute which voided sales and long leases of land by Masters of Oxford and Cambridge; the legislation did not specifically prohibit sales to the Queen. Accordingly, Roger Kelke, the Master of Magdalene College conveyed the estate to the

³⁶ Richard Hedlund, 'The Theological Foundations of Equity's Conscience' (2015) 4 *Oxford Journal of Law and Religion* 119 at 135.

³⁷ *The Earl of Oxford's Case* (1615) 21 ER 485.

Queen for an annual rent of £15, who then transferred it to Spinola. Spinola then sold the estate to the Earl of Oxford, who developed houses on it and granted leases. The King's Bench upheld Magdalene College's title.³⁸

29. The Earl of Oxford filed a petition in the Chancery claiming compensation.³⁹ The Master of Magdalene College refused to answer the Bill, and was sent to the Fleet Prison in contempt of court.

30. In the Court of Chancery, Lord Ellesmere decided the matter based upon three propositions: first, "the Law of God speaks for the Plaintiff"; second, "Equity and good Conscience speak wholly for [the plaintiff]"; third, "the Law of the Land [does not] speak against [the plaintiff]".⁴⁰ Lord Ellesmere thus opened his reasons with the following passage from Deuteronomy: ⁴¹

"By the Law of God, He that, builds a House ought to dwell in it; and he that plants a Vineyard ought to gather the Grapes thereof; and it was a Curse upon the Wicked, that they should build Houses and not dwell in them, and plant Vineyards and not gather the Grapes thereof."

³⁸ *Warren v Smith* (1615) 11 Co Rep 66b at 70 (*The Case of Magdalene College*).

³⁹ Note that the Earl of Oxford was not a party to the case before the King's Bench, which was between tenants.

⁴⁰ *The Earl of Oxford's Case* (1615) 21 ER 485 at 486 [4].

⁴¹ *The Earl of Oxford's Case* (1615) 21 ER 485 at 486 [4].

In other words, it would be against conscience, in the sense developed in the Bible, for the Master of Magdalene College to have the houses and garden in the estate, which he had not built.

31. The reasons are also important for Lord Ellesmere's explanation of the role and purpose of Chancery. Lord Ellesmere appeals to the natural law, stating that "[e]quity speaks as the Law of God speaks",⁴² before explaining the purpose of Chancery: ⁴³

"The Cause why there is a Chancery is, for that men's Actions are so divers and infinite, that it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances. The Office of the Chancellor is to correct Men's Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions, of what Nature soever they be, and to soften and mollify the Extremity of the Law, which is called Summum Jus. And for the Judgment, [sic.] Law and Equity are distinct, both in their Courts, their Judges, and the Rules of Justice; and yet they both aim at one and the same End, which is, to do Right; as Justice and Mercy differ in their Effects and Operations, yet both join in the Manifestation of God's Glory."

32. The Court of Chancery was thus not following St German's approach strictly – it was not confining itself to interpreting the common law. The Chancery was continuing to apply an internalised standard of morality, grounded in natural law, in its reasons.

33. For Magdalene College, Lord Ellesmere's decision was rather unsatisfactory. By 1880, following a number of compulsory acquisitions, the rent had been reduced to £2 annually. Today, at

⁴² *The Earl of Oxford's Case* (1615) 21 ER 485 at 486 [6].

⁴³ *The Earl of Oxford's Case* (1615) 21 ER 485 at 486 [6]-[7].

Magdalene College, a gargoyle of Spinola spits water into the River Cam.

Unconscionable bargains

34. But why does this history matter? This early history of the origins of "conscience" in the law of equity has numerous ramifications in Australian law today. For the purposes of tonight's address, my focus is its impact on the doctrine of unconscionable conduct, both in equity and under statute. That modern law of unconscionable conduct must be understood against its background in the equitable doctrine of unconscionable bargains. Those unconscionable bargain cases invoke equity's ingrained understanding of "conscience".
35. From the 17th century (and possibly before that time), the most common category of unconscionable bargain cases concerned an "expectant heir". The archetypal expectant heir case was that of a wealthy young aristocratic man, who, to maintain his place in society before he inherited the family property, had entered into poor financial bargains concerning those future interests. In some cases, these heirs had become severely indebted and entered into these bargains to avoid imprisonment; the heirs often did not wish to tell the families of their debts, and so sought to defer repayment until after they inherited. Unscrupulous money lenders could secure several times their outlay by taking a bond under which nothing was

repayable until the death of the person from whom the heir expected to inherit.⁴⁴

36. One notable example of these expectant heir cases is the 1686 case of *Berney v Pitt*. In that case, Berney borrowed £1,000 from Pitt secured by a "Bond, and Warrant of Attorney to confess Judgment" of £5,000 – £2,500 to be paid one month after the death of Berney's father and £2,500 to be paid when Berney married, but only if Berney should marry in his father's lifetime. The report of that case records that the Court of Chancery declared that the bargain was:⁴⁵

"corrupt and fraudulent, and tended to the Destruction of Heirs, sent hither for Education, and to the utter Ruin of Families ; ... so the Relief of this Court ought to be extended to meet with, and correct such corrupt Bargains and unconscionable Practices, and decreed the former Order to be discharged, and the Plaintiff to be restored to what he hath paid over and besides the Principal Money and Interest."

37. Thus, Chancery would set an unconscionable bargain aside unless it could be shown that it was fair and reasonable, on the heir repaying the amount received plus interest.⁴⁶ The 17th century reports describe these bargains as being "unrighteous",⁴⁷

⁴⁴ See, eg, *Wiseman v Beake and Tyson* [1689] 22 ER 1092; *Batty v Lloyd* [1687] 23 ER 374.

⁴⁵ *Berney v Pitt* [1686] 21 ER 697 at 698.

⁴⁶ See, eg, *Berney v Pitt* [1686] 21 ER 697.

⁴⁷ *Nott v Hill* [1683] 23 ER 391 at 391.

"unreasonable"⁴⁸ and "fraudulent and corrupt".⁴⁹ It was understood that the Chancery would set aside these "unreasonable securities, taken for annuities during the life of the father, *as against conscience*".⁵⁰ It seems clear that the Chancery was continuing to apply the concept of equity's "conscience", complete with its theological-laden origins.

38. Chancery also remedied unconscionable bargains where an agreement was entered by the elderly,⁵¹ the "imperfect[ly] educate[d]"⁵² or the poor,⁵³ without proper independent legal advice. Edelman J recently explained in *Australian Securities and Investments Commission v Kobelt*:⁵⁴

"The history of equity's proscription against unconscionable bargains has not been one in which 'unconscionable' has had a single, unitary application. A conscience is the moral force that acts upon an individual with knowledge. There is no monolithic moral force to conscience. In the 'most common case' of unconscionable conduct in equity in the nineteenth century, the Court of Chancery treated as 'unconscionable' any bargain that was not fair or reasonable."

⁴⁸ *Wiseman v Beake and Tyson* [1689] 22 ER 1092 at 1092.

⁴⁹ *Berney v Pitt* [1686] 21 ER 697 at 698.

⁵⁰ *Thornicraft v Harwood* [1730] 25 ER 445 at 445 (emphasis added).

⁵¹ *Baker v Monk* [1864] 55 ER 430 at 431.

⁵² *Fry v Lane* (1888) 40 Ch D 312 at 321.

⁵³ *Wood v Abrey* [1818] 56 ER 558 at 560-561.

⁵⁴ *ASIC v Kobelt* (2019) 267 CLR 1 at 94-95 [280].

39. The rationale behind these unconscionable bargain cases was explained by Mason J (as his Honour then was) and Deane J in the seminal case of *Commonwealth Bank of Australia v Amadio*.⁵⁵ Their Honours appeared to conceptualise the Chancery as awarding a remedy to protect a special weakness of the expectant heirs, arising from their "poverty" or other special disadvantage. Mason J explained that:⁵⁶

"Historically, courts have exercised jurisdiction to set aside contracts and other dealings on a variety of equitable grounds. They include fraud, misrepresentation, breach of fiduciary duty, undue influence and unconscionable conduct. In one sense they all constitute species of unconscionable conduct on the part of a party who stands to receive a benefit under a transaction which, in the eye of equity, cannot be enforced because to do so would be inconsistent with equity and good conscience. But relief on the ground of "unconscionable conduct" is usually taken to refer to the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage, e.g., a catching bargain with an expectant heir or an unfair contract made by taking advantage of a person who is seriously affected by intoxicating drink."

Modern ramifications – unconscionable conduct

40. This history of conscience has important implications for the modern doctrine of unconscionable conduct, both in equity and in its various statutory incarnations. It informs the values and norms against which a standard of unconscionable conduct should be

⁵⁵ (1983) 151 CLR 447.

⁵⁶ (1983) 151 CLR 447 at 461. See also A Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 10(Apr) *Law Quarterly Review* 238 at 248-249.

measured. Plainly, the equitable doctrine is a product of its history, as it has been developed over the centuries. The statutory doctrines, in the *Australian Consumer Law* and the *Australian Securities and Investments Commission Act 2001* (Cth) ("the ASIC Act") likewise draw upon that history inherent in the equitable doctrine. By way of example, s 12CA of the ASIC Act prohibits a person from engaging in conduct that is "unconscionable within the meaning of the unwritten law". Section 12CB prohibits a person from engaging "in conduct that is, in all the circumstances, unconscionable". In that context of s 12CB, s 12CB(4)(a) provides that unconscionable conduct "is not limited by the unwritten law".

41. In *Australian Securities and Investments Commission v Kobelt*, Nettle and Gordon JJ stated that:⁵⁷[t]he assessment of whether conduct is unconscionable within the meaning of s 12CB involves the evaluation of facts by reference to the values and norms recognised by the statute". As I observed in *Productivity Partners v Australian Competition and Consumer Commission*, that statement of the principle is "plainly correct", but it does not elucidate the question of whether unconscionable conduct, in equity and statute, must involve "moral obloquy" or "moral turpitude".⁵⁸

⁵⁷ (2019) 267 CLR 1 at 78 [234] (footnote omitted), quoted in *Productivity Partners Pty Ltd (t/as Captain Cook College) v Australian Competition and Consumer Commission* (2024) 281 CLR 338 at 453 [282].

⁵⁸ *Productivity Partners Pty Ltd (t/as Captain Cook College) v Australian Competition and Consumer Commission* (2024) 281 CLR 338 at 453-454 [282]-[283].

42. The task of a judge, in determining whether conduct is unconscionable "in all the circumstances" contrary to s 12CB "is to identify and apply the values and norms that Parliament must have taken to have considered relevant to the assessment of unconscionability".⁵⁹ As Keane J explained in *Kobelt*, Parliament made a very deliberate choice to use the morality-laden term "unconscionable", rather than, for example, the term "unjust", "unfair" or "unreasonable" – unconscionability "imports the 'high level of moral obloquy' associated with the victimisation of the vulnerable".⁶⁰ But what are the "values and norms" which inform the assessment of unconscionability?

43. In *Kobelt*, Gageler J arguably detached the idea of unconscionability from its Christian moral heritage. His Honour said:⁶¹

"In *Paciocco v Australia & New Zealand Banking Group Ltd*, I referred to unconscionable conduct within the meaning of s 12CB as requiring 'a "high level of moral obloquy" on the part of the person said to have acted unconscionably'. '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."

⁵⁹ *Paciocco v Australian and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at 266 [262].

⁶⁰ *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at 48 [118]-[119] (footnote omitted).

⁶¹ (2019) 267 CLR 1 at 39-40 [91] (footnotes omitted).

I myself rejected this reasoning, with very great respect, in *Productivity Partners*. I said:⁶²

"It is unclear what is meant by a "normative standard"; by "societal norms" of commercial behaviour; or by "generally accepted" "values and norms". These somewhat anaemic concepts appear to mask, or skate over, necessary analysis in accordance with a known methodology. To borrow the words of Professor Birks, it looks like an attempt to "clothe" equitable principle "in more grown-up words"."

44. I went on to argue as follows:⁶³

"[The doctrine of unconscionability] should not ... be a free form choice.

Nor should recourse to generally accepted 'values and norms' be seen as a reference to some form of empirical enquiry into what most Australians might think is a normative standard of behaviour. If it was, how would a judge discern it? Would it be a matter for expert evidence of some kind? Would it be a matter of judicial notice? What if many standards exist: a possibility which is real enough in a multicultural society which may no longer exhibit 'monolithic moral solidarity'. And what if the standards themselves are offensive or become so?"

45. Rather, the group of values that Parliament has required the Courts to consider is the norms and values developed in the common

⁶² *Productivity Partners Pty Ltd (t/as Captain Cook College) v Australian Competition and Consumer Commission* (2024) 281 CLR 338 at 458 [290].

⁶³ *Productivity Partners Pty Ltd (t/as Captain Cook College) v Australian Competition and Consumer Commission* (2024) 281 CLR 338 at 457 [291]-[292] (footnotes omitted).

law – with its Christian foundation.⁶⁴ As I went on to try and explain in *Productivity Partners*:⁶⁵

"The historical foundation of equity and its concern with standards of conscience is "ecclesiastical natural law" or perhaps more accurately just "ecclesiastical law". In that respect, judges often refer to the "ecclesiastical" or even the "religious" foundations of equity, without any more elaboration, and may do so in fear of using that one word which more accurately characterises the origins of equity, the doctrine of unconscionable conduct, and the society from which these laws historically emerged: Christianity."

46. That historical foundation is what I have sought to explain tonight. The medieval Chancery was concerned with correcting conduct which was "against conscience" or "unconscionable". The medieval Chancellors seemed to apply a theological conception of "conscience" in the tradition of the great scholastics, including St Aquinas and St Bonaventure. It may well be true that from at least the late 17th century, legal certainty, rather than a free-roaming inquiry into conscience, "served as equity's guiding light".⁶⁶ But, by that time, Chancery had internalised the Christian precepts of natural law and the ecclesiastical understanding of "conscience" and remedies were awarded in light of a body of law that had been

⁶⁴ *Productivity Partners Pty Ltd (t/as Captain Cook College) v Australian Competition and Consumer Commission* (2024) 281 CLR 338 at 458 [295].

⁶⁵ *Productivity Partners Pty Ltd (t/as Captain Cook College) v Australian Competition and Consumer Commission* (2024) 281 CLR 338 at 458 [297] (Steward J) (footnotes omitted).

⁶⁶ P Birks, 'Equity, Conscience, and Unjust Enrichment' (1999) 23 *Melbourne University Law Review* 1 at 22; P A Keane, *The 2009 WA Lee Lecture in Equity: The Conscience of Equity* (2010) 10(1) *QUT Law & Justice Journal* 106 at 111 (footnotes omitted).

grounded in a Christian conception of conscience. As Justice Jackman recently said extrajudicially, in explaining the views of Sir Victor Windeyer:⁶⁷

"Although [Victor Windeyer] recognised that the institutional influence of the church had diminished or been expelled by modern secular philosophy, and by what he referred to as 'a generous toleration of conflicting beliefs', he said that 'the moral values of Christianity, based very often on the values of Judaism, continue to pervade the common law and to point out the ways of its development'."

- 47. Thank you for kindly listening to me.
- 48. God bless you all.

⁶⁷ Ian Jackman, 'Civilisation and Citizenship: The Words and Deeds of Sir Victor Windeyer' (Speech, 14 April 2026, Aletheia Lecture, Ramsay Centre for Western Civilisation, Australian Catholic University, North Sydney).